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Developing countries and
emergency safeguard measures
in world trade law

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Summary

Before going into details and regulations behind the safeguard measures it's important to understand the basic starting point. The members of WTO all agree to have tariffs at a certain level and the member countries are prohibited to raise the tariffs above this level. This makes the system predictable; every one knows the tariff levels. Speaking in a broad sense one can say that this is the ultimate and historical goal with the different Rounds, to achieve an agreement on the levels of the tariffs. Safeguard measures give members the opportunity to raise the tariffs above the agreed level. This effect allows members to back pedal and placing restrictions on import for some limited time. This has the effect that one member can break the balance in the agreement. To restore the balance, the member country that activated the safeguard measures, must in another area compensate to set the balance in the agreement back on track. The compensation is achieved by lowering the tariffs in another area or several areas until symmetry is achieved in the agreement.

The WTO Agreement, like all trade agreements, has the purpose to push international trade forward. The basic rule applicable in WTO is the MFN rule. MFN is a rule against discrimination found in article I GATT. Every state shall be equally treated as the state you treat best. One effect with WTO is without any doubt increase of import for countries. It seems to be a general agreement that there is a major risk that entirely free trade may favour developed countries. This means that it is very important for the weak party to be able to protect itself in special situations. One form of protection is safeguard measures. This thesis investigates the protection form of safeguard measures with special focus on developing countries.

Under the regulations in WTO today, concerning safeguard measures, we find two different areas. These are industry area and agriculture area. For developing countries the question concerning agriculture area is of most importance. Developed countries, dominate trade in agriculture and stand for 70 per cent of import and export.¹ To get the right perspective it is important to compare with the fact that 96 per cent of world producers in agriculture live in developing countries.

The regulations concerning safeguard measures are found in WTO Agreement, GATT, SA and Agreement on Agriculture (AOA). The new agreements under WTO are usually more detailed than GATT. Looking at the relationship between the new agreements and GATT this was the subject in WTO panel case Korea. In this case it concerned article XIX GATT and SA. The panel said "any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provision of the Agreement of Safeguards."² So article XIX GATT and SA apply together.

¹ Seth – WTO och den internationella handelsordningen p 187.

² Appellate Body Report, Korea – Dairy para 77.

Safeguard measures under the industry area can be activated if it fulfils the demands of *increased import, unforeseen developments* and serious injury or threat thereof.

In the AOA there were separate rules created concerning safeguard measures. These measures are usually called Special Safeguards Provision (SSG) and are very different from the rules in the SA. SSG is different in the sense that it does not require the importing members to prove *serious injury* nor causation. There are two different ways to invoke safeguard measures. One is if the volume of imports of the concerned products exceeds a certain trigger level and the second one is if the import price falls below a certain trigger price.³ To be able to use the SSG provisions countries must designate the SSG products in their Country Schedules.⁴ 38 member states have done this, the EU counted as one.

Since 1990 and especially after the failure in Cancun there has been a global trend toward bilateral and regional trade agreements. Between January 2004 and February 2005 as many as 43 new RTAs have been notified to WTO.⁵ Factors behind RTAs include economy, politics and security considerations. Since 2005 there are some trends to be seen concerning RTAs. These are that they are increasing, becoming more complex, non-reciprocal relationship and they are in some way becoming cross regional. CU and Free Trade Area (FTA) are both acceptable exceptions from the MFN rule found in article XXIV GATT. Regional safeguard measures are permitted under WTO as long as the parties fulfil the demand of *substantially all the trade*.

In questions concerning interpretation of WTO agreements, developing countries have criticised DSB not to interpret in the right way. The issue involved concerns one of the purposes of WTO. The purpose that developing countries have in mind the concern that one of the objects of the WTO agreements and several RTAs between developed and developing countries is to strengthen and increase the role of the developing countries in the world trade. The rules concerning interpretation are found in VCLT. To make it as simple as possible I used the interpretation triangle when interpreting. In this thesis I used *serious injury* as an example and proved that this is ambiguous in its conventional language, the first level of the interpretation triangle.

In my attempt to reach clarity I reached the second level of the interpretation triangle. This level contains two different means of interpretation. These are object and purpose, which will be in focus now, and context. At some stages different purposes can go in different directions. When talking about huge

³ Article 5.1 (a+b) – Agreement on Agriculture.

⁴ Article 5.1 section 1 – Agreement on Agriculture.

⁵ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 1 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

organisations like WTO and UN they have many different purposes. It's not unusual that these different purposes collide.

It is important to remember that the interpretation shall be made in accordance with the conventional language looking at the object and purpose.⁶ Using this purpose interpreting serious injury is impossible. To strengthen and increase the role of developing countries would not bring clarity into the words *serious injury*. At the end of the day if doing it the way developing countries wish there would be even more ambiguity than before the starting point of this process. Then the words *serious injury* would mean one thing to developed countries and another to developing countries. This is not the right way to interpret according to the rules in VCLT and the interpretation triangle. So the ambiguity remains.

Developing countries set their fingers on the preamble to the WTO agreement and say that DSB shall interpret in favour of them because the conventional language use in the preamble talks in their favour. Developing countries uses this part of the preamble and say that according to article 31 §2 VCLT the interpretation shall be made favouring them and that the DSB have so far failed in doing this. The conventional language stops this interpretation to become reality. At the end of the day if doing it the way developing countries wish there would be even more ambiguity than before the starting point of this process. Then the words *serious injury* would mean one thing to developed countries and another to developing countries. This is not the right way to interpret according to the rules in VCLT and the interpretation triangle.

It's difficult in this case to exactly point to a specific issue that solves the ambiguity in this matter concerning *serious injury*, but looking at it from a bigger perspective there is no doubt DSB have solved similar matters before.⁷ One important factor is also what kind of damage that is at hand in every specific case. This will not make the developing countries happy because in the end there still have to be damage and it's up to every single country to prove this damage. The interpretation process might perhaps, when a developing country faces the risk, help single countries to have damage being seen as *serious injury* but looking at it in a bigger perspective the criticism against DSB from the developing countries concerning interpretation is not well founded.

Of all the members of WTO almost 70 per cent are developing countries.⁸ Looking at these numbers it's somewhat surprising that 30 per cent of the members have much more power. The rules and regulations concerning safeguard measures presented in this thesis are all *neutral*, when looking at

⁶ See chapter 6.4.1 section 3.

⁷ WTO Appellate Body Report, WT/DS2/AB/R, US – Standards for reformulated and Conventional Gasoline and WTO Appellate Body Report, WT/DS8-11/AB/R, Japan – Taxes on Alcoholic Beverages.

⁸ Developing Countries – p 93, www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf, 9 March 2006.

them. This means that it does not matter if it's a developed or a developing country that activates them. At the end of the day all members shall apply the rules the same way. What's it like then in real life? If the rules are neutral then they are used in almost equal share by developed and developing countries? Looking at the numbers presented above, that almost 70 per cent of WTO members are developing countries, this should mean in theory that developing countries use safeguard measures more than developed countries. In real life looking at all the years only 22 per cent of the safeguard measures were taken by developing countries. But in the years after SA was created the numbers have risen to 55 per cent.

So with neutral regulations and developing countries in majority, why then do they not use safeguard measures in the way they are expected or supposed to do? Looking at the *neutral* regulations there should be symmetry between developed and developing countries concerning safeguard measures. Is this true? For new members, China as an example, soft norms create lack of symmetry. If being seen as a troublemaker or even not trade liberal may in the end cause trouble becoming a member. Facing this may, especially for weak parties like developing countries, put them in difficult situations. Behind these soft norms, which can take up very different forms, stands a huge political game not easy to understand. For developing countries other threats can be put on the table. Developed countries may threaten with decreasing aid. This form of threats must also fall under soft norms. This kind of action can be used not only to new members but also present members, when they might be in the process of activating safeguard measures, which some countries don't want to realise.

Talking specifically about industry area there is symmetry in the question concerning access. The question of access is symbolic because the question of resources, capacity, question of compensation and fair play makes the asymmetry between developed and developing countries total in this area.

Going into the agricultural area the lack of symmetry hits the developing countries even earlier. The current system under the AOA and the SSG are only applicable to those products that were included in the Uruguay Round tariffication process. Most developing countries cannot use these safeguard measures. The reason for this is that they set bound tariffs outside the tariffication mechanism.⁹ Today 38 members of the WTO have the opportunity to use SSG.¹⁰ When talking about resources and capacity, for those countries than can access, the matter gets even worse because in developing countries there is small-scale farming. The small farmers often work alone and not in bigger groups. The possibilities for them to lobby to the government do not exist. They are extremely vulnerable to temporary variations in the market conditions.

⁹ Valdés and Foster – Special Safeguard for developing country agriculture: a proposal for WTO negotiations, p 6-7.

¹⁰ Special Agricultural Safeguard - Background Paper by the Secretariat – Committee on Agriculture G/AG/NG/s/9, 6 June 2000, WTO §3, p 1.

There is no symmetry between developed and developing countries concerning safeguard measures. Looking at the future there have during the ongoing Round in Doha been many proposals put on the table. What is important to include in the future, for getting the developing countries into the game, is to avoid costly procedures, make sure safeguard measures have short time limits and no compensation has to be given.

When talking about RTAs the question of asymmetry between developed and developing countries comes to life. There is no symmetry in the non-reciprocal relationships just because they are non-reciprocal. In the industry area the lack of symmetry is the same as in WTO. Perhaps a little bit smaller than in WTO, because of the smaller investigations that have to be made. WTO has a lot more members than the RTAs. In the agricultural area there has been an interesting development. In the FTAA agreement the asymmetry has been turned around. Developing countries have been favoured. It is important to remember that the FTAA agreement has recently entered into force, December 31 2005.

Looking at the regulations concerning agriculture it's easy to find things to improve and criticise especially for developing countries. One must remember that the agreement was born in 1994 after difficult negotiations. It's amazing that they could agree at all. So looking at it from the bright side one can say there is an agreement and this is the starting point. From my point of view this is the starting point of the agriculture regime. When comparing with the industry regime one easily realises that this regime has been in play since 1947. Comparing these two regimes one cannot demand that the agriculture regime has come as far as the industry regime. Even to think this thought is absurd. Most people forget this important fact. So the important thing to keep in mind is that there is an agreement, not the ultimate, most desirable one, but still an agreement. From this point one can renegotiate and take small steps forward towards a better agreement.

Perhaps the starting point towards a better tomorrow for developing countries was in Cancun when developing countries went together in a way never seen before. The fact that the whole round has development as a goal is a result of developing countries starting to raise their voice. One thing is sure; the road to symmetry between developed and developing countries is going to be long, hard and costly. Then to go even further to favour developing countries, to achieve asymmetry favouring developing countries, when activating safeguard measures, is even longer. So the protection the weak parties need in free trade to increase welfare and export seems far away but not unrealistic.

Preface

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Abbreviations

AFTA	ASEAN Free Trade Area
AOA	Agreement On Agriculture
ASEAN	Association of South East Asian Nations
ATC	Agreement on Textiles and Clothing
BAFTA	Baltic Free Trade Area
CAP	Common Agricultural Policy
CGSE	Consultative Group on Small Economies
COMESA	Common Market for Eastern and Southern Africa
CRTA	Committee on Regional Trade Agreements
CTG	Council for Trade in Goods
CU	Customs Union
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
ECOSOC	United Nations Economic and Social Council
EU	The European Union
EPA	Economic Partnership Agreement
FTA	Free Trade Area
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
HDI	Human Development Index
Ibid	ibidem

ICJ	International Court of Justice
ILR	International Law Reports
IMF	International Monetary Fund
ITO	International Trade Organisation
LDC	Least Developed Countries
MERCOSUR	Southern Common Market
MFN	Most Favoured Nation
MTS	Multilateral Trading System
NAFTA	The North American Free Trade Agreement
NAMA	Non-Agricultural Market Access
NT	National Treatment
NTB	Non Tariffs Barrier
OMAs	Orderly Marketing Arrangements
PPA	Protocol of Provisional Application
RTA	Regional Trade Agreements
SA	WTO Agreement on Safeguards
SASM	Special Agricultural Safeguard Mechanism
SPS	Sanitary and Phytosanitary Measures
SSG	Special Safeguard Provision in Agriculture
TBT	Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	The United Kingdom
UN	The United Nations
UNCTAD	United Nations Conference on Trade and Development

UNTS	United Nations Treaty Series
USITC	United States International Trade Commission
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on Law and Treaty
VERs	Voluntary Export Restraints
VRAs	Voluntary Restraint Arrangements
WTO	World Trade Organisation

1 Introduction

1.1 Introduction

The 48 least developed countries together accounted for only 0.5 per cent of world trade in 1998.¹¹ Compared with 1970 the same 48 countries stood for 1.7 per cent of world trade.¹² One of the large goals behind WTO is to increase and bring welfare to developing countries. Looking at the numbers just mentioned it is not strange that many developing countries wish to protect their domestic market. Comparing with the historic fact that US and Germany grew strong and healthy thru protectionism in the 19th century.¹³ Facing this fact it might not be so strange that developing countries today wish to act in the same way. For developing countries the most important area is usually the agriculture. Most of the population in the developing countries work in the agriculture area. Many developing countries see the agriculture area as the last major frontier for trade liberalisation.¹⁴ This makes the WTO agreement on agriculture area very important.

In this thesis focus will rest on WTO. Why WTO? The answer to this question is simple. If a state is not member of WTO the state can act in any matter it wishes. A state is only bound by the agreements it has consent to. This is basic international law about state sovereignty. 149 states are members of WTO.¹⁵ This makes it the second largest organisation in the world. Only the UN is older and bigger. Many states have a status of observers and will in the future become members. Examples of observer states are the Russian Federation, Serbia and Bosnia Herzegovina.¹⁶ When the Russian Federation becomes a member the globalisation will accelerate even further. But looking closer to states that will be members in the future most of them are developing countries from Asia and Africa.¹⁷

It seems to be a general agreement that there is a major risk that entirely free trade may favour developed countries. This means that it is very important for the weak party to be able to protect itself in special situations. One form of protection is safeguard measures.

Emergency safeguards under WTO are rules that in theory don't make any difference if the country that wishes to use the rules is a developing country

¹¹ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 9.

¹² Ibid.

¹³ Read in chapter 2:1, section 3.

¹⁴ Read further in chapter 2.3.2 and chapter 4.

¹⁵ Members and Observers -

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, 8 February 2006.

¹⁶ Ibid.

¹⁷ Afghanistan, Sudan and Tajikistan. For full list see - Members and Observers - http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, 8 February 2006.

or a developed one. At the end of the day the rules must be applied in the same way to every country. At this stage many important questions arise. Is it even possible for a developing country to take emergency safeguards? In theory developing countries can of course take safeguards measures but in real life? Can they afford it? Do developed countries put so much pressure on the developing countries that the latter don't dare to take action? Can the developing countries be faced with the facts of losing aid if they don't compare with the developed countries? The rules in WTO are *neutral* to all countries but is this the most effective way to achieve the goal to increase welfare in developing countries? Maybe the solution is there should be no symmetry between the rules of developed and developing countries.

Due to the limited scope of this thesis only emergency safeguards under WTO will be examined. Other exceptions under WTO will only be briefly mentioned.

One interesting aspect concerns the regulations found in GATT and the relationship with the new agreements that has been established. How is this solved in real life? One example of this is the relationship between article XIX GATT and the SA agreement.

Questions about interpretation arise when talking about the purpose of WTO. As mentioned in section one in this introduction, one of the large goals behind WTO is to increase and bring welfare to developing countries. Can we interpret the underlying purpose in the rules about emergency safeguards? What rules shall be used when interpreting WTO? VCLT? What do VCLT say in this matter? Many questions arise and need to be answered.

The ongoing Doha Round has had huge problems especially with the developing countries, which do not accept the terms, especially in the agriculture area, set by the developed countries. Cancun was a failure because of this. Is there a change on the horizon rising or is it just a desperate outbreak from the developing countries? The Doha Round has its aim on development but is this realistic? After the failure in Cancun states have been most willing to make RTA and what effect does this have on WTO and developing countries?

1.2 Safeguard measures are breaking the balance

Before going into the details and regulations behind the safeguard measures it's important to understand the basic starting point. The members of WTO all agree to have tariffs on a certain level and the member countries are prohibited to raise the tariffs above this level. This makes the system predictable; everyone knows the tariff levels. Speaking in broad outline one can say that this is the ultimate and historical goal with the different Rounds, to achieve an agreement on the levels of the tariffs. Safeguard

measures give members the opportunity to raise the tariffs above the agreed level. This effect allows members to back pedal and place restrictions on import for some limited time. This will have the effect that one member can break the balance in the agreement. To restore the balance, the member country that activated the safeguard measures, must in another area compensate to set the balance in the agreement back on track. The compensation is achieved by lowering the tariffs in another area or several areas until symmetry is achieved in the agreement.

I will explain this basic starting point with an example. To keep this example as simple as possible I assume that the agreed tariff levels are the same on all products, 10 per cent. In real life the levels of tariffs on the products are different. Sweden activates safeguard measures on shoes. All demands for the regulations concerning safeguard measures are fulfilled. Sweden raises the tariffs on shoes with 10 per cent to 20 per cent. When doing so the balance of the agreement is broken. To restore this balance, to achieve symmetry, Sweden must lower the tariff levels in other areas. Sweden lowers the tariffs on cars with 5 per cent to the level 5 per cent and on tires with 5 per cent to 5 per cent. The total decrease, the compensation, is 10 per cent. The agreement has become symmetric again. This basic starting point is important to keep in mind throughout this thesis. The questions concerning compensation are in detail described in chapter 3.5.2.3 in this thesis.

1.3 Purpose

The aim of this thesis is to examine and analyse emergency safeguard measures in world trade law related to developing countries. The thesis will show if there is asymmetry between developed and developing countries. If there is no asymmetry, what are the differences and likelihood? Another question is what happens when there are conflicts in norms? Are there any differences between global agreements (WTO) and regional agreements (RTA)? In the end I will explore the question if symmetry always is something to wish for between developed and developing countries.

1.4 Method, Theory and Material

The thesis contains a combined descriptive and analytical study on the relationship between emergency safeguards comparing developed and developing countries.

To answer the main issue in this thesis, regarding developed and developing countries and their symmetry or asymmetry in safeguard measures, there is at first a need to see the basic general rules. Therefore in this thesis the rules about safeguard measures under SA, GATT and Agreement on Agriculture (AOA) will be investigated. Since these rules are exceptions from the non-discrimination rule in WTO there is a necessity to understand the relationship with article I, III, XIX and XXIV in GATT. When it comes to

RTA I will use Free Trade Area of the Americas (FTAA) to find out the relationship between developed and developing countries.

When I, in this thesis, write GATT it means the GATT agreement from 1994. In the historic chapter, chapter number two, this rule is not in play.

When I, in this thesis, write; WTO Agreement, I mean the Agreement Establishing The World Trade Organization.

Writing, in this thesis, FTAA I mean the third draft of the FTAA.

Writing this thesis I will use classic sources as well as critical sources. The reader must in his reading be aware of this fact.

1.5 Neutrality, fair trade and soft norms

Talking about being neutral might be somewhat tricky. What does it really mean that something is neutral? The expression neutral is relative. It depends on the fact in which context it's used. Neutral can be used saying: neither moral nor immoral; neither good nor evil, neither right nor wrong.¹⁸ When talking about colours one usually says: neutral colours like black or white.¹⁹ But the most common meaning among the average population is that it doesn't support nor favour either side in a war, dispute, or contest.²⁰ Neutral doesn't always mean that there must be no discrimination. All this together makes the word difficult to use. In this thesis the meaning of the word neutral is that both parties stand on equal terms, no one has any forms of advantages. This includes non-discrimination.

Fair trade has over the years become associated with norms from movements with names usually including fair trade. One big problem is that the words include set of values. I simply avoid this problem by not using the words fair trade in this thesis.

Soft norms as a term are frequently used in this thesis. To find a simple definition to soft norms is not easy. Soft norms operate in a grey zone between law and politics.²¹ Soft norms are often referred to in literature as soft law. Soft law is in the sense of guidelines of conduct, which are neither strictly binding norms of law but yet, no completely irrelevant political maxims.²² The opposite side of soft law is hard law. Soft law is weaker than the binding force of traditional law, hard law.²³ Examples of soft law in international law are the Universal Declaration of Human Rights from 1948 and the resolutions of the UN General Assembly. The term soft law is also

¹⁸ Definition of neutral - <http://wordnet.princeton.edu/perl/webwn?s=neutral>, 27 March 2006.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Malanczuk – Akehurst's Modern introduction to international law p 54.

²² Ibid.

²³ Soft law – http://en.wikipedia.org/wiki/soft_law.

often used to describe various kinds of legal instruments in the EU. Examples of instruments in the EU are “code of conduct”, “guidelines” and “communications”. As you as a reader will find out soft norms have great importance in questions about symmetry or asymmetry between developed and developing countries. By bringing it up at this early stage of the thesis I only want to keep the reader aware of its importance.

1.6 Developing countries

One important question is which are the developing countries in the WTO? Looking at all WTO members, developing countries are in the majority. What is the definition of a developing country? In the WTO there is no definition of the term developing country. Members themselves decide whether or not they are to be seen as developed.²⁴ Other members can challenge this decision. LDC are recognised by WTO and those countries have been designated as such by the UN. Today there are 50 LDC on the list and of them there are 32 members in the WTO.²⁵ A complete list of LDC is available at WTO home page.²⁶ The lack of definition in the WTO regulation has not yet caused disputes before the DSB. In the future, if developing countries can use regulations in easier ways, especially safeguard measures, disputes regarding this definition might be realised. Many definitions exist in other places about a developing country on the basis of terms of when talking standard of living, industrial base and Human Development Index (HDI).²⁷

Other problems concerning the definition of developing countries are that many countries standing on the borderline, soon to become developed or no longer to be seen as LDC have much to lose. The LDC has many advantages that no longer can be used. This creates a vacuum so that countries in some stages want to be seen as LDC and in other situations don't. There is no simple solution to this dilemma and also to remember at this stage soft norms also influence in different directions.

