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A non-discriminative measure applicable to all?

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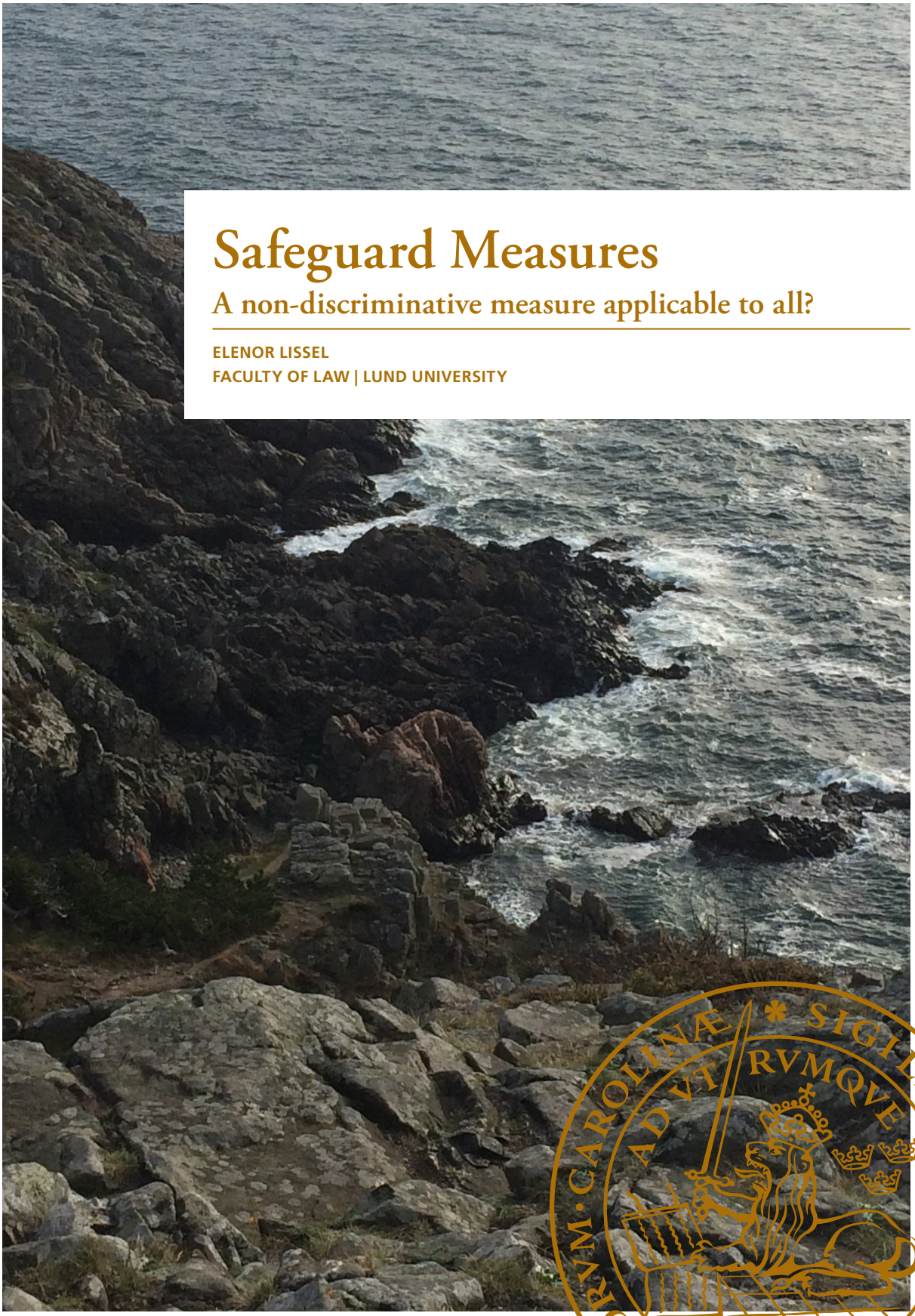

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A non-discriminative measure applicable to all?