1.7 Globalisation

What is the right definition of globalisation? My answer to this question is that it depends on whom you ask! There is no simple and plain definition to globalisation. I find it important, just because of this undefined area, to write down my definition of globalisation. In this text herein after this definition is the meaning I put into the word globalisation. This might be important to be able to understand this text.

²⁴ Development definition – http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, 14 March 2006.

²⁵ CRS Report for congress – WTO Doha Round: Agriculture Negotiating Proposals, CRS-10.

²⁶ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm, 14 March 2006.

²⁷ Developing countries – http://en.wikipedia.org/wiki/Developing_countries, 14 March 2006.

International law talks about state sovereignty. This means that states are independent.²⁸ This independence does not put states in any way above the law.²⁹ When a state is independent it makes its own decisions to protect its interests. In the term of globalisation the state sovereignty erodes. States can no longer act in the way they please. In the case of free trade, WTO limits states from taking actions and limits the state sovereignty. This is the key issue in defining globalisation, the effect that it has on state sovereignty. This pattern can be seen in other areas than free trade. Health regulations and communications control are other examples.³⁰

The most common ingredient concerning the definition of globalisation contains the increased connection between people over the globe and the start of the “Global Village”.³¹ This involves money, travelling, trade and service.³² My definition contains these elements as well but is somewhat more different than the usual one and goes further, as described above.³³

The term globalisation is used frequently but the world economy is still far from being integrated.³⁴ In the last 20 years the globalisation integration has continued rapidly and will continue to do so.³⁵ Criticism has arisen against globalisation saying that it will have negative impact on workers’ rights, environment and national values.³⁶ The answer to this criticism is the opportunity for elimination of war, hunger, poverty and economic injustice.³⁷

1.8 Outline

First there will be a historic view. Why a historic view? By looking at theories behind it is easier to understand why things look the way they do today. It is important to understand how it began and compare developed countries with developing countries from a historic point of view. Personally, I think that you can’t change the future if you don’t understand the past. Chapter three goes thru the rules under WTO as they function today concerning basic rules in WTO and emergency safeguards. Chapter

²⁸ Malanczuk – Akehurst’s Modern introduction to international law p 17.

²⁹ Ibid.

³⁰ Malcolm N Shaw – International law p 47.

³¹ Other definitions of globalisation can easily be found at –

<http://www.emarketing.ie/resources/glossary.html#g>,

http://news.bbc.co.uk/1/hi/programmes/working_lunch/guides/glossary/1496844.stm,

<http://portal.bibliotekivest.no/terminology.htm#G>,

<http://www.stile.coventry.ac.uk/cbs/staff/beece/BOTM/Glossary.htm>,

<http://www.1se.co.uk/financeglossary.asp?searchTerm=&iArticleID=1339&definition=globalisation>, all these links were visited 23 March 2006.

³² Ibid.

³³ Ibid.

³⁴ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 17.

³⁵ Ibid – p 18.

³⁶ Ibid.

³⁷ Ibid.

four concerns safeguard measures under the Agreement on Agriculture (AOA). Chapter five goes thru RTA and especially safeguard measures under the FTAA. Problems related with interpretation will be handled with in chapter six. In chapter seven I will investigate whether there is asymmetry between developed and developing countries when the question of activating safeguard measures is realised. Chapter eight will examine if there is any difference between WTO and RTA in the important question of symmetry or asymmetry. The ninth chapter will then finally answer the question if symmetry is always something to wish for between developed and developing countries. First in this thesis there is a summary, which then is followed by abbreviations.

2 History

2.1 Basic Historical Facts

Free trade is one of the most important cornerstones in WTO. It is important to remember that free trade, as an ultimate goal is not mentioned in GATT or WTO.³⁸ Adam Smith wrote down the basic economic theory that WTO rests upon. In his book *An Inquiry into the Nature and Causes of Wealth of Nations* from 1776 he criticized the theory used at that time, mercantilism, and came up with his theory.³⁹ Adam Smith said that people should do what they do best and then trade with others to acquire what they need to survive.⁴⁰ Adam Smith then took his theory to an international level.⁴¹ He pleads for free trade between states and that every state in the end would benefit from it.⁴²

In 1817 David Ricardo published his book *Principals of Political Economy and Taxation*. Ricardo followed in Smith's footsteps and came up with the idea about comparative advantage. Imagine two countries producing hats and shoes. What happens if one of the countries is better making both shoes and hats than the other? The answer according to Ricardo is that it lies in both countries' interest doing the thing that you do best. You don't have to be best in the world in the things you do, but you shall do the things you can do best.⁴³

The theory of free trade was often and usually used by England during the 19th century.⁴⁴ England was at the time the most developed country in the world. The theory had trouble being accepted by other states that were not so far developed. This was true in the 19th century and is still true today.⁴⁵ The classic theory did not give any solution to the complex situation between developed and developing countries.⁴⁶ Alexander Hamilton and Friedrich List, who criticised the theory, used this weakness.⁴⁷ Friedrich List developed a theory about protectionism that was later used by several countries.⁴⁸ The theories written by List and Hamilton were practised by US and Germany in the 19th century. The two countries grew strong and powerful. England, however, at the same time fell behind. Many developing

³⁸ Ibid – p 37.

³⁹ Seth – WTO och den internationella handelsordningen p 17.

⁴⁰ Ibid – p 17-18.

⁴¹ Ibid – p 18.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Hoekman B and Kostecki M – *The Political Economy of the World Trading System* p 19.

⁴⁵ Seth – WTO och den internationella handelsordningen p 19.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid – p 21.

countries today look at this and say: Look, we have to protect our country with tariffs to be able to develop.⁴⁹

England practised free trade policy during this time but at the same time England colonised other countries. In theory the ideas about free trade should be practised by the colonised states but in real life this did not happen.⁵⁰

England's free trade policy lasted until the First World War.⁵¹ The war made trade a part of war policy and free trade had to stand down. Countries imposed higher tariffs, import quotas and foreign-exchange controls.⁵² At the end of the First World War US had an average tariff of 47 per cent.⁵³

After the war protectionism became the ruling theory for trade. There were many reasons for this era. Many new states were born. Examples of states are Poland, Yugoslavia, the Baltic States and Finland. At this time the ruling thought was to build a new state, protectionism had to be used.⁵⁴ Add to this that states were waiting for a new war and had to protect their war industry and make sure they could feed their population.⁵⁵ League of Nations gathered in 1927 a world economic conference that aimed to request states to remove obstacles of trade.⁵⁶ The conference failed and in 1933 the international trade had almost totally collapsed.⁵⁷ The depression then followed and the Second World War. In 1941 Churchill and Roosevelt met and agreed on the Atlantic Charter that was to act for free trade not only between the UK and the US, but for other countries as well.⁵⁸ Another agreement was made between the two states in 1942 and it aimed to reduce trade barriers and limit discrimination after the war had ended.⁵⁹

2.2 GATT

During the end of the Second World War in 1944 a meeting was held in Bretton Woods, New Hampshire, US. 44 states were represented at the meeting. The idea was to create three cornerstones: ITO, The World Bank and IMF.⁶⁰ IMF started to operate in 1945.⁶¹ The World Bank also got operational and the two organisations still operate today. The US pushed the

⁴⁹ Ibid.

⁵⁰ Gallagher – The Imperialism of Free Trade p 1-15.

⁵¹ Irwin – The GATT in Historical Perspective p 323.

⁵² Ibid.

⁵³ Seth – WTO och den internationella handelsordningen p 24.

⁵⁴ Ibid – p 27.

⁵⁵ Ibid.

⁵⁶ Irwin – The GATT in Historical Perspective p 323.

⁵⁷ Seth – WTO och den internationella handelsordningen p 28.

⁵⁸ Ibid – p 29.

⁵⁹ Irwin – The GATT in Historical Perspective p 324.

⁶⁰ Seth – WTO och den internationella handelsordningen p 29.

⁶¹ IMF History – <http://www.imf.org>, 7 February 2006.

UN organ ECOSOC to arrange a world conference and meetings were held in 1946 and 1947.⁶²

Before the negotiations regarding the ITO were concluded, The GATT was negotiated between 23 countries.⁶³ Of these 23 countries 11 were developing countries.⁶⁴ GATT was a multilateral agreement for tariff reduction designed to operate under the umbrella of ITO.⁶⁵ The negotiations about ITO did not lead to the establishment of the organisation. A charter had been successfully accepted in Havana but the US congress refused to ratify the agreement.⁶⁶ Many states were doubtful about ITO and had made their ratifications dependent on ratification from US congress. For a country like USSR it was unacceptable to join the ITO and GATT because how the state was ruled, planned economy.⁶⁷ The lack of this ratification from US congress meant that the ITO organisation never came operational.⁶⁸

By October 1947 the GATT treaty was terminated and never came into force, although GATT obligations were binding under international law, due to the adoption of the Protocol of Provisional Application (PPA).⁶⁹ The PPA was activating GATT on a provisional basis.⁷⁰ The action was based on approval from most countries' executive authorities.⁷¹ This solved the problem that many countries faced with the need for approval from legislative authorisation.⁷² GATT entered into force 1 January 1948.⁷³ Many voices have said that GATT survived only because the ITO never was founded.⁷⁴ The narrow focus of GATT served the process of free trade.

One of the issues that the parties had to solve was that GATT was made up of countries with market economics and for market economy. Some countries that were parties were using planned economy. Special solutions were made for these countries.⁷⁵ In 1950 China withdraws from GATT.⁷⁶

Since ITO never was founded the right term to use about GATT members are contracting parties. GATT is only an agreement between nations and not

⁶² Pitroda – From GATT to WTO: The institutionalization of world trade p 46.

⁶³ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 38.

⁶⁴ The founding parties to the GATT were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, UK and US.

⁶⁵ Jiménez-Guerra – The World Trade Organization and Oil, p 3.

⁶⁶ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 38.

⁶⁷ Seth – WTO och den internationella handelsordningen p 32.

⁶⁸ Ibid – p 33.

⁶⁹ Jiménez-Guerra – The World Trade Organization and Oil, p 3.

⁷⁰ World Trade Organization Toolkit - ADB.org - General Agreement on Tariffs and Trade (GATT)/WTO History, p 2, <http://www.adb.org/Documents/Others/OGC-Toolkits/WTO/wto0100b.asp>, 11 April 2006.

⁷¹ Jiménez-Guerra – The World Trade Organization and Oil, p 3.

⁷² Ibid.

⁷³ Seth – WTO och den internationella handelsordningen p 32.

⁷⁴ Ibid – p 33.

⁷⁵ Ibid.

⁷⁶ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 39.

an organisation. States are contracting parties to agreements and members of organisations.

One big difficult problem with GATT was concerning the organisation. GATT was created to be a part of a charter and had no regulations concerning organisation. The rules came to be thin but this did not stop GATT from being active and develop for almost 50 years.⁷⁷ When the agreement talks about contracting parties in capital it means that all states that are parties together, take action.⁷⁸ In real life this means that states meet and make decisions. The main rule for making decisions is to have the majority. Some decisions had to have 2/3 majorities. An example of this is letting new contracting parties into the agreement. But in real life almost all decisions were made in consensus.⁷⁹ The contracting parties meet once in a year but the most important meetings lasted a longer time, not only one meeting but also several and had the goals of lowering tariffs.⁸⁰ These longer meetings are called rounds.

Eight rounds have at this time been held. Right now, starting in Doha in 2001, the ninth round is still in progress.⁸¹ The rounds all have different names. The names come from the place where they started or the person who took the initiative for the round. The six first rounds all had the goals to lower tariffs. A crucial achievement of the GATT during the 1950's came in preserving the sanctity of the early tariff reductions.⁸² The rounds were successful and managed to lower the tariffs from 40 per cent to 5 per cent.⁸³ Instead of tariffs states started to use NTB instead. Especially the EU and the US used NTB.⁸⁴

The seventh round, Tokyo, had more and different goals than just lowering tariffs. Agreements about NTB were made and enabling clauses for developing countries were agreed upon. One problem with these agreements was that the contracting parties could choose if they wanted to be parties to the new agreements.⁸⁵

In 1962 Uruguay complained and said that developed countries in different ways stopped import of goods from Uruguay.⁸⁶ On a few points the GATT panel decided that the developed countries had violated the rules. But on the important points the panel said that the developed countries had done

⁷⁷ Seth – WTO och den internationella handelsordningen p 34.

⁷⁸ GATT art XXV.

⁷⁹ Seth – WTO och den internationella handelsordningen p 34.

⁸⁰ Ibid.

⁸¹ Read chapter 2.3.2.

⁸² Irwin – The GATT in Historical Perspective p 325.

⁸³ Seth – WTO och den internationella handelsordningen p 35.

⁸⁴ Ibid – p 40.

⁸⁵ Ibid – p 36.

⁸⁶ Uruguay/ Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland and US, 1962 (BISD 11S/95).

nothing wrong. This decision made developing countries lose faith in GATT.⁸⁷

GATT includes not only industrial products; agriculture products formally fall under GATT as well. During this period the agreement concerning agriculture has not been followed. One big dispute in 1963, that GATT could not solve, between the US and the EU concerning chickens was a result of the policy the EU had in the agriculture area.⁸⁸ This dispute is usually referred to as the chicken war.⁸⁹ Because of rationalization in the US they could mass-produce at a low cost and the producers in Germany could not keep the same low prices. Export from US to Germany increased from 2.5 million dollars in 1958 to 50 million dollars in 1962.⁹⁰ But in 1962 the EU import regime came into effect and the export decreased into 20 million dollars. This single product, chicken, was not much for the US export. Behind this was the changing policy in the EU and the Common Agricultural Policy (CAP) that on a much larger scale would affect the US export to the EU if more protectionism action was taken from the EU.⁹¹

Thru all the years the contracting parties increased and in the 1990's GATT had evolved into a de facto world trade organisation.⁹²

2.3 WTO

On 15 April 1994 in Marrakech the final act was signed establishing WTO.⁹³ This ended the Uruguay Round. At some stages it seemed impossible but in the end the Uruguay Round brought about the biggest reform since GATT entered into force.⁹⁴ WTO entered into force on the 1 January 1995.⁹⁵ Today WTO has 149 members.⁹⁶ This makes it the second largest organisation in the world. Only the UN is older and bigger. Among the observer states we find the Russian Federation, Serbia and Bosnia Herzegovina. Also many Asian and African states are to be future members but at this time they have an observer status.⁹⁷

The WTO replaced GATT as an international organisation. GATT agreement has not ceased to exist. WTO is an umbrella treaty and GATT

⁸⁷ Seth – WTO och den internationella handelsordningen p 38.

⁸⁸ US/EEG, Chicken, 1963 (BISD 12S/65) p 128.

⁸⁹ Walker – Dispute Settlement: The Chicken War, p 671.

⁹⁰ Ibid.

⁹¹ Ibid – p 672.

⁹² Hoekman B and Kostecki M – The Political Economy of the World Trading System p 38.

⁹³ Ibid – p 40.

⁹⁴ The Uruguay Round - http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, 9 February.

⁹⁵ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 40.

⁹⁶ Members and Observers -

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, 8 February 2006.

⁹⁷ Look at homepage to see a complete list - Members and Observers -

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, 8 February 2006.

has today become a part of the WTO treaty.⁹⁸ In the document that was signed in Marrakech in 1994 the Agreement Establishing the World Trade Organisation was an integrated part.⁹⁹ The WTO Agreement contains only 16 articles and most of them are about WTO organisation.¹⁰⁰ The WTO Agreement includes three annexes that are integral parts of the agreement. These three annexes are all binding for the member states.¹⁰¹ At this point we find a huge difference between the old GATT agreement and WTO Agreement. The old GATT agreement faced problems when contracting parties could choose if they wanted to be parties to the new agreements or not.¹⁰² GATT and Agriculture agreement are to be found in annex 1A.¹⁰³ Annex 1B contains the agreement of the GATS and the annex 1C contains the agreement of the TRIPS.¹⁰⁴

In the WTO Agreement there are two pluralistic agreements that are not binding for the member states.¹⁰⁵

2.3.1 The Uruguay Round

When the Tokyo Round was finished in 1979 it had been operational for six years. Estimated time for the round was two years.¹⁰⁶ The Tokyo Round was more complex than all the rounds before. Many contracting parties said that in the future the agenda for the rounds must be less complex. It took only six years and then another decision was made to hold another round with even a more complex agenda. The US, especially the new president Ronald Reagan was one of the biggest initiators.¹⁰⁷

In November 1982 a ministerial meeting in Geneva was held.¹⁰⁸ The conference stalled on agriculture and was regarded as a failure. What was to become the Uruguay Round agenda was formed on the basis of the work programme that was used in the conference.¹⁰⁹

⁹⁸ Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations - § 2 - http://www.wto.org/english/docs_e/legal_e/legal_e.htm, 10 February 2006 and Agreement Establishing The World Trade Organization – Annex 1A.

⁹⁹ Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations - § 2 - http://www.wto.org/english/docs_e/legal_e/legal_e.htm, 10 February 2006.

¹⁰⁰ Agreement Establishing The World Trade Organization – Article I – XVI.

¹⁰¹ Ibid – Article II, § 2.

¹⁰² Read in chapter 2.2, section 8.

¹⁰³ Agreement Establishing The World Trade Organization – Annex 1A.

¹⁰⁴ Ibid – Annex 1B and 1C.

¹⁰⁵ Ibid – Annex 4.

¹⁰⁶ Seth – WTO och den internationella handelsordningen p 41.

¹⁰⁷ Ibid.

¹⁰⁸ The Uruguay Round - http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, 10 February 2006.

¹⁰⁹ Ibid.

In September 1986 the Uruguay Round launched in Punta del Este.¹¹⁰ The talks were to extend trading system in several new areas.¹¹¹ Examples of new areas are trade in service, intellectual property, agriculture and textiles.

In December 1990 a meeting was held in Brussels but disagreement arose in the area of agriculture.¹¹² The round that was supposed to be ended at this meeting did not. The parties took a decision to continue the round. The Uruguay Round entered its bleakest period. The two years that followed differences between the EU and the US became central to solve for a happy final.

The EU and the US settled most of their differences in November 1992. A deal known informally as the Blair House accord was settled. The round continued and it took until December 1993 for the parties to conclude and to finally resolve every issue. Then on 15 April 1994 ministers from most of the 123 participating governments signed the deal.

2.3.2 The Doha Round

On 14 November 2001 in Doha, Qatar, the 4th Ministerial conference started.¹¹³ This became the starting point of the ninth round. It was to be concluded in January 2005.¹¹⁴ The Doha Round is still operational. Some authors, like Mike Halle, said that The Doha Round had a difficult Birth.¹¹⁵ The previous round lasted for eight years and in the end created WTO. It is important to remember that the Uruguay Round also had painful negotiations.¹¹⁶ A process that started in the Tokyo Round and expanded in the Uruguay Round was that agreements intervened in areas that traditionally belonged to the domains of domestic decision-making.¹¹⁷ In the very first ministerial conference in 1996 new issues were proposed for the WTO agenda. Voices were raised that the members should return to the desk and start a new round.¹¹⁸ Mandate arises even stronger after the September 11 attack in New York. It was said that the world badly needed international cooperation especially with the Arab world and other developing countries.

Developing countries were sceptical to a new round, but when mandate was given for the round, they marked a change of policy and therefore, the

¹¹⁰ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 40.

¹¹¹ The Uruguay Round - http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, 10 February 2006.

¹¹² Ibid.

¹¹³ Ministerial declaration – preamble, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, 10 February 2006.

¹¹⁴ Ibid - § 45.

¹¹⁵ Halle - Where Are We in the Doha Round?, p1, chapter 1.

¹¹⁶ Ibid – p 1.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

agenda was named The Doha Development Agenda because it placed development on the agenda of multilateral trade negotiations.¹¹⁹

On the agenda for the Doha Round stand issues about agriculture, GATS, WTO rules, trade and environment, TRIPS, dispute settlement understanding, Singapore Issues and much more.¹²⁰ For most of the WTO members the main issue revolves round agriculture.¹²¹ Many developing countries see agriculture as the last major frontier for trade liberalisation. The agenda of the new round is called DDA, Doha Development Agenda.

2.3.2.1 Cancun

The 5th Ministerial conference was held in Cancun, Mexico, 10-14 September 2003. The conference ended rapidly when the minister, Derbez, from Mexico ended the conference on the 14th September.¹²² They failed to achieve consensus between developing and developed states.¹²³ At the centre of this were agriculture and the so-called Singapore issue.¹²⁴ Some say that underneath the failure lie also the procedures and organisation of the WTO itself.¹²⁵ The criticism at this point lies on the decision making process and that it is based on consensus. In the WTO Agreement article IX it says:

“The WTO shall continue the practise of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.”

In the first rounds only an average of 25 states participated in the negotiations. Compare this with the Doha Round where 148 states were engaged. This is one factor, not to be forgotten, that makes negotiations more difficult. There is no doubt that it will be hard to achieve consensus. But as art IX in the WTO Agreement continues in the second sentence it is clear that if consensus cannot be achieved a voting will take place. After the voting the problem of not achieving consensus is solved. So I don't find this criticism well founded.

One interesting thing to observe is the shifting in political power among the WTO members. The collapse at Cancun took place after a group of 20 developing countries led by Brazil, China and India refused to negotiate on the so-called Singapore issue.¹²⁶ The Singapore issues concerns

¹¹⁹ Parliament of Australia – Cancun to Hong Kong: Prospects for the WTO, p 1.

¹²⁰ Ministerial declaration –

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm, 10 February 2006.

¹²¹ Halle - Where Are We in the Doha Round?, p 2.

¹²² Kommentar till WTO-sammanbrottet i Cancun –

http://www.kommers.se/news_show.asp?id=65, 10 February 2006.

¹²³ Parliament of Australia – Cancun to Hong Kong: Prospects for the WTO, p 1.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Baldwin – Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies

competition, foreign investment, government procurement and trade facilitation.¹²⁷ Since the Kennedy Round the developing countries have been pressing for greater concessions from the developed countries but it was first in Cancun they were prepared to break up negotiations at such high level.¹²⁸

One effect after the collapse in Cancun has been the replacement of the multilateral trading system by a set of regional trading agreements among nations.¹²⁹ This subject will be handled under chapter 5 in this thesis.

2.3.2.2 Hong Kong

In Hong Kong, 13-18 December 2005, the 6th Ministerial conference was held. Many states and authors feared that a failure in Hong Kong like the one in Cancun earlier could lead to enormous consequences around the globe.¹³⁰ In the end it might slide back into protectionism and mercantilism.¹³¹

On the second day of the conference Minister Kituyi from Kenya said: “We are here to find compromises between positions – not to tell others what they already know”.¹³² The conference continued and they put the Doha Round back on track. On the third day the Hong Kong Ministerial conference approved of Tonga’s accession to WTO. Tonga will then become the 150th member state but first after ratification.¹³³ During the Hong Kong conference the member states agreed on cotton, secured an end date for all export subsidies in agriculture, a solid duty free and quota free access for the 32 LDC and some steps were taken in service and NAMA areas.¹³⁴

<http://www.fordschool.umich.edu/research/rsie/Conferences/CGP/Mar2004Papers/Baldwin.pdf>, 15 February 2006, p 9.

¹²⁷ Doha Round Briefing Series - The Singapore Issues, Vol 2 No. 6, August 2003.

¹²⁸ Baldwin – Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies

<http://www.fordschool.umich.edu/research/rsie/Conferences/CGP/Mar2004Papers/Baldwin.pdf>, 15 February 2006, p 9.

¹²⁹ Ibid – p 1.

¹³⁰ Bergsten – Rescuing the Doha Round –

<http://www.foreignaffairs.org/20051201faessay84702/c-fred-bergsten/rescuing-the-doha-round.html>, 15 February 2006, p 1-2.

¹³¹ Ibid – p 2.

¹³² Day 2: Convergence elusive on first full day of consultations; cotton also discussed – http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_14dec_e.htm, 15 February 2006.

¹³³ Day 3: Tonga all set to join, as movement seen in talks on least-developed countries - http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_15dec_e.htm, 15 February 2006.

¹³⁴ Day 6: Minister agree on declaration that ‘puts Round back on track’ - http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_18dec_e.htm, 15 February 2006.

2.4 Opposing classic groups

Before finishing this historic chapter I will briefly go thru three opposing classic groups within the WTO. The first one is between north and south. North are the developed countries and south are developing countries.¹³⁵ The different standard of welfare between these two groups is important to understand when considering what lies underneath the surface in WTO.

The second opposing groups are between the countries in the south and G20 countries. In G20 we find developing countries that have come further down the road and are well on the road to becoming developed. Brazil, China, South Africa and India are examples of countries in the G20 group.

The third group is northern countries against each other. In this group we especially find the EU against the US the two biggest trade blocks in the world.¹³⁶

¹³⁵ Seth – WTO och den internationella handelsordningen p 10.

¹³⁶ Ibid – p 10-11.

3 Safeguards Industry

3.1 Introduction

WTO Agreement, like all trade agreements, has the purpose to push international trade forward. One effect with WTO is without any doubt the increase in import for countries. For many people it therefore seems strange that the agreement allows members to back pedal and place restrictions on import.¹³⁷ Safeguards measures that fall under industry area are exceptions to free trade under WTO/GATT. This thesis will now turn into one of the major issues concerning safeguard measures. To understand these regulations it's important to understand the relationship that exists between articles I, III with article XIX GATT and the SA. In this chapter I will first go thru the regulations in article I and III before moving into the area of special measures under WTO and especially the regulations concerning safeguard measures.

3.2 Art I GATT

The fundamental and most basic rule of all in WTO is found in article I GATT.¹³⁸ The most common name for this rule is Most Favoured Nation (MFN). The MFN rule is also to be found in GATS and TRIPS. What does MFN say? MFN is a rule against discrimination. Every state shall be equally treated as the state you treat best. Discrimination against a member state is forbidden. One thing that is important to remember is that the non-discrimination rule is related to member states only. But if a member state makes a deal with a non-member state all members must be given the same offer. An example of this is: If the EU offers Russian Federation (not yet a member of WTO) lowered tariffs in a special area then the EU must offer the same tariffs to every member state in WTO. The exact words of article I §1 GATT is:

“Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be

¹³⁷ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 3, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹³⁸ Incorporated thru WTO Agreement art II §2, Annex 1A and GATT 1994 art 1 (a).

accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

The importance of the MFN rule has given the rule a special position in the WTO Agreement. Changes of the MFN rule in article I GATT must be agreed to by every member state in WTO.¹³⁹ If the MFN rule would be easy to change the WTO easily and rapidly could turn into something completely different. MFN rules have a long history and go back to the Cobden-Chevalier deal in 1860.¹⁴⁰

Why is it so important for WTO to have an MFN rule? The rule makes it easier for states in negotiations about reducing tariffs. To look even further you can say that the MFN rule lowers tariffs. All states don't have to participate in the negotiations. It's enough that two states make a deal for it to have effect on all other states. Criticism against the MFN rule has also been given saying that the rule can expand its effect in both lowering tariffs but also in increasing them. Criticism has also been brought up saying that most states are free riders, taking advantage of the lower tariffs without offering anything themselves. This lack of reciprocity may lead to the fact that states will become less active in making deals that lower tariffs. States become passive and await other states.

There are two especially related problems with MFN that I shortly will mention. The first issue is what actions fall under MFN? In article I it's tariffs, taxes and internal rules about sales. The second issue concerns the problem when two products are alike or not. One convention appears on the arena, the Harmonized Commodity Description and Coding System that entered into force in 1988. This convention is not a part of the WTO Agreement and for this reason not binding under WTO. At this point the problems begin because not all states use the convention to decide whether or not a product is alike.¹⁴¹

The MFN rule has some exceptions. One is called the Enabling Clause. The MFN rule shall be applied to every member state and not take into account whether it's developed or not. During 1960, after years of criticism, the idea was born that developing countries should be given extra advantages to help them on the way.¹⁴² The Enabling Clause has its roots in the special treatment that was given to colonies. Criticism has been given for the unpredictable outline that gives developed countries the possibility to choose which country to give this advantage. Developing countries that stand up and may criticise developed countries will not be given any opportunity to use this exception and the developing countries get locked up and have to sit nicely around the table not complaining.

¹³⁹ Article X §2 WTO Agreement.

¹⁴⁰ Seth – WTO och den internationella handelsordningen p 116.

¹⁴¹ Ibid – p 122.

¹⁴² Ibid – p 129-133.

Other exceptions to the MFN rule are the special measures that will be handled below, the rules about customs unions and free trade areas. FTA and CU fall under chapter 5 in this thesis. In this thesis I will not go any further into the rules about Enabling Clauses.

3.3 Art III GATT

The rule in article III GATT talks about National Treatment (NT). This rule comes into play when the goods have already entered the country. In the EU the NT rule has a much bigger influence than in WTO.¹⁴³ The NT rule is also to be found in Technical Barriers to Trade (TBT) agreement, Sanitary and Phytosanitary Measures (SPS) agreement and TRIPS. Article III in GATT has caused most disputes under GATT and WTO.¹⁴⁴

The purpose of the NT rule is that states shall not be able to give the domestic producers special treatment. The foreign producers shall compete on level terms. The state must not put on extra taxes and heavier demands for quality for the foreign producer. When the foreign products have passed the border they shall not be treated differently from domestic products. We can see examples of this in article III §1:

“Article III: National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*”¹⁴⁵

There is always a risk or an opportunity that taxes and regulations are used in a way that in real life give domestic producers advantages. Demands and terms can be set that are easy for domestic producers to fulfil. For foreign producers an expensive change must be made to fulfil the demands and terms. Within the EU this behaviour is common. In case *Cassis de Dijon* the European court said that a German regulation, liqueur must have a certain alcoholic per cent, was seen to be blocking free trade in the EU.¹⁴⁶ The NT rule says that there shall be non-discrimination between like products. Article III GATT goes further, NT shall include competitive and even substitutional products.¹⁴⁷ Difficulties that lie in this article concern to see whether a product is competitive or like another product. This problem is

¹⁴³ Ibid – p 133.

¹⁴⁴ Examples: US/EG hormones 1998 (WT/DS26), EG/Chile alcoholic taxes 2000 (WT/DS87, DS110).

¹⁴⁵ The article III GATT contains 10 paragraphs.

¹⁴⁶ Judgment of the Court of Justice, *Rewe-Zentral*, Case 120/78 (20 February 1979) This judgment, known as the '*Cassis de Dijon* judgment', EC C-120/78.

¹⁴⁷ Seth – WTO och den internationella handelsordningen p 135.

not unique for article III but can also be found in other situations under WTO.¹⁴⁸

3.4 Special measures GATT

Special measures, what it's really about are economic competition. Three groups appear and they are all exceptions to MFN rule in article I GATT. Anti dumping, countervailing duties and safeguards are the three groups. Anti dumping and countervailing duties are regulated in article VI GATT. These two groups will not be investigated further in this thesis. Safeguards are the major subject in this thesis and will be examined in detail, starting below. Safeguard measures are addressing trade that has not in any way have violated the rules under WTO, trade that has occurred in a proper way. With trade in a proper way I mean that exports are occurring under normal competitive conditions. Compare with the other two groups of special measures that unlike safeguard measures face that countries or firms in different ways have supported the goods that later have been exported in ways that are not in compliance with the rules under WTO.¹⁴⁹

3.5 Art XIX GATT

3.5.1 Safeguards

Free trade has many advantages but it also increases competition and at the end of the day corporations, not making any money, can face the facts of closing its business. As we will see below at some stages countries can take action and raise tariffs to protect domestic industry. This is regulated in article XIX, often called escape clause. Articles with exceptions always lead to temptation from states to use them in order to protect domestic industry. To prevent this temptation it's not unrealistic to assume that regulations regarding exceptions are very restrictive and exact. Article XIX hardly fulfils these expectations. In article XIX it says that states can activate emergency safeguard measures if a product import increases in such quantities that it threatens domestic producers. The article is vague and leaves many questions to be answered. Compared to the other special measures rules, anti-dumping and countervailing duty rules, safeguard rules are less developed. Below I quote article XIX §1 (a):

“Article XIX: Emergency Action on Imports of Particular Products

1. (a) If, as a result of *unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in

¹⁴⁸ Ibid.

¹⁴⁹ Appellate Body Report, Argentina – Footwear (EC), WT/DS121/AB/R, para 94.

that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.”

We find many matters that are vague: increased quantities, connection between import and injury, like or directly competitive products how do you define this? During Tokyo Round attempts were made to reach an agreement on interpretation of article XIX.¹⁵⁰ One key issue during Tokyo Round was whether or not an emergency safeguard action could be pinpointed against a single country. This approach is called selective. Many countries were of the opinion that a safeguard action had to be pointed to every country on an equal basis. Doing so the emergency safeguard action was based on MFN rule and not totally out of play. This failed. The contracting parties could not come to consensus in this issue. During Uruguay Round a special negotiations group was created with the task to give article XIX more and stronger grounds. One major factor behind this was that article XIX was too often in play, way beyond the purpose behind the article. 150 safeguard measures were officially notified under GATT.¹⁵¹ Australia had used article XIX 38 times, the US 27, the EU 27 and Canada 23.¹⁵² Even though the article is heavily used disputes before the DSB are rare.

One big problem with the failure in Tokyo Round not to improve article XIX was the increasing misuse of voluntary restraints in exports agreements. There are three often used forms of agreement, usually referred to in the terms of grey area measures, Voluntary Export Restraints (VERs), Voluntary Restraint Arrangements (VRAs) and Orderly Marketing Arrangements (OMAs). If the article did not improve and get more specific the contracting parties would most certainly face increasing use of these sorts of agreements. The creation of the special negotiation group during the Uruguay Round was to stop this from continuing any further. Another reason for using the grey area measures is found in the difficulty to face the request for compensation in article XIX and SA. The questions concerning compensation are discussed in chapter 1.2 and 3.5.2.3.

3.5.2 Agreement on safeguards

The negotiations from the Uruguay Round led to an agreement called agreement on Safeguards (SA). The purpose with the agreement was to improve and strengthen the international trading system.¹⁵³ The new agreement is far more detailed than article XIX. The SA agreement is special because it is the first agreement that develops the basic GATT

¹⁵⁰ Seth – WTO och den internationella handelsordningen p 177.

¹⁵¹ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 4, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁵² Seth – WTO och den internationella handelsordningen p 177.

¹⁵³ Agreement on Safeguards preamble.

provision.¹⁵⁴ One much more interesting aspect that comes to life after realising that a new agreement has been born concerns the value and importance of the old regulations, article XIX GATT. The relationship between article XIX and SA was the subject in WTO panel case Korea. The panel said:

“Thus, any safeguard measures with the exception of special safeguard measures taken pursuant to Article 5 of the Agreement on Agriculture (AOA) or Article 6 of the Agreement on Textiles and Clothing imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards (SA) and Article XIX of the GATT 1994.”¹⁵⁵

So article XIX and SA apply together. The article XIX GATT has not been placed out of play. Article XIX GATT applied to all goods. In WTO this remains but special regimes are however provided for in the WTO Agreement: AOA¹⁵⁶, Agreement on Textiles and Clothing (ATC, expired in 2005), GATS and Protocol of Accession of the People’s Republic of China.¹⁵⁷

The SA is rather short and partly confirming or building on article XIX GATT. Important to keep in mind is that regulations on safeguard measures are still rather limited and not very detailed.¹⁵⁸ Together with article XIX §1, article 2 and 4 SA lay down the substantive requirements that must be shown. This must be met in order to adopt a safeguard measure. Fulfilment must go through special procedures addressed in article 3 SA. Article 8 provides for mutually agreed compensation by the WTO member taking the safeguard measure.

One basic rule under SA is that safeguard measures may not be selective.¹⁵⁹ During special circumstances they may be selective. The committee on safeguards must approve this and proof must be put in front of the committee.¹⁶⁰

To be able to activate emergency safeguard measures, import for a product must have increased. This increase must be in absolute numbers or in relative numbers.¹⁶¹ I will explain this below in 3.5.2.1 section 5. The SA provides that the importing country that investigates if safeguard measures

¹⁵⁴ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 41, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁵⁵ Appellate Body Report, Korea – Dairy para 77.

¹⁵⁶ See chapter 4.

¹⁵⁷ See this chapter 3.5.3.

¹⁵⁸ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 2, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁵⁹ Article 2.2 SA - Read more about the question concerning selectiveness in chapter 3.5.2.4.

¹⁶⁰ Article 5 SA.

¹⁶¹ Article 2 SA.

shall be taken must notify the Committee of Safeguards.¹⁶² The parties involved must be given opportunity to present evidence and to respond.¹⁶³ I will now review both substantive and procedural rules under SA.

3.5.2.1 Increased import and unforeseen developments

To determine *increased import* a state cannot choose to take into account all import increase. Two main conditions must be fulfilled for a member to be able to activate safeguard measures. The first condition is that the increase must have occurred “as a result of *unforeseen developments* and of the effect of the obligations incurred by” a WTO member. The second condition is, that import should enter the importing country “in such increased quantities and under such conditions” as to cause or threaten *serious injury* to the domestic industry. I will below review the conditions set up in article 2.1 SA and article XIX GATT.

Article 2.1 SA must be read together with article 4.2 (a) SA for determining whether the conditions identified in 2.1 SA exist.

“Article 2: Conditions

1. A Member(1) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.”

“Article 4: Determination of Serious Injury or Threat Thereof

2. (a) In the investigation to determine whether *increased imports* have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by *increased imports*, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”

Two requirements must be fulfilled under article 2.1 SA. The first one is a quantitative and the second one is more generally related to the conditions under which foreign products come into the territory. Article 2.1 SA confirms the language from article XIX GATT but there is one exception in article XIX §1(a) that cannot be found in article 2.1 SA. XIX §1 (a) talks

¹⁶² Article 12.6 SA and see chapter 3.5.2.4.

¹⁶³ Article 3 SA.

about “*unforeseen developments*”.¹⁶⁴ As I wrote before *increased import* is the expected result of free trade and one of the purposes of WTO. So it must be an *unforeseen development* that causes the *increased import*. This is not further defined. The language is broad and the reason for this is to cover a wide range of circumstances. *Unforeseen development* has been handled in a few cases.¹⁶⁵ *Unforeseen development* was interpreted for the first time in the US – Hatters Fur case. The case concerned a change in fashion of hats, which had led to the increase in imports. The US – Hatters Fur case said:

“...the term “*unforeseen development*” should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated...”¹⁶⁶

The analysis of increased imports by domestic authorities assumes that such authorities select a so-called *reference period* or *investigation period*.¹⁶⁷ This is a short span of time prior to the determination during which import trends will be studied.¹⁶⁸ The SA contains no indication how the *reference period* should be selected.¹⁶⁹

Some more questions arise when we have come this far. How much must import increase? Besides quantities is value relevant? Finally which span of time shall we count? To answer the question about how much import must increase we must at first tell the difference between absolute and relative increase. Absolute increase is simply that a larger share of the production is imported. Relative increase is when the import stays at the same level but domestic production decreases. At this scenario, looking at numbers, the import increases compared with domestic production.¹⁷⁰ An example might help to understand the difference between absolute and relative increase. If Sweden in 2005 imports 10 of the goods X and domestic production is 20 the ratio is 1:2 or 0:5. If in 2006 the import stays at the same level but domestic production decreases to 15 the ratio changes into 1:5 or 0:6.6. Looking at the ratio numbers there has been a relative increase in import with 0:6.6 ratios. Looking at the import in reality, it has not increased at all.

¹⁶⁴ Article XIX §1 (a) See this chapter 3.5.1.

¹⁶⁵ WTO Appellate Body Report, WT7DS987AB/R, Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products, Dairy para84, WTO Panel Report, WT/DS121/R Argentina – Safeguard Measures on Imports of Footwear para 91, Working party Report, US – Hatters Fur, GATT/CP/106 p 10 para 131.

¹⁶⁶ Working party Report, US – Hatters Fur, GATT/CP/106 p 10 para 131.

¹⁶⁷ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 12, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 13, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

Under article 2.1 SA it says that these are alternative conditions. It is sufficient that one form of increase has occurred.¹⁷¹ Some guidelines how much the increase must be are found in Argentina Footwear case.¹⁷² There we can find some key words like: recent enough, sudden enough, sharp enough and significant enough. This confirms that the magnitude of the increase is important as well as the fact that the increase must take place over a relatively short span of time. In the same case the panel says that SA refers to quantity, so on focus shall lie this fact rather than on value.¹⁷³

3.5.2.2 Serious injury

Article 4.2 SA sets two requirements that have to be fulfilled.¹⁷⁴ The first one is a *causal link* between *increased import* and *serious injury*. It is also said that any injury caused by factors other than *increased imports* must not be attributed to such imports. Compared with the standard in anti-dumping the standard of *serious injury* in safeguards is very high.¹⁷⁵ To be able to activate safeguard measures lawfully the *increased import* must cause damage or threaten to do so to domestic industry.¹⁷⁶ The definition of domestic industry can be found in article 4.1 (c) SA. Two criteria must be fulfilled. Firstly it is a domestic producer that produces products that are like or directly competitive. These terms are not further defined in SA. But The Appellate Body has said that products that “ share properties, nature, qualities and end uses” they fall under like products.¹⁷⁷ It would not be too bold, to say that products that fall under the same category in the Harmonized Commodity Description and Coding System will be seen as products that are alike.¹⁷⁸ Secondly the *serious injury* must out of respect consist with either the whole domestic industry, or with that part which amounts to a major proportion.

Domestic industry and the *serious injury* that has to be found can occur either totally to the domestic producers or to a major proportion of them.¹⁷⁹ Coming this far it needs to be investigated whether *serious injury* or threat of *serious injury* is at hand.¹⁸⁰ Article 4.2 (a) SA lists a series of factors, all of which must at a minimum be evaluated by domestic authorities.¹⁸¹ The list has two aspects, formal and substantive. Substantive aspect is that domestic authorities must support their conclusion with facts that the domestic industry is suffering or threatened. The formal aspect puts on the domestic authorities a burden to evaluate all relevant factors. If the domestic

¹⁷¹ Article 2.1 SA.

¹⁷² Appellate Body Report, Argentina – Footwear (EC) para 131.

¹⁷³ Ibid – para 8.152.

¹⁷⁴ Article 4.2 SA.

¹⁷⁵ Appellate Body Report, Wheat Gluten para 149.

¹⁷⁶ Article 4.1 a+b SA.

¹⁷⁷ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 21, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁷⁸ About this convention see 3.2 section 5.

¹⁷⁹ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 23, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁸⁰ Article 4.2 (a) SA.