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UNIVERSITY

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Abstract

This thesis examines and analyses the rules on safeguard measures, the assessments by the Appellate Body and panels as well as the practice by WTO Members.

One of the differences between safeguard measures on the one hand and anti-dumping and countervailing duties on the other under WTO law, is that the Agreement on Safeguards has a preamble. The preamble state that the Agreement is applicable to all Members. This thesis explores what applicable to all means. Another difference is that safeguard measures are applicable on fair trade, while anti-dumping and countervailing measures are applicable to unfair trade. The preamble to the Agreement on Safeguards emphasize that there is a need to re-establish multilateral control over safeguards and eliminate measures that escape such control, since the measure historically has been used to combat unfair trade as well as set up measures and bilateral agreements – grey area measures – that was outside of the rules. Despite the intentions with the Agreement, no safeguard measures to date has been found to comply with the WTO rules.

Safeguard measures are not only regulated under the multilateral rules, but also in Regional Trade Agreements. This can cause some difficulties as to know when and if safeguard measures can be used and to what parties. Some conflicts can arise which are described in this thesis. The safeguard rules under WTO law state that safeguard measures should be applied to products irrespective of its source, meaning that they are applicable to all imports without being able to select affected parties. Exceptions from the principle of non-discrimination have been examined throughout the thesis and whether there is a space to discriminate under the safeguard rules.

This thesis show that discriminatory application of safeguard measures is allowed, which was not the intention when creating the Agreement on Safeguards. It is possible to apply selective measures and there is also a possibility to waive the rights to WTO DSB. Thus, the Agreement is neither *de jure* nor *de facto* applicable to all Members. It seems therefore as if the interpretation based primarily on the terms of the treaty, does not match the context and the treaty's object and purpose.

Consequently, while the rules lean more towards providing and establishing a protection, the interpretation by the DSB so far lean more towards free trade.

Key words WTO law, Safeguard Measures, Trade defence measures

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Table of Contents

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Lastly, I am also most grateful to tralac and Trudi Hartzenberg for their belief in me and for their support. This thesis is developed from a licentiate degree thesis published in 2015 by tralac and it is with their permission and consent I can submit this doctoral thesis.

After broadening and deepening my research since my licentiate thesis, I have made some considerations on how to present my final efforts and results. Instead of presenting a compilation thesis, I decided to present all research leading to the doctoral thesis as one complete, stand alone, book. I have put a lot of effort into getting it function like that. The book consists of both previous and new research. In 1.5, Thesis structure, I describe what of the content that I have published before, what parts are new research and how everything fits together.

Table of Cases

WTO Case Law

Argentina – Footwear (EC)

Panel Report on Argentina- Safeguard Measures on imports of footwear (EC), (*Argentina – Footwear (EC*)), WT/DS121/R, (25 June 1999).

Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)*), WT/DS121/AB/R, (14 December 1999).

Argentina – Import Measures

Appellate Body Reports, Argentina – Measures affecting the importation of goods, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, (15 January 2015).

Argentina – Poultry

Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003).

Argentina – Preserved Peaches

Panel Report on Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches, (Argentina – Preserved Peaches), WT/DS238/R, (14 February 2003).

Brazil — Retreaded Tyres

Panel Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (Brazil – Tyres), WT/DS332/R, (12 June 2007).

Appellate Body Report in Brazil — Measures Affecting Imports of Retreaded Tyres (*Brazil — Retreaded Tyres*), WT/DS332/AB/R, 3 December 2007.

Canada - Dairy

Appellate Body Report on Canada – Measures affecting the importation of milk and the exportation of dairy products, (*Canada – Dairy*), WT/DS103/AB/R, WT/DS113/AB/R, (13 October 1999).

Canada – Feed-in Tariff Program

Appellate Body Report on Canada – certain measures affecting the renewable energy generation sector and Canada – Measures Relating to the Feed-in Tariff Program, (*Canada – Feed-in Tariff Program*), WT/DS412/AB/R, WT/DS426/AB/R, (6 May 2013).