¹⁸¹ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 19, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

authorities fail to fulfil these aspects they violate article 4.2 SA. The list put up in article 4.2 SA is not exhaustive.¹⁸²

Finding that a threat of *serious injury* is at hand is similar to the demands for *serious injury*. The definition in article 4.1 (b) SA refers to article 4.2 SA.¹⁸³ There are some differences to keep in mind. The first is that a threat of *serious injury* is looking into the future, it's a coming event. This event may not be realised. Even so under article 4.1 (b) SA it must be determined on facts and combined with article 4.2 it must be clearly imminent. What really is *serious injury* and threat of *serious injury* have been discussed and arguments point to different directions.¹⁸⁴

Article 4.2 (b) SA requires a *causal link* between *increased import* and *serious injury*. The issue is difficult and has given rise to controversy. The Appellate Body has indicated that *increased import* alone must cause the *serious injury*.¹⁸⁵

3.5.2.3 Duration, compensation and provisional measures

Safeguard measures have the purpose to give the domestic producers breathing space to adapt to the new market that is at hand. During the year that has passed the most common way they use safeguard measures are to increase tariffs. This form is still under SA the most common one today.¹⁸⁶ One exception appears in article 11.1 (b); we now see that the grey area measures are forbidden.

Safeguard measures shall not be active longer than necessary and may not have a duration longer than four years.¹⁸⁷ During these four years provisional measures shall be included.¹⁸⁸ Sometimes an extension may be at hand but the total period must not exceed eight years.¹⁸⁹ When the safeguard measures are lifted there will be a cooling-off period.¹⁹⁰ The purpose of this period is to make sure that the safeguard measures don't get permanent. The different time periods that have to be fulfilled during the cooling period depend on the time the safeguard measures were active.¹⁹¹ In some cases when developing countries are involved special and more flexible regulations are at hand.¹⁹² The developing countries get a shorter

¹⁸² Dispute Settlement – WTO, safeguard measures – UNCTAD – p 23, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁸³ Article 4.1 (b) SA.

¹⁸⁴ Seth – WTO och den internationella handelsordningen p 179.

¹⁸⁵ Appellate Body Report, US – Wheat Gluten, para 70 and Appellate Body Report, US Line Pipe, para 209.

¹⁸⁶ Article 11.1 (a) SA refers to article XIX GATT.

¹⁸⁷ Article 7.1 SA.

¹⁸⁸ Article 6 SA.

¹⁸⁹ Article 7.3 SA.

¹⁹⁰ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 34, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

¹⁹¹ Article 7.5 SA.

¹⁹² Article 9.2 SA.

cooling period and a longer duration in activation of safeguard measures, ten years.

The activation of safeguard measures breaks the balance of rights and obligations for WTO members. To adjust these negotiations and to achieve compensation negotiations with the exporting members must be held. The compensation is achieved by lowered tariffs in other areas so that the balance will be intact.¹⁹³ If an agreement is not achieved within 30 days the exporting member states may individually take action or suspend other obligations.¹⁹⁴ Retaliation may not be used for the first three years after the activation of the safeguard measures.¹⁹⁵ Exceptions from this rule may be found but not when the safeguard measures have been taken on absolute numbers.¹⁹⁶

The rules of provisional measures only take the form of increase in tariffs, they last at a maximum of 200 days and there must be clear evidence of increasing import that have caused serious injury or threaten to do so.¹⁹⁷

When a member state is in a starting position for activating safeguard measures, notifications and consulting must be achieved.¹⁹⁸ Among the obligations is the fact that the committee on Safeguards must be informed.¹⁹⁹

3.5.2.4 Non-discrimination

When safeguard measures get operational they must be applied to all exporters regardless of country origin.²⁰⁰ This rule is based on the MFN rule and is a major principle of SA. This is a major guiding principle of the SA and a fundamental change compared to article XIX GATT.²⁰¹ There was a heated discussion in GATT in 1947 about the possibility to apply selective safeguard measures.²⁰² Today according to article 2.2 SA this discrimination is prohibited. In this link to MFN rule the article XIX GATT was missing.

This link to MFN rule becomes interesting concerning RTAs. One big issue concerns CU and FTA areas if they can be excluded. Looking at article XXIV GATT it allows FTA and CU to agree further liberalization. A lot of debating has been in progress on this matter but it gets complicated when realising that article XXIV doesn't cover the link to MFN rule, like the one

¹⁹³ Seth – WTO och den internationella handelsordningen p 180.

¹⁹⁴ Article 8.1 SA and article XIX: 3 GATT.

¹⁹⁵ Article 8.3 SA.

¹⁹⁶ Ibid.

¹⁹⁷ Article 6 SA.

¹⁹⁸ Article 8 and 12 SA.

¹⁹⁹ Article 12.1 and 12.4 SA.

²⁰⁰ Article 2.2 SA.

²⁰¹ Read about the historical situation concerning selective approach under article XIX in chapter 3.5.1 section 3.

²⁰² Dispute Settlement – WTO, safeguard measures – UNCTAD – p 35, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

found in article 2.2 SA.²⁰³ This missing link is Pauwelyn pointing at putting his theory about excluding regional partners on the table.²⁰⁴

3.5.2.4.1 The demand for parallelism in case law

The question concerning selective application has been put on the table before the DSB. The DSB have in case law come up with the concept of parallelism.²⁰⁵ This has been described as: “the imports included in the determination made under articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under article 2.2.”²⁰⁶ In the case concerning Argentina the injury determination had been based on all imports but when later applied they excluded its MERCOSUR partners. The Appellate Body said: “Argentina’s investigation...caused by imports from all sources, could only lead to the imposition of safeguard measures on imports from all sources.”²⁰⁷ The Appellate Body came to the same conclusion in the US steel case.²⁰⁸ From this statement one can deduce that for the Appellate Body article XXIV GATT can never justify a violation of parallelism.²⁰⁹

Questions have been raised why the DSB came up with the rule of parallelism.²¹⁰ According to the author Pauwelyn the DSB simply should say that it was a violation of article 2.2 SA instead. Pauwelyn goes even further and says that article XXIV GATT must be able to justify a violation of parallelism but this will be further investigated in 5.3.4.

3.5.2.5 Committee on safeguards

In SA a committee is established, the Committee on Safeguards, one function is to oversee the implementation of the agreement.²¹¹ The committee has also a general monitoring function on the SA agreement.²¹² The committee is open for all member countries in WTO, is a forum for discussion between the countries and must report to the Council for Trade in Goods.²¹³

²⁰³ Ibid – p 36.

²⁰⁴ Read more about his theory in chapter 5.3.4.

²⁰⁵ First detected by the panel in WTO Panel Report, WT/DS121/R Argentina – Safeguard Measures on Imports of Footwear para 8.91 and then later confirmed by the Appellate Body in WTO Appellate Body Report, WT/DS121/AB/R Argentina – Safeguard Measures on Imports of Footwear para 113.

²⁰⁶ WTO Appellate Body Report, WT/DS166/AB/R – US – Definitive Safeguard Measures on Imports of Wheat Gluten From European Communities para 96. In this quote all paragraphs refers to SA Agreement.

²⁰⁷ WTO Appellate Body Report, WT/DS121/AB/R Argentina – Safeguard Measures on Imports of Footwear, para 113.

²⁰⁸ See chapter 3.6.1.2.

²⁰⁹ Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 121.

²¹⁰ Ibid.

²¹¹ Article 13 SA.

²¹² Article 13.1 (a) SA.

²¹³ Ibid.

3.5.2.6 Developing country members

In article 9.1 SA developing countries get protection from developed countries from using safeguards in special situations. These rules are minimum rules in favour for developing countries. In February 2000, the US adopted two separate definitive safeguard measures with respect to the importation into the US territory of wire rod and line pipe.²¹⁴ These measures were brought up before the DSB in the US-Line Pipe case. In the US-Line Pipe the regulation, concerning developing country members, was at hand and the panel said that as long as the conditions in 9.1 SA are fulfilled developed countries should not use safeguard measures against developing countries. In this case the panel said that the US had failed in its obligations.²¹⁵ Developing countries enjoy other special rights such as legal assistance and special deadlines for panel proceedings.²¹⁶

3.5.3 China

To be able to accept China as a member state in WTO they had to agree on demands from other member states in WTO. For this matter a protocol was signed (Protocol of Accession of the People's Republic of China). In this accession protocol a safeguard clause provides other WTO members with the possibility to limit imports from China. China cannot respond with retaliation to the same degree as other member states and the rules in article 11.1 (b) SA concerning the grey areas do not include China.²¹⁷ In the accession agreement this is instead recommended as a possibility. If China doesn't accept the grey area measures the other country involved can stop import from China.²¹⁸ This clause is applicable for 12 years after China's accession.²¹⁹ This means that the accession agreement is in play until 2013.²²⁰ For some time there have been disputes concerning textiles coming from China. Both the US and the EU have taken restricted measures on export of Chinese textiles.²²¹ See also in chapter 7.1.1 in questions concerning China and its accession.

3.6 Case law

During the years that have passed safeguard measures have been subject to many different views. Some say it is the most protective device of all and

²¹⁴ US – Wire Rod and Line Pipe Safeguards (CR) - [www.worldtradelaw.net/cr/ds214-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds214-1(cr).pdf), 11 April 2006.

²¹⁵ WTO Panel Report, WT/202/R – US – Definitive Safeguard Measures on Import of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe, para 7.

²¹⁶ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 52, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

²¹⁷ Seth – WTO och den internationella handelsordningen p 182.

²¹⁸ Ibid.

²¹⁹ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 7, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

²²⁰ Seth – WTO och den internationella handelsordningen p 182.

²²¹ Read further in US Action on China's Textiles Seen as Excessive - <http://www.china.org.cn/english/BAT/66726.htm> and ordinance (EG) nr 1084/2005.

some say it maintains and further free trade.²²² Until 2002 typical safeguard measures had been limited causing only limited impacts. On March 20, 2002 the US applied safeguard measures that increased tariffs up to 30 per cent to import of a wide range of steel products. To keep in mind is that the US has a major industry and is one of the largest economies in the world. This case will be investigated further below.

3.6.1 US steel case

Once the US steels industry was the heart and soul of world economy and the US industry. The background, the action taken by the US to protect the steel industry is to some degree found in this fact. Over the years that passed the US steel industry faced huge crises because of old and smaller mills, outdated technique and a pension burden.²²³ An average of 5 000 persons lose their employments every year in this sector in the US.²²⁴ The US producers have for a period of years faced losses and many companies have become bankrupted. Not only the US but also the global steel market has during recent years faced the same challenges. The world steel market is faced with over-capacity and a number of 20 per cent's over-capacity has been mentioned on the global market.²²⁵ Thru history the US administrations have helped domestic steel industry. Trade protection and subsidies have been common to the industry. Behind all this lies political consideration. In 2002 it was mid-term elections for Congress in the US. Many potential electors work in the steel industry and may boost votes in selected states.

The EU, Korea, Japan, China, New Zealand, Brazil, Switzerland and Norway said that the safeguard measures violated WTO/GATT and said that the US had to abort the measures directly.²²⁶ The question arising was, regardless of the political motive, if the measures are consistent with the WTO rules on safeguards. The EU requested the establishment for a panel and said that the US safeguard measures violated article 2, 3, 4, 5 and 9 SA and I:1 XIII, XIX:1 GATT.²²⁷ The panel and Appellate Body have given the complaining countries right.²²⁸ There are four reasons for the decision that I will now present.

3.6.1.1 Unforeseen developments

In article XIX §1 (a) the demand for *unforeseen development* exists.²²⁹ The decision from Appellate Body confirms this. Domestic authorities are obligated to demonstrate this existence. The Panel really pointed at the

²²² Lee – Safeguard Measures in World Trade – p 183.

²²³ Ibid – p 185.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Seth – WTO och den internationella handelsordningen p 180.

²²⁷ Lee – Safeguard Measures in World Trade – p 187.

²²⁸ WTO Panel Report, WT/DS248-DS259/R – US – Definitive Safeguard Measures on Import of Certain Steel Products and WTO Appellate Body Report, WT/DS248-DS259/AB/R – US – Definitive Safeguard Measures on Imports of Certain Steel Products.

²²⁹ See Chapter 3.5.2.1 section 4.

importance of the connection between *unforeseen developments* and the *increased import*.²³⁰ These *unforeseen developments* lead to increasing import causing or threatening to cause *serious injury*. The report from United States International Trade Commission (USITC) did not include this.²³¹ Both the Panel and Appellate Body found that the US had failed to demonstrate the *unforeseen developments*.²³²

3.6.1.2 Selective application

When invoking safeguard measures these measures may not be selective.²³³ Read more about the regulations concerning selective application in chapter 3.5.2, chapter 3.5.2.4, chapter 3.5.2.4.1, chapter 5.3 and chapter 5.3.2. The actions from the US did not include all countries. Four countries were excluded and could continue to export steel products to the US.²³⁴ In the USITC report the assessment was based on import of steel from all sources. In this calculation from USITC the mentioned countries above were included. In the report there was also a separate investigation concerning NAFTA parties. The Panel found in the US- Wheat Gluten that once the determination is based on all sources, safeguard measures must be applied to the imports from all sources, because imports from different sources may collectively cause the injury.²³⁵ This criterion from the Dispute Settlement Body (DSB) is known as the demand for parallelism. This criterion is further investigated in chapter 3.5.2.4.1. Both the Panel and Appellate Body confirmed this.²³⁶

3.6.1.3 Injury factors

The SA requires members to consider specific injury factors.²³⁷ All factors listed in 4.2 (a) SA must be considered according to previous Panels and Appellate decisions.²³⁸ In the USITC report not all factors were analysed. Productivity, listed in article 4.2 (a) SA, was one factor that was not considered. An increase in unemployment may be an important motivation for activating safeguard measures because it often causes serious social and political problems.²³⁹ But when unemployment is a result of increased

²³⁰ Lee – Safeguard Measures in World Trade – p 48.

²³¹ USITC report Pub No 3479 (December 2001).

²³² WTO Panel Report, WT/DS248-DS259/R – US – Definitive Safeguard Measures on Import of Certain Steel Products, note 52, para 10.145 – 10150 and WTO Appellate Body Report, WT/DS248-DS259/AB/R – US – Definitive Safeguard Measures on Imports of Certain Steel Products, note 53, para 330.

²³³ See Chapter 3.5.2 and Article 2.2 SA.

²³⁴ Canada, Israel, Jordan and Mexico.

²³⁵ WTO Appellate Body Report, WT/DS166/R – US – Definitive Safeguard Measures on Imports of Wheat Gluten From European Communities.

²³⁶ WTO Panel Report, WT/DS248-DS259/R – US – Definitive Safeguard Measures on Import of Certain Steel Products, note 52, para 10.609, 10.623, 10.633, 10.643, 10.653, 10.660, 10.670, 10.680, 10.692, 10.699 and WTO Appellate Body Report, WT/DS248-DS259/AB/R – US – Definitive Safeguard Measures on Imports of Certain Steel Products, note 53, para 474.

²³⁷ Article 4.2 SA.

²³⁸ Lee – Safeguard Measures in World Trade – p 188.

²³⁹ Ibid – p 189.

efficiency because of labour saving production changes it causes no *serious injury* to the domestic industry.²⁴⁰

3.6.1.4 Members with substantial interest

Members that are in position to activate safeguard measures must provide adequate opportunity for prior consultation with members having substantial interest.²⁴¹ The US announced its decision on 5 March and implemented the actions only 15 days later. Several attempts were rushed during this period but no settlement could be reached. The Appellate Body has considered that a period of 18 days was insufficient to analyze the effect of the measures. Taking this into account 15 days is an even shorter period that is not justifiable.²⁴²

3.7 Conclusions

I have to this point gone thru the regulations concerning safeguard measures in the industry area. From this point it's interesting for the upcoming chapters in this thesis to keep these regulations in mind. For all members in WTO these regulations in theory are all *neutral*. All members shall apply them in the same way. This will be further investigated in chapter 7, 8 and 9. I will now continue to go thru the special regulations concerning the agriculture area.

²⁴⁰ Ibid.

²⁴¹ Article 12.3 SA.

²⁴² WTO Appellate Body Report, WT/202/AB/R, US – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe.

4 Safeguards Agriculture

4.1 Introduction

This thesis continues with the important question concerning agriculture. As described in the introduction 1.1 most of the population in the developing countries work in the agriculture area. Many developing countries see the agriculture area as the last major frontier for trade liberalisation.

Finishing the Uruguay Round an agreement concerning agriculture was created. The creation of the agreement was difficult because many member states had difficulties in achieving consensus.²⁴³ The US and the EU could not become united in this question. Not until one week before the end of the round the US and the EU agreed.²⁴⁴ Even though the EU and the US agreed much criticism has been raised against them. To be honest, it is not unfair to say the opposite; it is amazing that they could agree at all. The agreement was given the name AOA and is a part of the WTO Agreement.²⁴⁵ The AOA established rules for agricultural trade for all WTO members.²⁴⁶ The area of agriculture is in most countries subject to different kind of support, states intervene. EU has different forms to intervene, their CAP, and the tools that are provided in regulations concerning agriculture account for 80 per cent of all the EU regulations.²⁴⁷

GATT does not only apply to products from industry but also in the area of agriculture. In GATT there are even some special regulations in the agriculture area to be found.²⁴⁸ In real life GATT never really came to be used in the area of agriculture. One reason for this is that the US in 1954 was granted exceptions for many of its most important agriculture products.²⁴⁹ Other countries then followed this example and said if the US doesn't have to follow the rules then they are not applicable to us either. The US accepted this interpretation. When the EU in the 1960s formulated their CAP, many violations to GATT were found.

The reasons for the EU and other countries intervention in this area are totally historic. Wars and other disasters had made many countries to intervene face the fact not being able to feed its population. Other reasons for state intervention have been presented and some examples are: to guarantee food security, increase output in agriculture sectors, to support

²⁴³ Read about consensus in chapter 2.2 section 6.

²⁴⁴ Blair House agreement see chapter 2.3.1 section 5.

²⁴⁵ Agreement Establishing The World Trade Organization – Annex 1A.

²⁴⁶ Agreement on Agriculture glossary, p 2-3 -

www.tradeobservatory.org/library.cfm?refID=37606, 13 April 2006.

²⁴⁷ Seth – WTO och den internationella handelsordningen p 185.

²⁴⁸ Article XI and XVI GATT.

²⁴⁹ Seth – WTO och den internationella handelsordningen p 185.

development in the sector and improve the balance of payment.²⁵⁰
Agriculture and food are very hot political issue. Food shortages can lead to criminal acts, revolutions and war.²⁵¹

In the EU and the US the costs for intervention and support in the agriculture area have become a huge problem. This was true especially for the US. The US faced dollar decrease and lack of balance in the state budget. This in the end made the negotiations for the US in Uruguay Round, about cutting support in the area, become important and may even be one major factor for the parties to agree at the end of the day.²⁵² Keep in mind that the political power behind, in the EU and the US, had a huge support for intervention and support in the agriculture area. The negotiators were left with a difficult task, to make everybody happy. Even a child understands that there is no simple solution to this dilemma.

Developed countries, which dominate trade in agriculture, stand for 70 per cent of import and export.²⁵³ To get the right perspective it is important to compare with the fact that 96 per cent of world producers in agriculture live in developing countries. Developed countries support their production with export subsidies and other domestic support. The different forms of support lead to the fact that agriculture products from development countries cannot compete.

One interesting thing to observe is that developed and developing countries have different strategies in the agriculture area. Developed countries support their producers financially or by other means. Developing countries tax their producers. For developing countries this is one of few possibilities to get funds to the state.²⁵⁴

Some countries say that the area of agriculture has multifunctionality. In this expression lies the fact that countries must be able to feed their own population and that if states get dependent on others this can be misused. Environmental issues fall under this expression and also culture in heritage. Even questions about dignity for animals and food safety fall under the expression multifunctionality. In the EU one of the biggest supporters of this is France.²⁵⁵ Japan, Norway, Switzerland and Korea are often referred to as the most protectionist nations in the agriculture area.²⁵⁶ These four countries have been called “friends of multifunctionality”.

²⁵⁰ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 210.

²⁵¹ Ibid.

²⁵² Seth – WTO och den internationella handelsordningen p 185.

²⁵³ Seth – WTO och den internationella handelsordningen p 187.

²⁵⁴ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 210.

²⁵⁵ Ibid.

²⁵⁶ Seth – WTO och den internationella handelsordningen p 188.

The failure in Cancun in 2001 has its roots in the agriculture area.²⁵⁷ Most developing countries see the agriculture area as the last major frontier for trade liberalisation.²⁵⁸

4.2 Agreement on Agriculture

The Agreement on Agriculture (AOA) is very complicated and difficult to understand when reading it. The agreement contains many numbers and references to different years of production. I will not go very deep into the regulations under the agreement. I will basically go thru the basic principles in the agreement. After doing this I will concentrate on the special regulations in the agreement concerning safeguard measures.

The purposes behind establishing the AOA were to make agricultural market access conditions more transparent, predictable and competitive.²⁵⁹ The parties also wanted to establish or strengthen the link between national and international agricultural markets.²⁶⁰

Quotas and other NTB shall be converted into tariffs.²⁶¹ The tariffs shall be reduced with a simple average of 36 per cent.²⁶² This process is called *tariffication*.²⁶³ The LDC does not have to reduce their tariffs.²⁶⁴ This change from NTB tariffs has been done almost into 100 percent. Comparing with industry products the tariffs within agriculture are still very high. The reduction of 36 per cent has had very little effect in reality. The reasons for this reduced effect are many. The reduction of tariffs was counted on a period when the tariffs were exceptionally high and the price on the world market was low. The tariffs that were reduced were not often of any bigger importance to the import. The EU had average tariffs of 26 per cent in 1995.²⁶⁵ In 2000 the average was 18 per cent.²⁶⁶ The EU has tariffs in butter of 167 per cent and sugar 219 per cent.²⁶⁷

Different forms of domestic support in the agriculture area exist. This support makes it difficult for domestic exporters to compete at level terms. A huge problem with this domestic support is that in many countries it leads to overproduction. To keep the price high countries then give export

²⁵⁷ See chapter 2.3.2.

²⁵⁸ Ibid.

²⁵⁹ Agriculture: Explanation, Market access, p 1, http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#special_safeguard, 13 April 2006.

²⁶⁰ Ibid.

²⁶¹ Article 4 – Agreement on Agriculture.

²⁶² Mah Jai S – Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO p 197.

²⁶³ Agreement on Agriculture glossary, p 2-3 - www.tradeobservatory.org/library.cfm?refID=37606, 13 April 2006.

²⁶⁴ Seth – WTO och den internationella handelsordningen p 190.

²⁶⁵ Ibid – p 191.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

subsidies. The Aggregate Measures of Support are to be reduced as much as 20 per cent.²⁶⁸ The question concerning export subsidies say that volume is to be reduced to 21 per cent.²⁶⁹

4.3 Art 5 – Agreement on Agriculture

Due to these above-mentioned measures in the agriculture area there was a need to allow certain temporary protective measures. In the AOA there was a separate rule created concerning safeguard measures. These measures are usually called Special Safeguards Provision (SSG) and are very different from the rules in the SA. SSG is different in the sense that it does neither require the importing members to prove *serious injury* nor causation. There are two different ways to invoke safeguard measures. One is if the volume of imports of the concerned products exceeds a certain trigger level and the second one is if the import price falls below a certain trigger price.²⁷⁰

Before going any further into the regulations concerning the different ways to trigger safeguard measures it's important to understand the possibilities to access the safeguard measures. Countries that underwent *tariffication* could reserve the right to apply safeguard tariffs to protect domestic producers against sudden import surges. To be able to use the SSG provisions countries must designate the SSG products in their Country Schedules.²⁷¹ They have to make both ad hoc and annual notifications to the Committee on Agriculture.²⁷² 38 member states have done this, the EU counted as one. Countries not designating any products have lost the opportunity to use the SSG. This was done during the negotiations of the agreement during the Uruguay round. New members of WTO get the opportunity to negotiate in this matter and this is done in the protocol of accession. Only 21 developing countries have access to the SSG.²⁷³ All 38-member states that can activate SSG are listed in supplement A. The EU has reserved 539 products and the US 189.²⁷⁴ Switzerland is on top with 961 products reserved.²⁷⁵ In supplement A there is a list with the number of products that the different members have reserved.

Interesting to know is that differences can be seen in which countries use the two different safeguard measures. The US and Poland have used the price-based measures most. The EU and Japan usually use the volume-based measures. The first five years of the agreement the price-based measures

²⁶⁸ Mah Jai S – Reflections on the Special Safeguard Provision in the Agreement on Agriculture of the WTO p 197.

²⁶⁹ Ibid.

²⁷⁰ Article 5.1 (a+b) – Agreement on Agriculture.

²⁷¹ Article 5.1 section 1 – Agreement on Agriculture.

²⁷² Agriculture: Explanation, Market access, p 1,

http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#special_safeguard, 13 April 2006.

²⁷³ Agreement on Agriculture glossary, p 2-3 -

www.tradeobservatory.org/library.cfm?refID=37606, 13 April 2006.

²⁷⁴ Seth – WTO och den internationella handelsordningen p 197.

²⁷⁵ Ibid.

were used 435 times and the volume-based measures were used 213 times.²⁷⁶

In supplement B article 5 AOA can be reviewed. I have chosen to put the text in the supplement because of its complexity. The volume-based SSG measures are set according to article 5.1 (a) AOA. The trigger levels of invoking the SSG provision above are very complex. The rules are found in article 5.4 (a-c) AOA.

It is important to remember that the possibility to invoke SSG measures exists every year.²⁷⁷ Any member taking measures under this regulation must give notice to the Committee on Agriculture in writing.²⁷⁸

The price based SSG measures are set according to article 5.1 (b) AOA. The trigger levels of invoking the SSG provision above are very complex. The rules are found in article 5.5 (a-e) AOA.

Any member taking measures under this regulation must give notice to the Committee on Agriculture in writing within ten days.²⁷⁹

Due to the short duration of the safeguard measures in SSG, one year for the volume-based SSG²⁸⁰, the regulations concerning duration are different from those that appear in SA article 6 and 7.4.²⁸¹ The measures under SSG cannot be applied at the same time as the rules about safeguard measures under SA and article XIX GATT.²⁸²

²⁷⁶ Ibid.

²⁷⁷ Article 5.4 section 3 – Agreement on Agriculture.

²⁷⁸ Article 5.7 – Agreement on Agriculture.

²⁷⁹ Article 5.7 – Agreement on Agriculture.

²⁸⁰ Article 5.4 – Agreement on Agriculture.

²⁸¹ Read about duration in SA in chapter 3.5.2.3 section 2.

²⁸² Article 5.8 – Agreement on Agriculture.

5 RTA

5.1 Introduction

Since 1990 and especially after the failure in Cancun there has been a global trend toward bilateral and regional trade agreements. Between January 2004 and February 2005 as many as 43 new Regional Trade Agreements (RTAs) have been notified to WTO.²⁸³ Today almost all countries around the globe are parties to such agreements. Among the best-known regional trade agreements are: EU, NAFTA, BAFTA, EFTA, MERCOSUR, ASEAN, AFTA and COMESA.²⁸⁴ Looking at the RTAs that are in force today 84 per cent are Free Trade Area (FTA) agreements.²⁸⁵

One important question before going any further is what lies behind RTAs? Well, there is no simple answer to this question. Many varieties of factors are involved. These factors include economy, politics and security considerations.²⁸⁶ One huge factor is that RTAs are promoting for deeper integration of the economy than is available under WTO at present.²⁸⁷ At present this deeper integration concerns investment, competition, environment and labour standards.²⁸⁸ Some smaller countries and developing countries some times see RTAs as a defensive necessity.²⁸⁹ From a political point of view governments seek to consolidate increased regional security with their RTA partners.²⁹⁰ Other political goals are to demonstrate good governance and to prevent backsliding on economic reforms.²⁹¹

In 2005 and since Cancun there are four trends concerning RTA that are apparent.²⁹² The first trend is that almost every country around the world is increasingly making RTAs.²⁹³ This is true even for countries that traditionally are reluctant to Multilateral Trading System (MTS). The second trend is that RTAs are becoming much more complex.²⁹⁴ Notable is that RTA do not only cover reduction of tariffs, Non Tariffs Barrier (NTB) and services but covers investment rules and intellectual property. Thirdly

²⁸³ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 1 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

²⁸⁴ Read about member states in the different RTAs in – http://www.wto.org/english/tratop_e/region_e/region_e.htm, 28 February 2006.

²⁸⁵ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 3 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

²⁸⁶ Ibid – p 16.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid – p 2.

²⁹³ Ibid.

²⁹⁴ Ibid.

there is in RTAs between developed and developing countries a decreasing reciprocity leading to non-reciprocal relationship.²⁹⁵ Looking at Asia and RTAs concerning Japan these agreements seem to show an attitude that they do not necessarily oblige Japan to equal liberalization.²⁹⁶ This will be further investigated in chapter 8 of this thesis. The fourth and final trend is that the regional agreements are in some way becoming cross regional.²⁹⁷ This means that they cover different continents. Traditionally RTAs have been made between natural trading partners. The words natural trading partners mean: countries that are geographically located closely to one another and already have a well-established trading pattern.²⁹⁸ Interesting to mention in this matter is that there is also a trend that RTAs are made not only between a few countries; instead it contains a continent-wide scale.

Increasing is also the RTA between North and South, or if you want to put it differently between developed and developing countries. Among interesting new RTAs between North and South can be seen Free Trade Area of the Americas (FTAA) and Economic Partnership Agreement (EPA). EPA has not yet entered into force but will probably do so in 2007. FTAA entered into force recently, during 2005, and under this chapter I will use FTAA as an example.

In the earlier chapters of this thesis I presented the fundamental principle in GATT called MFN and this rule is based on non-discrimination.²⁹⁹ RTAs are formally recognized as exceptions to MFN obligation under WTO and GATT. WTO legal system provides with two different categories of rules of trade in goods and RTA. The first one is to be found in article XXIV GATT. This rule is general and is applicable to all RTAs. The second one is Enabling Clauses³⁰⁰ and is not so strict as the rule found in article XXIV GATT. Some authors believe that this leads to a belief among developing countries that they can be exempt from equal liberalization when they make RTAs with developed countries.³⁰¹ Using article XXIV GATT or The Enabling Clauses this is depending on the status of the participating countries. RTAs that include one developed country are governed by article XXIV GATT.³⁰² Agreement between only developing countries activates the rules under The Enabling Clauses. This means that RTAs between developed and developing countries are governed by article XXIV GATT.³⁰³ For this reason I will not go any further into the rules concerning The Enabling Clauses. Some voices have been raised which said that RTAs

²⁹⁵ Ibid.

²⁹⁶ Yanai – Legal Framework for North-South RTAs under the WTO System, p 1, http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf, 28 February 2006.

²⁹⁷ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 2 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

²⁹⁸ Ibid – p 5.

²⁹⁹ See under chapter 3.1, 3.2 and 2.2.

³⁰⁰ Read further 3.2 section 6.

³⁰¹ Yanai – Legal Framework for North-South RTAs under the WTO System, p 1, http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf, 28 February 2006.

³⁰² Ibid – p 7.

³⁰³ Ibid.

between north and south should be applicable to the rules under The Enabling Clauses.³⁰⁴ I will now continue with the regulations in article XXIV, safeguard measures in RTAs and then go through the safeguard measures in the FTAA agreement. RTA is also to be found in the area of service but these regulations fall under GATS and will not be handled in this thesis.³⁰⁵

5.2 Article XXIV GATT

Since 1947 the RTAs have greatly increased in number and importance.³⁰⁶ Article XXIV GATT has since this time been targeted for huge criticism. Full of loopholes, vague and ambiguous are some of the critical words pinpointed against the article.³⁰⁷ For this reason, during the Uruguay Round, an understanding of the interpretation was produced.³⁰⁸ There are three situations provided under article XXIV GATT that can make exceptions from MFN treatment. These three are: traffic frontiers, CU and Free Trade Area (FTA). CU and FTA are usually referred to as RTAs. To be consistent with article XXIV GATT these three exceptions must satisfy the provisions of paragraphs 5, 6, 7 and 8 of article XXIV GATT.³⁰⁹

Traffic frontiers and CU have been recognized in bilateral agreement for more than 200 years.³¹⁰ Including these two into article XXIV was uncontroversial.³¹¹ Concerning FTA it was a little more difficult. Looking at the first suggested draft of what later became the Havana charter for the ITO it only concludes traffic frontier and CU.³¹² It was first under the negotiations during the conference in 1947 that the concept of FTA was born.³¹³ The regulation in article XXIV is identical with Havana Charter article 44.³¹⁴ The FTA was brought up on the initiative of developing countries.

Article XXIV provides the basic rules concerning trade in goods on preferential arrangements. According to the article the definition of a CU is:

³⁰⁴ Ibid.

³⁰⁵ Article V GATS.

³⁰⁶ Understanding On The Interpretation Of Article XXIV Of The General Agreement On Tariffs And Trade 1994, preamble.

³⁰⁷ Chase - Multilateralism compromised: the mysterious origins of GATT Article XXIV, p 1.

³⁰⁸ GATT § 1 (c) iv.

³⁰⁹ Understanding On The Interpretation Of Article XXIV Of The General Agreement On Tariffs And Trade 1994, §1.

³¹⁰ Yanai – Legal Framework for North-South RTAs under the WTO System, p 3, http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf, 28 February 2006.

³¹¹ Ibid.

³¹² Chase - Multilateralism compromised: the mysterious origins of GATT Article XXIV, p 5.

³¹³ Yanai – Legal Framework for North-South RTAs under the WTO System, p 3, http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf, 28 February 2006.

³¹⁴ Chase - Multilateralism compromised: the mysterious origins of GATT Article XXIV, p 5.

“(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories”³¹⁵

The definition of FTA is:

“(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.”³¹⁶

To be accepted as CU or FTA the conditions set in article XXIV must be fulfilled. These conditions will be presented below in 5.2.1 to 5.2.4.

5.2.1 Substantially all the trade

These conditions are usually phrased “*substantially all the trade*”.³¹⁷ Between the areas on which RTA is applicable this means that duties and other restrictive regulations must be eliminated in products originating from this area. The phrase “*substantially all the trade*”, is unclear, has been on the agenda several times but questions still exist on what the phrase covers. Can areas like the agriculture be left out? Today many RTAs don’t include the agriculture area.³¹⁸ During the Uruguay Round this was discussed but the group could not agree. EFTA said that it should not be included because the text “*substantially all the trade*” was written. If the text had been “trade in substantially all products” the agriculture area had to be involved but not according to the phrase that now exists in article XXIV GATT.³¹⁹ *Substantially all the trade* is also investigated in chapter 5.3.1.

5.2.2 A reasonable length of time

A big question concerns how long time countries that enter into RTAs have to put an end to all barriers. In reality it doesn’t happen over a night that countries do this. Usually implementation of CU and FTA occurs over a period of time and in several steps. In article 5 (c) XXIV GATT the phrase “a reasonable length of time” is used. In 1994 this was interpreted to mean not more than ten years but on special occasions exceptions can be granted.³²⁰ Looking at historical facts some RTAs have had a very long period of implementation.

³¹⁵ Article XXIV §8 (a) GATT.

³¹⁶ Ibid – (b).

³¹⁷ Article XXIV §8 (a) i and 8 (b) GATT.

³¹⁸ Ex EFTA.

³¹⁹ Seth – WTO och den internationella handelsordningen p 127.

³²⁰ Understanding On The Interpretation Of Article XXIV Of The General Agreement On Tariffs And Trade 1994 § 3.

5.2.3 Stand still

Conditions are set up concerning the level of restrictions applied to non-members in the RTA. These conditions set out the duty:

“shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union”³²¹

A question arises on what really is to be seen as the whole. To be able to answer this question there must be consensus on exactly how to count these numbers. Several times disputes have arisen on this question.³²²

5.2.4 CTG and CRTA

A condition is also that all RTA and interim agreements must be notified to the Council for Trade in Goods (CTG).³²³ In 1996 the CTG created Committee on Regional Trade Agreements (CRTA) and gave this committee two principal duties.³²⁴ These two duties are to examine RTA individually and to examine the systematic implication and the relationship between RTA and multilateral trading system.³²⁵ One big problem with CRTA is that its decision is based on consensus.³²⁶ This makes it impossible to reach if a RTA is not following the rules of the WTO because the countries that are parties to the RTA will not agree on consensus and this means that CRTA can't make a decision in this matter.

5.2.5 Contracting parties

Countries must be members of WTO or the agreement doesn't fall under article XXIV. This conclusion comes from article XXIV §5:

“Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties”³²⁷

If an RTA involves a non-contracting party the exception from MFN is not in force.

³²¹ Article XXIV § 5 (a) GATT.

³²² Ex Chicken War US/EEG, 1963, BISD 12S/65.

³²³ Understanding On The Interpretation Of Article XXIV Of The General Agreement On Tariffs And Trade 1994 § 7.

³²⁴ Regional Trade Agreements –p 1

http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm#Work%20of%20the%20Goods%20Council, 3 Mars 2006.

³²⁵ Ibid.

³²⁶ Seth – WTO och den internationella handelsordningen p 129.

³²⁷ Article XXIV § 5 GATT.

5.3 Safeguard measures in RTAs

When talking about safeguard measures in RTAs many questions concerning countries that are both members of WTO and RTAs comes alive. Is a safeguard measure, that only invokes the parties under the RTA, permitted under WTO? The basic rule under SA is that safeguard measures may not be selective.³²⁸ Safeguard measures must be applied to all imports including those specific imports or sources of importation that do not cause injury. This reasoning is relevant when the injury determination is based on the totality of imports. When activating safeguard measures under WTO the countries in CU/FTA shall also be included when, it is determined whether there is *serious injury* or not? I will below in this chapter investigate different aspects.

5.3.1 Are regional safeguard measures permitted?

Can regional imports be subject to safeguard measures notwithstanding article XXIV GATT? Looking at the rules under WTO, safeguard measures if activated, must be applied to both third-party importers and regional importers. The question at hand concerns if article XXIV GATT prevents intra-regional safeguard measures. The Appellate Body has made it clear that inconsistent measures can only be justified under article XXIV GATT.³²⁹ One could then put forward the argument that safeguard measures under these conditions violates article XXIV GATT. Article 8 XXIV GATT explicitly allows for the continuation of some restrictions on intra-regional trade but safeguard measures are not included.³³⁰ The lists of GATT provisions do not include article XIX GATT.³³¹ Voices have been raised saying that the list found in article 8 XXIV GATT is not an exhaustive one.³³² The list is devoid of not only safeguard measures but also article XXI and XVII: B.³³³ Not allowing these measures would be unconvincing and absurd.³³⁴

Article 8 (a) (i) XXIV GATT talks about “*substantially all the trade*”.³³⁵ This condition has been discussed in chapter 5.2.1. More important than the list is the demand of *substantially all the trade*.³³⁶ As discussed in chapter

³²⁸ Article 2.2 SA.

³²⁹ Appellate Body Report, Turkey – Restrictions on Import Of Textile and Clothing Products, WT/DS34/AB/R, adopted 19 November 1999, para 47 ff.

³³⁰ Article 8 XXIV GATT; includes article XI, XII, XIII, XIV, XV and XX.

³³¹ Ibid.

³³² Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 126.

³³³ Article XXI GATT concerns national security exceptions and article XVIII: B concerns trade restrictions for balance of payment for developing countries.

³³⁴ Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 126-127.

³³⁵ Article 8 (a) (i) XXIV GATT talks about FTA – If CU see Article 8 (b) XXIV GATT.

³³⁶ Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 127.

5.2.1 there is no clear meaning what these words contain. As mentioned earlier and also in case law *substantially all the trade* is not the same as all the trade but it's something considerably more than merely some of the trade.³³⁷ So article XXIV GATT does not prevent safeguard measures to be activated among regional partners. It's also important to remember that safeguard measures have a temporary nature and this strengthens the arguments presented above even further.³³⁸ So regional safeguard measures are permitted under article XXIV GATT as long as *substantially all the trade* is liberalized.

5.3.2 Related problems with safeguard measures in RTAs

Article 2, 4 and 5 in SA spell out the basic principles on how WTO members must apply any potential safeguard measures.³³⁹ One interesting aspect is that article 2.1 SA does not impose restriction in respect of the origin of the *increased imports*. A WTO member that wants to activate safeguard measures could accord article 2.1 by taking either into account all imports or only examining imports coming from third parties.³⁴⁰ There is nothing in article 2.1 SA that would prevent a member state from taking into account only a single country when they determine *serious injury*.

In article 4 SA it is required that one takes into account and "evaluates" the total imports from all sources.³⁴¹ Looking at articles 2 and 4 these seem to permit exclusion of regional imports.

As described above in chapter 5.3, 3.5.2 and 3.5.2.4 safeguard measures may not be selective according to article 2.2 SA. Safeguard measures must be applied to all imports including those specific imports or sources of importation that do not cause injury. As a principle all imports must be included when determining *serious injury* but according to article 5.1 SA there is a possibility to limit the application "to the extent necessary to prevent or remedy *serious injury*".³⁴² If not all imports are included when determining *serious injury* this does not change the way that the safeguard measures shall be applied. Potential safeguard measures shall be applied to all sources of import even if not included when determining *serious injury*.³⁴³

³³⁷ See Appellate Body Report, Turkey – Restrictions on Import Of Textile and Clothing Products, WT/DS34/AB/R, adopted 19 November 1999, para 48 and chapter 5.2.1.

³³⁸ Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 127-128.

³³⁹ Read chapter 3.5.2.

³⁴⁰ Pauwelyn – The Puzzle of WTO Safeguards and Regional Trade Agreements, p 115.

³⁴¹ Article 4 SA.

³⁴² Article 5.1 SA.

³⁴³ Article 2.2 SA.

5.3.3 Another view that excludes regional partners

Pauwelyn means that the DSB interpretation of article XXIV GATT has no support in the legal text or in the spirit of the article.³⁴⁴ When Pauwelyn talks about the spirit of the article one should keep in mind the missing link between article XXIV and the MFN rule discussed earlier.³⁴⁵ He means that exclusion is a part of the formation of a regional arrangement and this is in line with article XXIV GATT. According to Pauwelyn justification of excluding regional imports from safeguard measures can be justified under article XXIV GATT. This would keep regional trade free from WTO safeguard measures and create an incitement for WTO members to sign RTAs and especially to do so with members that usually use safeguard measures. The absence of safeguard measures from WTO does not preclude the imposition of regional safeguard measures under the mechanism provided from the RTA. This point of view has not been accepted or taken by the DSB in the case law. Anyone interested in this should read further in Pauwelyn article “The Puzzle of WTO Safeguards and Regional Trade Agreements”.

5.4 FTAA

Free Trade Area of the Americas (FTAA) has 34 parties all located to the American continent.³⁴⁶ It entered into force on the 31st December 2005 for the countries that have ratified it.³⁴⁷ This agreement is of certain interest because of its arrangements between developing and developed countries. FTAA is a free trade agreement. FTAA is the most ambitious free trade initiative of the post war trading system.³⁴⁸ Never before have so many countries of such diverse sizes and levels of development joined negotiations of a reciprocal free trade pact.³⁴⁹ Looking at the current status the FTAA negotiations have been stuck since the Miami ministerial meeting in 2003.³⁵⁰ Since the failure in Cancun in September 2003 the Miami meeting in November 2003 stood under the pressure not to fail.³⁵¹ The outcome of the meeting prevented the collapse but made it more difficult to achieve an agreement that balanced the interests of the participating

³⁴⁴ Ibid p 128-140.