China – Auto Parts

Appellate Body Report on China — Measures Affecting Imports of Automobile Parts, (China – Auto Parts), WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, (15 December 2008).

Chile – Price Band System

Appellate Body Report, Chile – Price Band System, Chile – Price Band System and safeguard measures relating to certain agricultural products, (*Chile – Price Band System*), WT/DS207/AB/R, (23 September 2002).

Dominican Republic – Safeguard Measures

Panel Report on Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric, (*Dominican Republic – Safeguard Measures*), WT/DS415/R, WT/DS/416/R, WT/DS417/R, WT/DS418/R, (31 January 2012).

EEC – Bananas II

Appellate Body Report, EC – Bananas III, European Communities - Regime for the importation, sale and distribution of bananas, WT/DS27/AB/R, (9 September 1997).

Panel Report on EEC – Import Regime for Bananas, *(EEC – Bananas II),* WT/DS38/R, (11 February 1994), (unadopted).

EC – Hormones

Appellate Body Reports on European Communities - Measures Concerning Meat and Meat Products, (*EC – Hormones*), WT/DS26 and WT/DS48, (13 February 1998).

United States – Continued suspension of obligations in the EC – Hormones dispute, WT/DS320/AB/R, 16 October 2008.

Decision by the Arbitrators, European Communities – Measures concerning meat and meat products (Hormones) original complaint by the united states recourse to arbitration by the European Communities under Article 22.6 of the DSU, (*EC — Hormones (US) (Article 22.6 — EC),* WT/DS26/ARB, (12 July 1999).

EC and certain member States — Large Civil Aircraft

Appellate Body Report on European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft, (*EC and certain member States — Large Civil Aircraft*), WT/DS316/AB/R, (18 May 2011).

EC – Poultry

Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, (*EC – Poultry*), WT/DS69/AB/R, (13 July 1998).

EC – Sardines

Appellate Body Report, European Communities — Trade Description of Sardines, (*EC — Sardines*), WT/DS231/AB/R, (26 September 2002).

EC – Tariff Preferences

Appellate Body report on European Communities – conditions for the granting of tariff preferences to developing countries, (*EC — Tariff Preferences*), WT/DS246/AB/R, (7 April 2004).

India – Import restrictions

Communication from the United States, Request to Join Consultations, India – Import restrictions, WT/DS149/2, 24 November 1998.

Communication from Japan, Request to Join Consultations, India – Import restrictions, WT/DS149/3, 25 November 1998.

Communication from Australia, Request to Join Consultations, India – Import restrictions, WT/DS149/5, 26 November 1998.

Communication from Switzerland, Request to Join Consultations, India – Import restrictions, WT/DS149/4, 26 November 1998.

Request for Consultations by the European Communities, India – Import restrictions, WT/DS149/1, G/L/265, G/AG/GEN/29, G/LIC/D/25, 12 November 1998.

India – Patents (US)

Appellate Body Reports, India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, (India — Patents (US)), WT/DS50/AB/R, (19 December 1997).

Indonesia – Iron or Steel Products

Panel report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/R, WT/DS496/R, (Indonesia – Iron or steel products), (18 August 2017).

Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (Indonesia – Iron or steel products), (15 August 2018).

Japan – Alcoholic Beverages

Appellate Body Report Japan – Taxes on Alcoholic Beverages, (*Japan – Alcoholic Beverages*), WT/DS8-11/AB/R, (1 November 1996).

Korea – Dairy

Panel Report on Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (21 June 1999).

Appellate Body Report on Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (14 December 1999).

Korea – Procurement

Panel report on Korea – measures affecting government procurement, (*Korea – Procurement*), WT/DS163/R, (1 May 2000).

Mexico – Soft Drinks

Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, (Mexico — Soft Drinks), WT/DS308/13, (29 March 2006).

Peru – Agricultural Products

Panel Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/R, (*Peru – Agricultural Products*), (27 November 2014).

Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015).

Russia – Commercial Vehicles

Appellate Body Report on Russia – Anti-dumping duties on light commercial vehicles from Germany and Italy, (*Russia – Commercial Vehicles*), WT/DS479/AB/R, (22 March 2018).