³⁴⁵ See chapter 3.5.2.4.

³⁴⁶ Parties see Preamble the Third Draft Agreement FTAA – http://www.ftaa-alca.org/FTAADraft03/Index_e.asp, 3 Mars 2006.

³⁴⁷ Article 8 Chapter XXIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁴⁸ Schott – Does the FTAA Have a Future?, p 1, <http://www.iie.com/publications/papers/schott1105.pdf>, 4 April 2006.

³⁴⁹ Ibid.

³⁵⁰ Ibid – p 8.

³⁵¹ Ibid.

countries.³⁵² In the area of agriculture the talks stalled due to differences, like them found in the ongoing Doha Round.³⁵³

The support for FTAA in the US has ebbed. The Congress is distracted by the war on terror, Iraq and Supreme Court nominees.³⁵⁴

In FTAA general rules about safeguard measures are found but also special rules in the agriculture area. I will now present these rules.

5.4.1 General Safeguard Measures

The general safeguard measures are to be found in chapter XIV FTAA. It's divided into three chapters, a-c. Each chapter starts with several definitions.³⁵⁵ In section b the substantive provisions are found. A party may apply safeguard measures on imports of goods benefiting from the Tariff Elimination Program³⁵⁶ under the FTAA agreement.³⁵⁷ The terms set forth in this chapter XIV FTAA must be fulfilled, otherwise the measures cannot be applied.³⁵⁸ Special regulations are found about customs unions that may apply safeguard measures as a single entity or on behalf of one of the state parties.³⁵⁹ FTAA safeguard measures shall not be applied at the same time as global safeguard measures.³⁶⁰

The conditions and the nature of the measures are to be found in the following articles. The conditions set out under this chapter are almost all familiar but some a bit different. The imports for the goods shall have increased in absolute terms in relation to production threatening to cause *serious injury* or threat thereof to the domestic industry.³⁶¹ In determining if imports have increased, a party shall cumulatively consider imports from the territories of all other parties.³⁶² The safeguard measures shall only consist of tariff measures.³⁶³

³⁵² Ibid.

³⁵³ Ibid – p 10.

³⁵⁴ Ibid – p 12.

³⁵⁵ Article 1 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁵⁶ Tariff Elimination Program see Article 5 Chapter VIII Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁵⁷ Article 2.1 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁵⁸ Ibid.

³⁵⁹ Article 2.2 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁰ Article 2.5 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶¹ Article 3.1 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶² Ibid.

³⁶³ Article 4.1 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

The period of application for safeguard measures is different and falls during a period of one to four years. Parties with small economies can apply for a longer period.³⁶⁴ Safeguard measures cannot be applied to the same goods more than once during the transition period.³⁶⁵

In article 6 there are complicated rules found about investigation procedures and transparency requirements.³⁶⁶ Article 7 handles notifications and consultation and provisional safeguards fall under article 8.³⁶⁷ Special provisions concerning global safeguards are found under article 11.³⁶⁸ In section c questions about dispute settlement are regulated.³⁶⁹

5.4.2 Agriculture

In chapter IX FTAA there are special provisions for the agriculture area. In these provisions there are special safeguard measures found.

It starts by saying that all parties shall not apply the rules under the AOA concerning safeguard measures in article 5.³⁷⁰ Instead of using the AOA the parties may apply an automatic Special Agricultural Safeguard.³⁷¹ Only the parties with small economies in the hemisphere may use this provision.³⁷² In the FTAA there has been created a CGSE, Consultative Group on Smaller Economies, which is open to all participating parties in FTAA. The way to impose safeguard measures is familiar and the import price of the goods is used.³⁷³ There is a trigger price set out in Annex XX.³⁷⁴ Very complicated rules on determining the tariffs are found in article 6.8. In the following article there is a restriction saying that it's not ok to use safeguard measures

³⁶⁴ Article 5.2 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁵ Article 5.5 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁶ Article 6 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁷ Article 7 and 8 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁸ Article 11 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁶⁹ Article 12 Chapter XIV Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷⁰ Article 6.1 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷¹ Article 6.2 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷² Article 6.3 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷³ Article 6.7 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷⁴ Ibid.

both in chapter IX and XIV at the same time.³⁷⁵ Safeguard measures may not be used at the same time as article XIX GATT and SA.³⁷⁶

³⁷⁵ Article 6.9 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

³⁷⁶ Article 6.10 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

6 Problems related to Interpretation

6.1 Introduction

For some time there has been focus on the interpretation process concerning WTO agreements.³⁷⁷ When developing countries raised their voices in Cancun and even before the Doha Round started the issue was raised and discussed among many developing countries.³⁷⁸ The issue that developing countries are involved is one of the purposes of WTO. The purpose that developing countries have in mind concerns the fact that one of the objects of the WTO agreements and several RTAs between developed and developing countries is to strengthen and increase the role of the developing countries in the world trade. Many developing countries have said that the manner in which the present interpretation of the WTO agreements has advanced from Dispute Settlement Body (DSB) they don't fulfil the purpose of WTO. The developing countries say that when interpretation takes place they shall take into account the object and purpose of WTO; strengthen the developing countries in world trade. This is not the case today, according to the developing countries and they want to see a change in this field.

When talking about safeguard measures this issue is really on a collision course. Developing countries point at the regulations and say that there is a lacking symmetry between developed and developing countries, this matter will be investigated in chapter 7, and for this reason they should be interpreted favouring developing countries. They say that the rules regarding safeguard measures should be interpreted in a way to make the rules, whenever they are applied, of become asymmetric in favour of developing countries, or at least symmetric. So the criticism from the developing countries concerns the fact that the DSB, when interpreting, is not doing this in the right way.

So a big question arises concerning these demands from developing countries. Which is the right way to interpret the WTO Agreements? Are the actions taken by DSB made in the right way? The rules on safeguard measures are all parts of different international treaties (WTO Agreements and FTAA) and the legal sources concerning interpretation of treaties are found in international law. I will below answer these questions. Doing so I will use article 4.2 (a) SA to answer the questions concerning interpretation. Article 4.2 (a) concerns *serious injury* in safeguard measures.³⁷⁹

³⁷⁷ Qureshi – Interpreting World Trade Organization Agreements for the Development Objective p 847.

³⁷⁸ Read about the failure in Cancun under chapter 2.3.2.1.

³⁷⁹ The text of article 4.2 (a) is found in chapter 3.5.2.1 and below in chapter 6.4.

6.2 Sources in International Law

An international norm has to be found in a confirmed international source. The confirmed sources are found in the Statute of the International Court of Justice article 38 §1. The statute of ICJ is only binding for those who have ratified UN Charter.³⁸⁰ But looking at doctrine and customary international law the sources found in article 38 §1 of the Statute of the International Court of Justice are the sources used even for those who are not parties of the UN charter.³⁸¹

There are three confirmed international sources. These three sources are international conventions, international customs and the general principles of law recognized by civilized nations.³⁸² The rules concerning interpretation of treaties in international law are found in VCLT.³⁸³ The convention entered into force on 27 January 1980.³⁸⁴ The convention only binds the parties that have ratified it. The countries, not parties of the VCLT, are still bound by the rules found in VCLT because the same rules are to be found in international customary law.³⁸⁵ So looking at international law the rules in play concerning interpretation of treaties are found in VCLT article 31-33.

6.3 DSB

The rules of VCLT concerning interpretation can be used on any treaty that faces the need for interpretation. The different WTO Agreements are all to be seen as treaties. Some voices have said that the rules in VCLT are not in play concerning the WTO Agreements.³⁸⁶ Dispute Settlement Body (DSB) has dismissed these arguments in several cases.³⁸⁷ WTO Agreements are to be seen as treaties and the VCLT is in play. Using the VCLT rules when interpreting WTO Agreements have been accepted by the DSB.³⁸⁸ So going further I will look into the rules found in VCLT. Below, in chapter 6.4 and 6.5, I will go thru articles 31 and 32 in VCLT.

³⁸⁰ In article 93 §1 UN Charter it says, "All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."

³⁸¹ Harris – International Law, p 18 – 42, ICJ in North Sea Continental Shelf Cases p 3 and Asylum Case p 266.

³⁸² Statute of the International Court of Justice article 38 §1.

³⁸³ VCLT art 31-33.

³⁸⁴ Linderfalk – Om tolkningen av traktater, p 7.

³⁸⁵ Ibid – p 9-10 and ICJ in Qatar v Bahrain, ILR, Vol. 102, p 59 and North Sea Continental Shelf Cases, ICJ Reports 1969 § 70 -, and Harris – International Law, p 24-41.

³⁸⁶ WTO Appellate Body Report, WT/DS2/AB/R, US – Standards for reformulated and Conventional Gasoline.

³⁸⁷ WTO Appellate Body Report, WT/DS2/AB/R, US – Standards for reformulated and Conventional Gasoline and WTO Appellate Body Report, WT/DS8-11/AB/R, Japan – Taxes on Alcoholic Beverages.

³⁸⁸ Ibid.

6.4 Article 31 VCLT

The rules concerning interpretation under VCLT, which will be used, are found in article 31-32. Article 31 talks about the general rules of interpretation. Below I quote article 31 §1 VCLT:

“General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Article 31 and 32 are created in the way that they present different ways in interpretation that can be used. Article 31 §1 talks about three general rules of interpretation. These three are: 1) Conventional language 2) Object and purpose 3) Context. Looking at article 32 there is another one talking about supplementary means of interpretation.³⁸⁹ When interpreting one cannot choose in which order to use the different means presented above. When reading the concerned articles in VCLT they are very easily misunderstood.³⁹⁰ To use them in a proper way I will use the interpretation triangle presented to me by Ulf Linderfalk.³⁹¹ Below in 6.4.1 the interpretation triangle and how it's used will be presented. After the presentation of the interpretation triangle I will look into the different ways presented in article 31 to interpret treaties. When doing so I will use article 4.2 (a) SA. Below I quote the section of article 4.2 (a) that I will use:

“Article 4: Determination of *Serious Injury* or Threat Thereof

2. (a) In the investigation to determine whether *increased imports* have caused or are threatening to cause *serious injury* to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by *increased imports*, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”

6.4.1 Interpretation triangle

The interpretation triangle that was presented to me by Ulf Linderfalk³⁹² makes the difficult rules concerning interpretation in International Law much easier. By using a triangle, in which the different means of

³⁸⁹ VCLT article 32.

³⁹⁰ In this case article 31-32 VCLT.

³⁹¹ Ulf Linderfalk is assistant professor of International Law at the Faculty of Law at the University of Lund.

³⁹² Ibid.

interpretation are put in, it makes it simple to use. The interpretation triangle is illustrated in Supplement C in this thesis.³⁹³ At this point it is important to understand that this presentation of the interpretation triangle is on a basic level. To go into details in this matter would have made its own thesis. Further reading is to be found in Ulf Linderfalk's book "Om tolkningen av traktater". In this book Ulf Linderfalk doesn't speak about the interpretation triangle, the triangle is a method he uses to make students understand, but he goes thru every detail concerning interpretation.

The interpretation triangle is divided into three different levels. Then the different means of interpretation are placed into the triangle. At the top of the first level is conventional language. On the second level there are at first object and purpose and then context. The last level contains supplementary means of interpretation. The lines between the different levels make a presumption for clarity.³⁹⁴ This presumption can be broken in different ways; one example is to show that conventional language leaves the meaning ambiguous or obscure.³⁹⁵

On the second level there is an important limit that is easy to forget. Reading article 31-32 VCLT one understands that the conventional language is the barrier on this level.³⁹⁶ Using the second level when interpreting one cannot come to a conclusion that goes beyond the conventional language. The interpretation shall be made in accordance with the conventional language looking at the object and purpose.³⁹⁷ So the conventional language limits the first and the second levels in the interpretation triangle. On the third level of the interpretation triangle this limit is not to be found.³⁹⁸ On this level the interpretation can go beyond the conventional language.³⁹⁹ To be able to go beyond this barrier the conventional language must be ambiguous or obscure, or it must lead to a result, which is manifestly absurd or unreasonable.⁴⁰⁰

In chapter 6.4.2 – 6.4.4 the first two levels of the interpretation triangle will be gone thru. Chapter 6.5 then will continue with the third level of the interpretation triangle. In these chapters I will use article 4.2 (a) SA as an example going thru the different levels.

6.4.2 Conventional language

In treaties very often the conventional language has many different meanings. The language may even change over the years. The meaning the conventional language had when it was written might 50 years later have

³⁹³ See the Interpretation triangle in Supplement C.

³⁹⁴ Ibid.

³⁹⁵ VCLT article 32 (a).

³⁹⁶ Linderfalk – Om tolkningen av traktater, p 383-384.

³⁹⁷ Ibid – p 384.

³⁹⁸ Ibid – p 386-389.

³⁹⁹ Ibid.

⁴⁰⁰ VCLT article 32 (a) and (b).

changed into something completely different.⁴⁰¹ Other factors may have importance such as treaties written in different languages⁴⁰² and different meanings in social groups society⁴⁰³. Sometimes the parties of a treaty give the conventional language a special meaning and if doing so these definitions shall be used.⁴⁰⁴ So being able to break the presumption on the first level the conventional language must be ambiguous or obscure. Looking at article 4.2 (a) SA and especially the words “*have caused or are threatening to cause serious injury to a domestic industry*” there is no doubt that conventional language is ambiguous.

What is really *serious injury* or threat thereof? Read more about this issue in chapter 3.5.2.2 section 3. There is no doubt that arguments point towards different directions concerning the meaning of the words *serious injury* and even more differences appear when talking about threat of *serious injury*.⁴⁰⁵ So in this conventional language the presumption on the first level has been broken. There is no clarity, ambiguity rules.

So to be able to solve this uncertainty the process must continue into the second level of the interpretation triangle.

6.4.3 Object and purpose

In my attempt to reach clarity I have now reached the second level of the interpretation triangle.⁴⁰⁶ This level contains two different means of interpretation. These are object and purpose, which will be in focus in this chapter, and context.

To make it as simple as possible I will only use one of the purposes of WTO, the purpose in question is to strengthen and increase the role of the developing countries in the world trade. At some stages different purposes can go into different directions. When talking about huge organisations like WTO and UN they have many different purposes. It's not unusual that these different purposes collide.⁴⁰⁷

So in the interpretation process I will use the purpose mentioned above to try and get a clear idea of the meaning of *serious injury*. It is important to remember that the interpretation shall be made in accordance with the conventional language looking at the object and purpose.⁴⁰⁸ Using this purpose interpreting *serious injury* is impossible. To strengthen and increase the role of developing countries would not bring clarity into the words *serious injury*. At the end of the day if doing it the way developing countries

⁴⁰¹ Linderfalk – Om tolkningen av traktater, p 82-111.

⁴⁰² VCLT article 33.

⁴⁰³ Linderfalk – Om tolkningen av traktater, p 66-82.

⁴⁰⁴ VCLT article 31 §4.

⁴⁰⁵ Reed in chapter 3.5.2.2 section 3.

⁴⁰⁶ See Supplement C.

⁴⁰⁷ Linderfalk – Om tolkningen av traktater, p 238-246.

⁴⁰⁸ See chapter 6.4.1 section 3.

wish there would be even more ambiguity than before the starting point of this process. Then the words *serious injury* would mean one thing to developed countries and another to developing countries. This is not the right way to interpret according to the rules in VCLT and the interpretation triangle. One shall reach clarity not more ambiguity. So the ambiguity still remains.

6.4.4 Context

On the same level in the interpretation triangle the meaning of context is also found.⁴⁰⁹ Since no clarity has been reached concerning *serious injury* this is the next step of the process. It is important to remember that the interpretation shall be made in accordance with the conventional language looking at the context.

When talking about context the usual definition includes almost everything in the event which surrounds it.⁴¹⁰ This is not the way that VCLT talks about context. Article 31 § 2 (b) says:

“(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”

So article 31 §2 (b) limits the context when interpreting under these circumstances. The keywords in this paragraph are without doubt “in connection with the conclusion” and in these words lies the limit.

In article 31 there are also other regulations found concerning the context. These are:

“2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

⁴⁰⁹ See Supplement C.

⁴¹⁰ Definition of Context - <http://en.wikipedia.org/wiki/Context>, 24 March 2006.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.”

6.4.4.1 Preamble and other related facts

In the interpretation process that goes on in this chapter trying to reach clarity in the words *serious injury*, developing countries set their fingers on the preamble of the WTO agreement. They say that DSB shall interpret in favour for them because the conventional language used in the preamble talks in their favour. Looking at the preamble of the WTO agreement it says:

“Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,”

Developing countries use this part of the preamble and say that according to article 31 §2 the interpretation shall be made favouring them and that the DSB has so far failed in doing this. But the problem I faced in 7.4.3 I also face in this situation, the conventional language prevents from this interpretation becoming real. At the end of the day if doing it the way developing countries wish there would be even more ambiguity than before the starting point of this process. Then the words *serious injury* would mean one thing to developed countries and another to developing countries. This is not the right way to interpret according to the rules in VCLT and the interpretation triangle. One shall reach clarity not more ambiguity.

It's difficult in this case, exactly to point at a specific issue that solves the ambiguity in this matter concerning *serious injury*, but looking at it from a bigger perspective there is no doubt that DSB has solved similar matters before.⁴¹¹ One important factor is also what kind of damage that is at hand in every specific case. I have only used the words *serious injury* in chapter 6.4.2-6.4.4 without connecting it to any real damage. But there is no doubt in my conviction that the DSB by means of the context will make the ambiguity disappear and decide whether, the specific damage that is at hand, falls in under *serious injury* or not.

This will not make the developing countries happy because in the end there still have to be damage and it's up to every single country to prove this damage. The interpretation process might perhaps help single countries when a developing country faces the risk to have damage being seen as *serious injury* but looking at it in a bigger perspective the criticism against

⁴¹¹ WTO Appellate Body Report, WT/DS2/AB/R, US – Standards for reformulated and Conventional Gasoline and WTO Appellate Body Report, WT/DS8-11/AB/R, Japan – Taxes on Alcoholic Beverages.

DSB from the developing countries concerning interpretation is not well founded.

6.5 Article 32 VCLT

Article 32 VCLT talks about supplementary means of interpretation and this is found on the last level of the interpretation triangle.⁴¹² The article says:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

This means that there are two possibilities in this article. I will go thru the two different possibilities below in chapter 6.5.1-6.5.2.

6.5.1 Ambiguous or obscure

If reaching the end of level two of the interpretation triangle and the ambiguity still remains there is the possibility to reach clarity but the main difference on this level is that the limit that conventional language set up before doesn't exist on this level. If the ambiguity remains reaching this far there is no doubt that developing countries should have possibilities to be more successful in their requests. Since the barrier in the conventional language no longer exists the interpretation can go further. So in theory DSB could even interpret *serious injury* favouring developing countries. One very important thing to remember is that safeguard measures are exceptions from the non-discrimination rule and exceptions shall be interpreted with caution. To interpret an exception in a way long beyond the conventional language against several purposes of WTO is not realistic. Altogether this makes the demands from the developing countries not well founded.

6.5.2 Manifestly absurd or unreasonable

If the ambiguity doesn't remain after the second level and clarity has been achieved there is still one possibility. One more important thing to remember at this stage is that safeguard measures are exceptions from the non-discrimination rule and exceptions shall be interpreted with caution and restrictiveness. If the developing countries can show that the result after interpreting leaves a result that is manifestly absurd or unreasonable they can interpret in another direction. But to show this in the issue of *serious injury* they must for example show that it directly violates the purpose of

⁴¹² See Supplement C.

WTO. I will not say that it is impossible but almost. To show that the exception from the non-discrimination rule violates the purposes of such dignity that it can be seen as manifestly absurd feels impossible. Also one important thing to remember is that WTO have different purposes often going in different directions.

6.6 Conclusions

Looking at the arguments presented by me in this chapter it's not wrong to say that the criticism by the developing countries saying that the DSB is interpreting in a wrong way is not well founded. Putting so much energy into this matter feels wasted. What the developing countries should put their energy on is to get the rules concerning safeguard measures to be changed. Changed in a way that makes developing countries benefit, make them asymmetric. I will discuss this matter in chapter 9.

7 Asymmetry in application between developed and developing countries?

7.1 Introduction

Of all the members of WTO almost 70 per cent are developing countries.⁴¹³ Looking at these numbers it's somewhat surprising that 30 per cent of the members have much more power. It seems to be a general agreement that there is a major risk that entirely free trade may favour developed countries. This means that it is very important for the weak party to be able to protect itself in special situations. This thesis investigates the protection form of safeguard measures.

The rules and regulations concerning safeguard measures presented in this thesis chapter 2 – 4 are all *neutral*. This means that it does not matter if it's a developed or developing country that activates them. At the end of the day all members shall apply the rules in the same way. What's it then like in real life? If the rules are neutral then they are used in almost equal shares by developed and developing countries? Looking at the numbers presented above, that almost 70 per cent of WTO members are developing countries, this should mean that in real life developing countries are using safeguard measures more than developed countries.

From a historical point of view safeguard measures have been used 170 times between the years 1947-2000.⁴¹⁴ In 38 of these safeguard measures were taken by developing countries.⁴¹⁵ After the Uruguay Round where the SA was created the numbers are different. Between 1995-2000 there were 20 activated safeguard measures and of those 11 were taken by developing countries.⁴¹⁶ Looking at all the years only 22 per cent of the safeguard measures were taken by developing countries. But in the years after SA was created the numbers have risen to 55 per cent.⁴¹⁷ The numbers show that developing countries more often use safeguard measures now. To keep in mind is that the time period between 1995-2000 is short and many different factors may lie behind the increasing numbers. It seems like the numbers will be kept at a higher level. Among safeguard measures that are investigated between 1995 and September 2003 there are 58 per cent from

⁴¹³ Developing Countries – p 93,

www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf, 9 March 2006.

⁴¹⁴ Bown – Why are safeguards under the WTO so unpopular? - p 48.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

developing countries.⁴¹⁸ Nevertheless the total numbers of safeguard measures taken by developing countries are way too few looking at their percentage in WTO. Important to keep in mind is also that developing countries as mentioned above in section one is more vulnerable and more in need of protection than developed countries. With this in mind the numbers of safeguard measures taken by developing countries should be even higher. One other important issue that must be mentioned concerns the total numbers of trade in goods. Developed countries stand for 72 per cent of the total trade in goods in 1998.⁴¹⁹ The LDC together accounted for only 0,5 per cent of the world trade in 1998.⁴²⁰

So with neutral regulations and developing countries in majorities, why then do they not use safeguard measures in the way they are supposed to do? Looking at the *neutral* regulations there should be symmetry between developed and developing countries concerning safeguard measures. Is this true? Looking at the numbers presented above this is really a question of doubt. The reasons for this can be many. At this stage many important questions arise. Is it even possible for a developing country to take emergency safeguards? In theory developing countries, of course, can take safeguards measures but in real life? Can they afford it? Could it be so that developed countries put so much pressure on the developing countries that they don't dare to take action? Can the developing countries be faced with the facts of losing aid if they don't compare with the developed countries? In this chapter I will investigate if there is asymmetry between developed and developing countries in the matter of activating safeguard measures.

From a historic point of view the US grew strong when using protectionism as a measure during the 19th century. Many developing countries today study this phenomenon and say: look we have to protect our country with tariffs and other measures to be able to grow strong and developed.⁴²¹

The ongoing Doha Round has had huge problems especially with the developing countries that don't accept the terms, especially in the agriculture area, set by the developed countries. Cancun was a failure because of this. Is there a change rising on the horizon or is it just a desperate outbreak from the developing countries? The Doha Round has its aim on development but is this realistic? Most developing countries see the agriculture area as the last major frontier for trade liberalisation.⁴²²

In this chapter I will go thru the different areas of industry and agriculture. Since the area of agriculture is often more important to developing countries the major focus will rest upon this area. New member countries of WTO

⁴¹⁸ Natinal Board of Trade, Sweden – The Agreement on Safeguards: Use of the instrument, problem areas, and proposal for change, p 18.

⁴¹⁹ Hoekman B and Kostecki M – The Political Economy of the World Trading System p 10.

⁴²⁰ Ibid – p 9.

⁴²¹ Seth – WTO och den internationella handelsordningen p 21 and chapter 2.1.

⁴²² See Chapter 4.1 section 9.

often face a special and more vulnerable situation. This will be looked into below in 7.1.1. It's important to keep in mind that developing countries in general in many places under WTO receive special treatment.⁴²³ This includes more time, better terms and means of help. In this chapter I do not include this special treatment. Focus lies totally on safeguard measures and the questions found above.

7.1.1 New Members and soft norms

Observer countries, standing in line for the opportunity to become members of WTO are today mostly developing countries. These new members are very vulnerable. Their options and possibilities to take certain measures to help domestic production are very often limited. The observer countries do almost anything not to be seen as states not acting in a spirit of brotherhood, not being seen as troublemakers. Voices have been raised concerning this behaviour. The opponents say: look we are not forcing the states to do anything. They are sovereign states and they act by themselves. The problem at this point is that states don't want to be seen as troublemakers. When Venezuela was faced with the fact of ending their monopoly in the water section or at the end of the day not becoming a member of WTO they chose to privatize.⁴²⁴ Because of the actions taken by a sovereign actor, the word *forced* cannot be used. There is nothing in WTO agreements that forces states to act this way. But using the right word would be to talk about soft norms. If being seen as a troublemaker or even not trade liberal may at the end cause trouble becoming a member. Facing this may, especially for weak parties like developing countries, put them in difficult situations.⁴²⁵ Behind these soft norms, that can take very different forms stands a huge political game not easy to understand.

For developing countries other threats can be put on the table. Developed countries may threaten with decreasing aid. This form of threats must also fall under soft norms. This kind of action can be used not only to new members but also present members, when they might be in the process of activating safeguard measures, which some countries don't want to be realised. This kind of action might at the end of the day face the developing countries with reality, if activating safeguard measures to protect domestic industry they might lose even more if taking action. Standing before this threat it is easy to understand if they choose not to activate safeguard measures. These kinds of soft norms are not easy to see because these actions happen in the dark, well hidden.

Another example of these soft norms was when China once again became member of WTO.⁴²⁶ To be accepted as a member China had to agree on

⁴²³ See Chapter 3.2 section 6.

⁴²⁴ Lang – Beyond Formal Obligation: The Trade Regime and the Making of Political Priorities, p403-424.

⁴²⁵ Ibid.

⁴²⁶ China was member in GATT from the beginning but in 1950 China withdrew from GATT – See 2.2 section 4.

different terms in the Protocol of Accession of the People's Republic of China.⁴²⁷ In this accession protocol a safeguard clause provides other WTO members with the possibility to limit imports from China. China cannot respond with retaliation to the same degree as other member states and the rules in article 11.1 (b) SA concerning the grey areas do not invoke China.⁴²⁸ In the accession agreement this is instead recommended as a possibility. If China doesn't accept the grey area measures the other country involved can stop import from China.⁴²⁹ This agreement is applicable for 12 years after China's accession.⁴³⁰ This means that the accession agreement is in play until 2013.⁴³¹ There is no doubt that soft norms are behind this acceptance from China. There is no question about the vulnerable situations that future developing members of WTO stand before.

7.2 Industry application

Activating safeguard measures in industry the regulations in play are SA and article XIX GATT.⁴³² The primary purpose of using these temporary safeguard measures is to give domestic affected industry time to prepare for the newly arisen situation. For developing countries these safeguard measures under the area of industry are not yet so very important. The reason for this is simple. Many developing countries don't have much industry and especially not LDC. Looking at Africa and especially sub-Saharan Africa we here find 10 per cent of the world population but the area only stands for 1 per cent of the global trade market.⁴³³ From this 1 per cent only a minor part comes from the industry area, most of the trade is accounted for in the agriculture area.⁴³⁴ There is no doubt about the fact that in the future this area will grow and become more important. This will be true only after growth of these countries and with the fact of increased globalisation companies will choose to relocate their business to developing countries to reduce their costs. This is certainly real life in many areas in Asia and especially China today. For the LDC there is still a long way to go before globalisation hits them to a bigger extent. Many problems with infrastructure and even governments still remain.

Below I will go thru different areas in industry application that might be missing symmetry between developed and developing countries. These areas are presented in chapters 7.2.1 – 7.2.4.

⁴²⁷ Protocol of Accession of the People's Republic of China - <http://www.unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002123.pdf>, 10 March 2006.

⁴²⁸ Seth – WTO och den internationella handelsordningen p 182.

⁴²⁹ Ibid.

⁴³⁰ Dispute Settlement – WTO, safeguard measures – UNCTAD – p 7, http://www.unctad.org/en/docs/edmmisc232add16_en.pdf, 20 February 2006.

⁴³¹ Seth – WTO och den internationella handelsordningen p 182.

⁴³² See Chapter 3.

⁴³³ Oxfam Briefing Paper – Africa and the Doha Round, p 8.

⁴³⁴ Ibid.

7.2.1 Access

Developing countries are facing the fact that activating safeguard measures or not in industry have in theory no trouble with access. The regulations are open for all members of WTO when they fulfil the demands that are to be found in the different agreements.⁴³⁵ As regards of accessing safeguard measures there is symmetry between developed and developing countries.

7.2.2 Resources and capacity

Even though developing countries have the same possibility to access safeguard measures, action rarely has been taken from developing countries under industry area.⁴³⁶ Looking at a normal way of activating safeguard measures the first act is usually raised by the industry itself. Corporations, realising the danger, communicate and take actions to inform the government. These acts usually have the purpose in getting the government to open their eyes and realise the issue involved. All with the purpose to get the government to start acting in the matter and to open a process that in the end benefits the corporation. At this point many unfortunate problems may arise. In developing countries governments lack recourses even to start a process.⁴³⁷ Many times the lack of recourses in developing countries doesn't come as a surprise. It is usually a big issue why they are defined as developing countries. In this case the lack of recourses may have a devastating effect on the country. Not being able to activate safeguard measures may cause huge damage to domestic industry. The damage caused to domestic industry will, at the end of the day, give developing countries difficulties to repair and recover from this damage. Then comes the question of legal capacity and having the knowledge to determine the question at hand. Many of the LDC don't have educated staff to handle the issue at hand.

These different arguments presented above concerning education, resources and capacity leave the developing countries many times in trouble to determine and prove *serious injury*.⁴³⁸ Not being able to prove or to determine *serious injury* at this point will in the end lead to the situation concerning that safeguard measures don't get activated. This leaves the already weak industry with no defence at all. So resources and capacity developing countries face the fact that they are in asymmetry with developed countries.

7.2.3 Question of compensation

The regulations in safeguard measures say that a country activating safeguard measures must in another area compensate for the balance to be

⁴³⁵ Ibid.

⁴³⁶ Ruffer and Vergano – An Agriculture Safeguard Mechanism for Developing Countries, p 12.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

right.⁴³⁹ If no compensation is given the other members have the right to retaliate. The compensation that members must give will lead to further costs and even vulnerability in another area. Facing these costs and the uncertainty of future damage in other areas are arguments often used not to activate safeguard measures for developing countries.⁴⁴⁰ Especially for the LDC the question of compensation makes the regulation not to be in symmetry with developed countries. This question goes hand in hand with the issue of resources and as mentioned above this is the big issue why these countries are developing countries, their lack of resources. This act of compensation must also in some way be economically financed, not only the compensation itself but also all the work behind it. Looking at the regulations in theory they are *neutral* but the lack of recourses and the demands of compensation give the developing countries a disadvantage they cannot handle. In this matter the regulations favour developed countries and at this point there is a huge gap in the symmetry between developed and developing countries.

7.2.4 Fair play

Talking about the question of fair play concerns the area of soft norms.⁴⁴¹ This area is ambiguous and very obscure. There is no doubt about the fact that developing countries depend on trade with developed countries. To keep this trade going many developing countries don't want to act in a manner causing infection with developed countries. They don't want to be seen as troublemakers, not acting in a spirit of brotherhood towards the existing members. Who wants to trade with countries not acting fair play or in a spirit of brotherhood? Almost no one, some exceptions may be seen but the majority won't trade with these countries. So developing countries must not be seen as countries acting this way. Doing so may sometimes lead to the conclusion not to activate safeguard measures because if doing so the country may be seen as a country not acting in a spirit of brotherhood. This will put a burden on the developing countries, which may have huge impact. This together with the facts presented above leave developing countries with the fact of not being able to use safeguard measures in a desirable way. This further opens the gap between developed and developing countries and the lack of symmetry between them in using these regulations.

7.2.5 Future

Safeguard measures in industry are today of big importance but in the future this will increase. Industry will, because of globalisation, increase in developing countries and as a result of this the importance of safeguard measures will also increase. Today industry only stands for a very small part of the total production in developing countries. The agriculture area is with no doubt the biggest area. To be fair and give the majority of members in

⁴³⁹ See Chapter 3.5.2.3 section 3.

⁴⁴⁰ Ruffer and Vergano – An Agriculture Safeguard Mechanism for Developing Countries, p 12.

⁴⁴¹ See chapter 7.1.1.

WTO the same opportunity the rules of safeguard measures ought to be changed. Changed in a way that in the end gives the solution of symmetry between developed and developing countries. The road is long to reach this goal. Perhaps the starting point was in Cancun when developing countries went together in a way never seen before. The fact that the whole round has development as a goal is a result of developing countries starting to raise their voice. One thing is sure; the road to symmetry between developed and developing countries is going to be long, hard and costly.

7.2.6 Conclusions

The regulations concerning safeguard measures in industry do not have symmetry between developed and developing countries. Its true that all member countries have access to the regulation and that they in theory are *neutral*. The symmetry that exists in access is symbolic because of the asymmetry in the areas of recourses, capacity, question of compensation and fair play. They can access in theory but the asymmetry in the other areas makes it almost impossible for developing countries to activate safeguard measures as easy as developed countries and this makes the asymmetry almost total. The lack of recourses in developing countries is the major factor to the asymmetry. This is true concerning the possibilities of starting a process, compensating for it and in the end developing countries even might loose their reputation and might be seen as countries not acting in a spirit of brotherhood with the existing members.

7.3 Agriculture application

The regulation in play concerning agriculture is the AOA.⁴⁴² Since poor developing countries need to expand they also need to increase their export. For most of the LDC the agriculture area is the only possibility of increasing export. Looking at Africa the agriculture area provides for livelihood for 70 per cent of the population.⁴⁴³ The agriculture area is central for the LDC in Africa.⁴⁴⁴ At present the US, Japan and the EU on average have very low tariffs. But those barriers still existing often apply to products coming from developing countries.⁴⁴⁵ These barriers mostly put developing countries in difficult situations and one common area for this is agriculture.⁴⁴⁶ To understand this protectionism, causing so much damage to developing countries, one must look at it from a historical point of view. Food security, food shortages and other disasters have thru the years made the agriculture area very political, full of hard feelings and hot stuff.⁴⁴⁷ This hot political

⁴⁴² See chapter 4.

⁴⁴³ Oxfam Briefing Paper – Africa and the Doha Round, p 12.

⁴⁴⁴ Ibid.

⁴⁴⁵ Lincoln – Iraq, Agriculture and the Doha Round –

http://www.cfr.org/publication/6449/iraq_agriculture_and_the_doha_round.html, 10 March 2006.

⁴⁴⁶ Ibid.

⁴⁴⁷ See Chapter 4.1 section 3.

issue is very true today especially in the EU.⁴⁴⁸ The costs for intervention in this area are huge, especially in the EU. This might in the end lead to openings from the developed countries, they cannot afford to keep their policy up.⁴⁴⁹ But even so, 80 per cent of all regulations in the EU concern agriculture.⁴⁵⁰ The issue for developing countries in this area concerns the high protection developed countries still have and their subsidies. Subsidies from developed countries usually leave overproduction, which in the end goes to export, competing with developing countries on the world market. At some stages the overproduction gets even more subsidies and gets exported to developing countries knocking out their domestic producers who stand almost without subsidies and protection.⁴⁵¹ The EU accounts for 90 per cent of all export subsidies in the agriculture area and have done so for a long period of time.⁴⁵²

Much is at stake for the developing countries. Several economic analyses say that liberalization and globalisation concerning agriculture would provide economic gains for both developed and developing countries.⁴⁵³ Estimations have been done and the number involved talks about 613 billion dollars.⁴⁵⁴ Even though the number might be wrong almost all agree that everybody in the end would benefit from it. The ongoing Doha Round that has development on the agenda has been faced with a more aggressive approach from the developing countries.⁴⁵⁵ This resulted in the failure in Cancun and on the front line stood the G-20 countries. They have retained this attitude and will play an important role in the negotiations ahead.⁴⁵⁶ Among the developing countries it is widely accepted that the EU must make a major change in their Common Agricultural Policy (CAP) or they will refuse to cooperate.⁴⁵⁷

Before going any further it's important to mention that the majority of rules under WTO concerning trade defence in the domestic market is designed to protect industrial interests.⁴⁵⁸ These rules do not take into account the special situation under the agriculture area.

Below I will go thru different areas in agriculture application that might be missing symmetry between developed and developing countries. These areas are presented in chapters 7.2.1 – 7.2.4.

⁴⁴⁸ Ibid.

⁴⁴⁹ Seth – WTO och den internationella handelsordningen p 185.

⁴⁵⁰ Ibid.

⁴⁵¹ Brown, Deardorff and Stern – Developing Countries Stake in the Doha Round p 3.

⁴⁵² CRS Report for congress – WTO Doha Round: Agriculture Negotiating Proposals, Tabel 1.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid.

⁴⁵⁵ See chapter 2.3.2.1.

⁴⁵⁶ CRS Report for congress – WTO Doha Round: Agriculture Negotiating Proposals, p 6.

⁴⁵⁷ Brown, Deardorff and Stern – Developing Countries Stake in the Doha Round p 3.

⁴⁵⁸ Ruffer and Vergano – An Agriculture Safeguard Mechanism for Developing Countries, p 8.

7.3.1 Access

The current system under the AOA and the SSG are only applicable to those products that were included in the Uruguay Round tariffication process. Most developing countries cannot use these safeguard measures. The reason for this is that they set bound tariffs outside the tariffication mechanism.⁴⁵⁹ Countries that underwent *tariffication* could reserve the right to apply safeguard tariffs to protect domestic producers against sudden import surges. To be able to use the SSG provisions countries must designate the SSG products in their Country Schedules.⁴⁶⁰ They have to make both ad hoc and annual notifications to the Committee on Agriculture.⁴⁶¹ Today 38 members of the WTO have the opportunity to use SSG.⁴⁶² Only 21 developing countries have access to the SSG.⁴⁶³ All 38-member states that can activate SSG are listed in supplement A. Switzerland is on top with 961 products reserved.⁴⁶⁴ This means that a majority of the developing countries don't even have access in theory to the SSG. So already from the beginning there is a lack of symmetry between developed and developing countries. Many states have been criticising the SSG and this issue is supposed to be on Doha Development Agenda (DDA) but to see a big change in this area may take several years. There is a perception amongst many members that the imbalance or the lack of symmetry in the current rules needs to be changed. I will discuss this further in 7.3.5.

7.3.2 Resources and capacity

Those 21 developing countries that can access SSG stand before another huge obstacle. Simply as mentioned under chapter 7.2.2 the first action taken is usually raised by the actors themselves and not by the government. If the industries in developing countries sometimes have difficulties in finding resources to lob the government the situation in the agriculture area is even worse. The problems in this area are the same as presented in 7.2.2 but concerning small farmers they are even more vulnerable. This issue concerning small farmers is presented below.

One big difference in the agriculture area is that *serious injury* must not be proved. Instead the country must trigger the safeguard measures with the price-based SSG or the volume-based SSG. So the government must act on this matter. Even though this process of triggering one of two possibilities at some stages is less demanding than to prove *serious injury* under the

⁴⁵⁹ Valdés and Foster – Special Safeguard for developing country agriculture: a proposal for WTO negotiations, p 6-7.

⁴⁶⁰ Article 5.1 section 1 – Agreement on Agriculture.

⁴⁶¹ Agriculture: Explanation, Market access, p 1, http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#special_safeguard, 13 April 2006.

⁴⁶² Special Agricultural Safeguard - Background Paper by the Secretariat – Committee on Agriculture G/AG/NG/s/9, 6 June 2000, WTO §3, p 1.

⁴⁶³ Agreement on Agriculture glossary, p 2-3 - www.tradeobservatory.org/library.cfm?refID=37606, 13 April 2006.

⁴⁶⁴ Ibid.

industry area there is no doubt that resources must be put in. Here developing countries face the same as presented before, education and lack of money. The process in the agriculture area may be smaller and doesn't demand as many resources as in the industry area but there is still asymmetry between developed and developing countries.

7.3.2.1 Small farmers

In the agriculture area and especially in developing countries the farmers are very small. These farmers often lack subsidies and safety nets from the government because of shortage of resources. They usually get very heavily taxed because it's the only way for developing countries to get an income. The small farmers often work alone and not in bigger groups. The possibilities for them to lobbying to the government do not exist. They are extremely vulnerable to temporary variations in the market conditions. Big differences in price have very huge effect on them and so even disasters caused by nature. Usually there is big turbulence concerning the price on agriculture products. To believe that this group should be able to act for safeguard measures to be activated would be to tell a lie. There does not exist any symmetry between developed and developing countries concerning resources and capacity.

7.3.3 Time limits

The time limits for invoking safeguard measures under WTO vary. The duration under AOA is short.⁴⁶⁵ The article does not specify those shorter periods but they are definitely thought to be temporary.⁴⁶⁶ Even though the duration is short the EU and the US, especially concerning some products, have used the SSG year after year. This means at the end of the day that SSG measures are not temporary. The way the EU and the US use the SSG in this matter makes the safeguard measures permanent obstacles. There is no doubt about the fact that symmetry does not exist between developed and developing countries in this matter either.

7.3.4 Fair play

Since almost no developing countries are able to use the SSG the question of fair play has not been a huge question. It's not impossible that in the future if the SSG measures will be open for developing countries, the question will be brought back to life. Depending on how new rules will be made in the future the question of soft norms will be hard to answer today. One thing is sure if developing countries get the possibility to use SSG more than today, the question will be more interesting.

⁴⁶⁵ See Chapter 4.3 section 16.

⁴⁶⁶ Lee – Safeguard Measures in World Trade – p 154.

7.3.5 Future

During the ongoing Doha Round many proposals for the future have been presented. The developing countries have, in a way that has not been seen before, gone together to be able to change the regulations. Looking at some of the proposals and especially the proposal from G-33⁴⁶⁷ they contain three major arguments for justification and create a special agriculture safeguard mechanism (SASM) for developing countries. These three arguments are: 1) The lack of symmetry in current rules 2) Vulnerability of small farmers in developing countries 3) The turbulence of the world agriculture market. No matter what, this will take a very long time and the result is uncertain.⁴⁶⁸ They're the three lessons that can be learned from this review and they might be incorporated into SASM. These three will be presented below.

The first lesson concerns avoiding costly procedures. In future SASM it's important to include regulations that make it easy for developing countries to determine and prove *serious injury*. This is true especially for small farmers with little or no collective group voices at all.

The second lesson concerns the time limits. The duration period for the regulation and protection should be short. This is true for members and especially for developed countries.

The third and final lesson concerns the question of compensation. Compensation is today not a matter concerning the agriculture area and it should stay that way. Looking at the industry area the demand for compensation should be taken away for developing countries and be a starting point for the LDC.

⁴⁶⁷ Group of 33 countries including China, Turkey, Indonesia, India, Pakistan and countries from Africa, Caribbean, South America and Asia.

⁴⁶⁸ Lee – Safeguard Measures in World Trade – p 155.

8 Is there any difference in the asymmetry question concerning RTA?

8.1 Introduction

In chapter 7 I investigated the question if there was asymmetry between developed and developing countries when using safeguard measures under the rules of WTO. Looking at the safeguard measures in chapter 7 and the question of asymmetry the conclusion was that both in the industry area and the agriculture area there was no symmetry between developed and developing countries.⁴⁶⁹ Another interesting question is whether asymmetry in this respect exists in RTAs.

RTAs are discussed in chapter 5 of this thesis. In this chapter I talk about four trends that can be seen in the RTA area today.⁴⁷⁰ The first trend was that RTA is increasing in great numbers in almost every country over the world. This makes the question about asymmetry between developed and developing countries concerning RTAs even more important and will increase to do so. Another trend that is of interest in this chapter is the third one. The third trend is that there seems to be a tendency by some developed countries to design RTAs concluded with developing countries in a non-reciprocal manner. This will be investigated below in 8.2. In this chapter only the first and the third trend of today's RTAs, discussed in chapter 5.1, are relevant.

In chapter 5.4 I used the FTAA agreement and I will continue to do so in this chapter when investigating the question concerning asymmetry between developed and developing countries.

8.2 Non-reciprocal relationship

Looking at the third trend among RTAs today as presented in chapter 5.1 there is an increasing trend of non-reciprocal relationships. Some developing countries are in RTAs with developing countries, are making sure that there is a decreasing reciprocity leading to a non-reciprocal relationship.⁴⁷¹ Looking at Asia and RTAs concerning Japan these

⁴⁶⁹ See chapter 7.

⁴⁷⁰ See Chapter 5.1 section 2.

⁴⁷¹ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 2 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

agreements seem to show an attitude that they do not necessarily oblige equal liberalization to Japan.⁴⁷²

This lack of reciprocity, described above, has the effect that symmetry doesn't exist from the beginning in the RTAs between these countries. Since it has become a trend among some developed countries, especially Japan, this will have deep impact in the future. One big important reason behind this is soft norms. But many factors have an influence. These factors include economy, politics and security considerations. Some smaller countries and developing countries some times see RTAs as a defensive necessity.⁴⁷³ Not to be left out in the coldness they agree on RTAs.

From a political view governments seek to consolidate increased regional security with their RTA partners.⁴⁷⁴ Other political goals are to demonstrate good governance and to prevent backsliding on economic reforms.⁴⁷⁵

Arguments from supporters of the increasing non-reciprocal relationship say that, in the best of worlds the ultimate goal, of course, is symmetry, even so liberalization thru RTA may be the only option if there is resistance to liberalization at the multilateral level.⁴⁷⁶ This perhaps second-best option is better than no option at all.⁴⁷⁷

8.3 Industry area

In chapter 8.3 and 8.4 I will use the FTAA agreement when investigating there is asymmetry between the developed and developing countries whether or not. The regulations in the FTAA agreement in the industry area are found in the general safeguard measures.⁴⁷⁸ Looking at these rules they are almost similar to those found under WTO.

The problems faced are the same that I investigated under chapter 7. These are the questions of access, resources, capacity and fair play. All parties have access and can activate these safeguard measures. Concerning resources and capacity the pattern is well known. The arguments are all found under chapter 7.2.2. One difference that can appear is that the investigation might not be so big as under WTO. The FTAA agreement has only 34 parties and this will without a doubt lead to a smaller investigation at the end of the day. A smaller investigation will not be so costly and doesn't have to involve a lot of employees. A smaller investigation talks for the developing countries and for the special point of view taken by

⁴⁷² Yanai – Legal Framework for North-South RTAs under the WTO System, p 1, http://www.ide.go.jp/English/Publish/Apec/pdf/apec15_wp6.pdf, 28 February 2006.

⁴⁷³ Crawford and Fiorentino – The Changing Landscape of Regional Trade Agreements, p 16 – http://www.wto.org/english/res_e/reger_e/discussion_papers_e.htm, 19 March 2006.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ See chapter 5.3.1.

Pauwelyn that regional partners should be excluded under WTO and safeguards are activated only among the regional partners when needed.⁴⁷⁹ But it doesn't solve the lack of symmetry between developed and developing countries in this matter. It only makes the gap in the asymmetry smaller.

8.4 Agriculture area

Most of the major RTAs that have been formed during recent years have liberalized most agriculture trade. In the west NAFTA and MERCOSUR have removed nearly all agriculture trade barriers for their members.⁴⁸⁰ FTAA has major potential because its goal is to make the parties one comprehensive trade bloc.⁴⁸¹

In the agriculture area the FTAA agreement becomes very interesting. The parties have agreed not to apply the rules under the AOA concerning safeguard measures in article 5.⁴⁸² Instead of using the AOA the parties may apply an automatic Special Agricultural Safeguard.⁴⁸³ Only the parties with small economies in the hemisphere may use this provision.⁴⁸⁴ This certainly talks for the developing countries that are parties. This means that only weak countries will have access to the safeguard measures under the agriculture area. There is at this time no definition to be found telling what the criteria are that have to be fulfilled to fall under "small economies". If it means what most people put into the words this would mean that the asymmetry turns over to the other side and be in favour of the developing countries. The developed countries face asymmetry towards the developing countries. This is expected to increase economic growth in the developed and developing countries in the Western Hemisphere.⁴⁸⁵

One important thing to remember at this stage is that the FTAA agreement has recently entered into force, December 31 2005.

So there is lack of symmetry in this area as well, even at this stage when it has turned around, there is no doubt about the fact that there is no symmetry between developed and developing countries. The important question that is natural to ask when coming this far is if symmetry between developed and developing countries always is desirable? I will answer this question in chapter 9.

⁴⁷⁹ About Pauwelyn view read in chapter 5.3.4.

⁴⁸⁰ USDA Economic Research – Regional Trade Agreements & US Agriculture p 25.

⁴⁸¹ Ibid.

⁴⁸² Article 6.1 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

⁴⁸³ Article 6.2 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

⁴⁸⁴ Article 6.3 Chapter IX Third Draft Agreement FTAA - http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp, 3 Mars 2006.

⁴⁸⁵ USDA Economic Research – Regional Trade Agreements & US Agriculture p 25.

9 Is symmetry between developed and developing countries always desirable?

9.1 Introduction

Answering the question if symmetry between developed and developing countries always is desirable is a complex matter. One could say that in the long run symmetry is desirable and the ultimate aim. But one should ask the question if this might be utopia. Countries are different and will always continue to be so. No matter which countries you compare there will always be a country that in some way is stronger and better prepared than others. It depends mostly upon which result you are aiming to reach. There are always opposing sides to be found. On one side developed countries and on the other developing countries. This is the classic confrontation also mentioned as north against south. I will below briefly go thru the opposing sides and then talk a little bit about the future.

9.2 Opposing sides

In this thesis I put my focus on the developing countries. This means that the lack of symmetry that can be found in chapter 8.4 is something to wish for on a bigger scale. Especially when it comes to the area of agriculture. I wrote it in chapter 4.1 but because of its importance I will write it again; Developed countries, which dominate trade in agriculture stands for 70 per cent of import and export.⁴⁸⁶ To get the right perspective it is important to compare this with the fact that 96 per cent of world producers in agriculture live in developing countries. Developed countries support their production by export subsidies and other domestic support. The different forms of support lead to the situation that the agriculture products of developing countries cannot compete. So the lack of symmetry favouring developing countries in this area, as seen in the FTAA agreement, is something to wish for. If doing this the trend of decreasing export for the LDC and other developing countries that have been seen for the recent years can be turned around.⁴⁸⁷ To have neutrality and symmetry may not even be something to wish for between the countries in the north. There will always be some country that is weaker and falls behind. Some say, look this is nothing new! Someone is always stronger! This is true, no doubt, but then it gets even more important to create rules and regulations that help the weaker part.

On the other side stand the developed countries. By the look of it there is not much interest from them in changing the rules, favouring the weak

⁴⁸⁶ Seth – WTO och den internationella handelsordningen p 187.

⁴⁸⁷ About the numbers read in chapter 1.1.

parties. Ok, there are the Enabling Clauses but the area in which the developing countries need help is the agriculture area. Looking especially towards the EU one can understand the hopelessness that many developing countries show.

9.3 The game behind

Looking at the regulations concerning agriculture it's easy to find things to improve and criticise especially for developing countries. One must remember that the WTO Agreement on Agriculture was born in 1994 after difficult negotiations. As I said earlier in chapter 4 it's amazing that they could agree at all. So looking at it from the bright side one can say there is an agreement and this is the starting point. From my point of view this is the starting point of the agriculture regime. Talking about agriculture regime it has its base in regime theory. Krasner gave a simple definition of regime in 1986. He defines a regime as: A regime comprises "principles, norms, rules and decision making procedures around which actors expectations convergence in a given issue – area".⁴⁸⁸ Behind Krasner's definition there are soft law and norms to be found. One interesting question is why even bother talking about regime? Well, the answer is simple. It allows us to understand what's behind it. It helps us to understand and get input concerning the whole area, the regime. Looking at Krasner's definition it comprises the process in Cancun, decisions and so on and not just only the agreement. Comparing with the industry regime one easily realises that this regime has been in play since 1947. Comparing these two regimes one cannot demand that the agriculture regime has come as far as the industry regime. Even to think this thought is absurd. Most people forget this important fact. So the important thing to keep in mind is that there is an agreement, not the ultimate most desirable one, but still an agreement. From this point one can renegotiate and take small steps forward towards a better agreement. One can at this point use the prisoners' dilemma to understand my point of view. It's easier to understand it if one can see it as a game that keeps going on. I will below go thru the basic principles in the prisoners' dilemma and further explain my point of view and the game behind.

9.3.1 Prisoners' dilemma

My knowledge concerning prisoners' dilemma comes from a lecture by Gregor Noll⁴⁸⁹, Comparing Trade and Migration I: Regime Theory as a Tool.⁴⁹⁰

A murder has been committed. The police arrest two suspects, A and B. The police separate them into two different cells and they cannot communicate

⁴⁸⁸ Institutionalism & regime-theory – http://www.ir-online.org/insti_ext/text_4.shtml, 14 April 2006, Part 4, p 1.

⁴⁸⁹ Gregor Noll is assistant professor at the Faculty of Law at the University of Lund.

⁴⁹⁰ Read more about Prisoners dilemma in Institutionalism & regime-theory – http://www.ir-online.org/insti_ext/text_4.shtml, 14 April 2006, Part 4, p 3.

with each other. There is one problem for the police; they have insufficient evidence for a conviction. The police visit the two prisoners and give them the same offer; if one testifies for the prosecution against the other (Kings witness) and the other one remains silent, the silent accomplice receives the full 10-year sentence and the betrayer receives a pardon, goes free. What are the alternatives? This is illustrated in supplement D. If both stay silent, the police can only give both prisoners 6 months for minor charge. (In the illustration the first line to the left.) If A betrays B and B remain silent, then B serves 10 years and A goes free. (In the illustration the first line to the right.) If both betray each other, they receive a two-year sentence each. (In the illustration second line to the right.) If B betrays A and A remains silent, then A serves 10 years and B goes free. (In the illustration second line to the left.)

So what can I learn from the prisoners' dilemma? Well, the prisoners they cannot communicate with each other. They can benefit from it but there is also a big risk for them. Taking this to the agriculture regime it's easy to say if the parties can communicate and continue to do so the risk is eliminated. They don't have to take chances any more. A state will have the opportunity to negotiate again and again. The prisoners only had one chance. Countries at the negotiation table always get a second chance, one can see it as an ongoing game and everybody learns on the way. The prisoner's didn't get this opportunity. In the agriculture regime they have an agreement and because of the ongoing game, they can improve it. Looking at it from the perspective of the prisoners they only got one chance, but because of the agreement the game started and is still in play today. In the end everybody will benefit from looking at it from the perspective of the prisoners' dilemma. It leads to better cooperation through regimes. Since the industry regime has been playing for so much longer time, the agriculture regime has much to learn from the industry regime, not making the same mistakes.

9.4 Future

To turn the numbers around, increase exports for developing countries instead of decrease, there must in the future be lack of symmetry favouring the developing countries, especially in the agriculture area. By the look of it, it doesn't seem hopeful if looking at the EU and their Common Agricultural Policy (CAP). Something to hope for in the future is certainly the change that was seen in Cancun. The on going Doha Round has had huge problems especially with the developing countries who don't accept the terms, especially in the agriculture area, set by the developed countries. Cancun was a failure because of this. Is there a change on the horizon or is it just a desperate outbreak from the developing countries?

Other interesting things on the horizon are the FTAA agreement and the safeguard measures in the agriculture area. But one important thing to remember is that, even though it looks good, it might be used in a way not favouring the developing countries in a desirable way. There has been trouble from the beginning of the FTAA agreement. Looking at the current

status the FTAA negotiations have been stuck since the Miami ministerial meeting in 2003.⁴⁹¹ The support for FTAA in US has ebbed. The Congress is distracted by the war on terror, Iraq and Supreme Court nominees. Other questions that also are especially interesting; what is really a party with small economy? When deciding this or even interpreting this it can be done in a way not favouring developing countries, bringing a whole different meaning into the words small economies. The Consultative Group on Small Economies (CGSE) has been created but every party of FTAA may participate and I have not found any described meaning of what they have put into the words small economies.

Perhaps the starting point was in Cancun when developing countries went together in a way never seen before. The fact that the whole round has development as an aim is a result of developing countries starting to raise their voices. One thing is sure; the road to symmetry between developed and developing countries is going to be long, hard and costly. Then to go even further to favour developing countries when activating safeguard measures that will last even longer. So the protection the weak parties need in free trade to increase welfare and export seems far away but not unrealistic.

⁴⁹¹ See further in chapter 5.3.

Supplement A

The list of member countries, which have reserved the right to activate safeguard measures to the SSG and the listed number of products that the different members have reserved.⁴⁹²

Members:	Reservations:
Australia	10
Barbados	37
Botswana	161
Bulgaria	21
Canada	150
Colombia	56
Costa Rica	87
Czech Republic	236
Ecuador	7
El Salvador	84
EC	539
Guatemala	107
Hungary	117
Iceland	462
Indonesia	13
Israel	41
Japan	121
Korea	111
Malaysia	72
Mexico	293
Morocco	374
Namibia	166
New Zealand	4
Nicaragua	21
Norway	581
Panama	6
Philippines	118
Poland	144
Romania	175
Slovak Republic	114
South Africa	166
Swaziland	166
Switzerland-Lichtenstein	961
Thailand	52
Tunisia	32
US	189
Uruguay	2
Venezuela	76
Total:	38
	6072

⁴⁹² Committee on Agriculture – Special Agricultural Safeguard, Background Paper by the Secretariat, G/AG/NG/S/9, 6 June 2000, Tabel 1 and Tabel 2.

Supplement B

AOA Part III: Article 5 Special Safeguard Provisions

1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol “SSG” as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:

(a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:

(b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price⁽²⁾ for the product concerned.

2. Imports under current and minimum access commitments established as part of a concession referred to in paragraph 1 above shall be counted for the purpose of determining the volume of imports required for invoking the provisions of subparagraph 1(a) and paragraph 4, but imports under such commitments shall not be affected by any additional duty imposed under either subparagraph 1(a) and paragraph 4 or subparagraph 1(b) and paragraph 5 below.

3. Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed under subparagraph 1(a) and paragraph 4 shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering the provisions of subparagraph 1(a) in that year.

4. Any additional duty imposed under subparagraph 1(a) shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption⁽³⁾ during the three preceding years for which data are available:

- (a) where such market access opportunities for a product are less than or equal to 10 per cent, the base trigger level shall equal 125 per cent;
- (b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent, the base trigger level shall equal 110 per cent;
- (c) where such market access opportunities for a product are greater than 30 per cent, the base trigger level shall equal 105 per cent.

In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 per cent of the average quantity of imports in (x) above.

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

- (a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the “import price”) and the trigger price as defined under that subparagraph is less than or equal to 10 per cent of the trigger price, no additional duty shall be imposed;
- (b) if the difference between the import price and the trigger price (hereinafter referred to as the “difference”) is greater than 10 per cent but less than or equal to 40 per cent of the trigger price, the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent;
- (c) if the difference is greater than 40 per cent but less than or equal to 60 per cent of the trigger price, the additional duty shall equal 50 per cent of the amount by which the difference exceeds 40 per cent, plus the additional duty allowed under (b);
- (d) if the difference is greater than 60 per cent but less than or equal to 75 per cent, the additional duty shall equal 70 per cent of the amount by which the difference exceeds 60 per cent of the trigger price, plus the additional duties allowed under (b) and (c);
- (e) if the difference is greater than 75 per cent of the trigger price, the additional duty shall equal 90 per cent of the amount by which the

difference exceeds 75 per cent, plus the additional duties allowed under (b), (c) and (d).

6. For perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b).

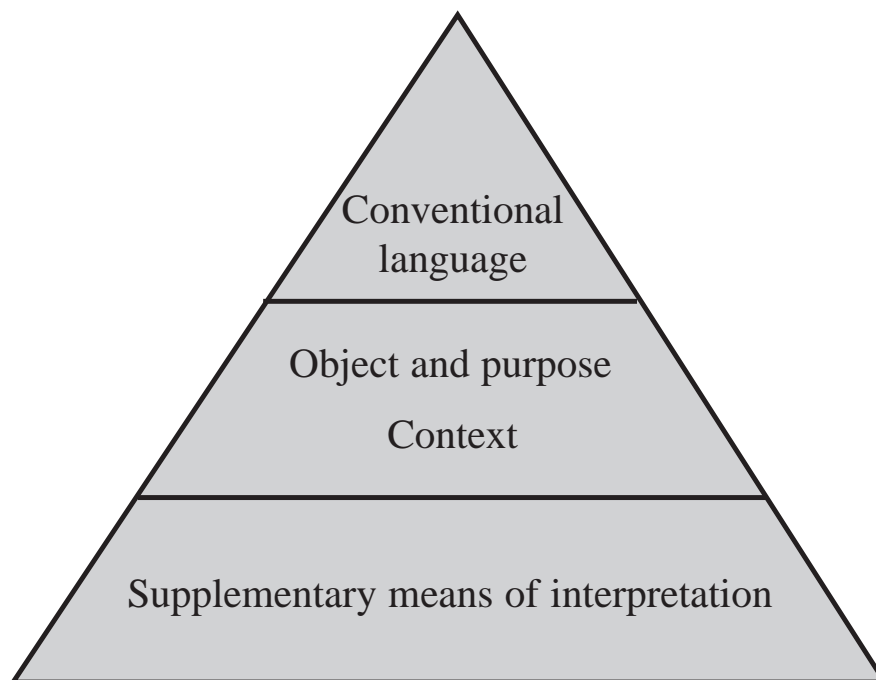
7. The operation of the special safeguard shall be carried out in a transparent manner. Any Member taking action under subparagraph 1(a) above shall give notice in writing, including relevant data, to the Committee on Agriculture as far in advance as may be practicable and in any event within 10 days of the implementation of such action. In cases where changes in consumption volumes must be allocated to individual tariff lines subject to action under paragraph 4, relevant data shall include the information and methods used to allocate these changes. A Member taking action under paragraph 4 shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action. Any Member taking action under subparagraph 1(b) above shall give notice in writing, including relevant data, to the Committee on Agriculture within 10 days of the implementation of the first such action or, for perishable and seasonal products, the first action in any period. Members undertake, as far as practicable, not to take recourse to the provisions of subparagraph 1(b) where the volume of imports of the products concerned are declining. In either case a Member taking such action shall afford any interested Members the opportunity to consult with it in respect of the conditions of application of such action.

8. Where measures are taken in conformity with paragraphs 1 through 7 above, Members undertake not to have recourse, in respect of such measures, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or paragraph 2 of Article 8 of the Agreement on Safeguards.

9. The provisions of this Article shall remain in force for the duration of the reform process as determined under Article 20.

Supplement C

Interpretation triangle



Ulf Linderfalk uses this triangle to teach students concerning Interpretation.⁴⁹³

⁴⁹³ Ulf Linderfalk is assistant professor of International Law at the Faculty of Law at the University of Lund.

Supplement D

Prisoners' dilemma as an illustration from the lecture by Gregor Noll⁴⁹⁴,
 Comparing Trade and Migration I: Regime Theory as a Tool.⁴⁹⁵

Prisoner A Betrays	Prisoner B serves ten years; Prisoner A goes free	Both serve two years
Prisoner A Stays Silent	Both serve six months	Prisoner A serves ten years; Prisoner B goes free
Prisoner B Stays Silent		Prisoner B serves ten years; Prisoner A goes free
Prisoner B Betrays		

⁴⁹⁴ Gregor Noll is assistant professor at the Faculty of Law at the University of Lund.

⁴⁹⁵ Read more about Prisoners' dilemma in Institutionalism & regime-theory – http://www.ir-online.org/insti_ext/text_4.shtml, 14 April 2006, Part 4, p 3.

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