Russia — Traffic in Transit

Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (Russia — Traffic in Transit), (5 April 2019).

Thailand – Cigarettes (Philippines)

Appellate Body Report on Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, (*Thailand – Cigarettes (Philippines)*), WT/DS371/AB/R, (17 June 2011).

Turkey – Textiles

Panel Report on Turkey – Restrictions on imports of textile and textile and clothing products, (*Turkey – Textiles*), WT/DS34/R, (31 May 1999).

Appellate Body Report on Turkey – Restrictions on imports of textile and textile and clothing products, (*Turkey – Textiles*), WT/DS34/AB/R, (22 October 1999).

UAE - measures relating to trade in goods and services, and trade-related aspects of intellectual property rights

Constitution of the panel established at the request of Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/3, 3 September 2018.

Request for consultations by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/1, G/L/1180, S/L/415, IP/D/35, 4 August 2017.

Request for consultations by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/1, G/L/1180, S/L/415, IP/D/35, 4 August 2017, para. 4.

Request for the establishment of a panel by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/2, 12 October 2017.

Ukraine – Passenger Cars

Panel Report on Ukraine — Definitive Safeguard Measures on Certain Passenger Cars, (*Ukraine – Passenger Cars*), WT/DS468/R, (26 June 2015).

US – 1916 Act

Appellate Body Report on United States – Anti-dumping act of 1916, (US – 1916 Act), WT/DS136/AB/R, WT/DS162/AB/R, (28 August 2000).

US – Carbon Steel

Appellate Body Report, United States – sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan, (US — Carbon Steel), WT/DS244/AB/R, (15 December 2003).

US – Certain EC Products

Panel Report on United States – Import measures on certain products from the European Communities, (*US — Certain EC Products*), WT/DS165/R, (17 July 2000).

Appellate Body Report on United States – Import measures on certain products from the European Communities, (*US — Certain EC Products*), WT/DS165/AB/R, (11 December 2000).

US – Continued Zeroing

Appellate Body Report on United States – continued existence and application of zeroing methodology, (*US – Continued Zeroing*), WT/DS350/AB/R, (4 February 2009).

US – Countervailing Measures (China)

Appellate Body Report on United States — Countervailing Duty Measures on Certain Products from China, (*US – Countervailing Measures (China)),* WT/DS437/AB/R, (18 December 2014).

US – Corrosion-Resistant Steel Sunset Review

Appellate Body Report on United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, (*US – Corrosion-Resistant Steel Sunset Review*), WT/DS244/AB/R, (15 December 2003).

US – Cotton Yarn

Appellate Body Report on United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, *(US – Cotton Yarn),* WT/DS192/AB/R, (8 October 2001).

US – FSC

Appellate Body Report on United States — Tax Treatment for "Foreign Sales Corporations", (*US – FSC*), WT/DS108/AB/R, (24 February 2000).

US – Gambling

Appellate Body Report on United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (*US — Gambling*), (WT/DS285/AB/R, WT/DS285/AB/R/Corr.1), (7 April 2005).

US – Gasoline

Appellate Body Report on United States – Standards for reformulated and Conventional Gasoline, (*US – Gasoline*), WT/DS2/AB/R, (20 May 1996).

US – Hatter's Fur

Working Party Report, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement of Tariffs and Trade. (*US – Hatter's Fur*). 27 March 1951. GATT/CP/106.

US – Lamb

Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, (*US — Lamb*), WT/DS177/AB/R and WT/DS178/AB/R, (1 May 2001).

US – Large Civil Aircraft

Appellate Body Report on United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint, *(US – Large Civil Aircraft (2nd complaint),* WT/DS353/AB/R, (12 March 2012).

US – Line Pipe

Appellate Body Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US - Line Pipe*), WT/DS202/AB/R, (15 February 2002).

US – Offset Act

Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 ("US – Offset Act (Byrd Amendment)"), WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003).

US – Section 301

Panel Report on United States – Sections 301-310 of the Trade Act of 1974, (*US-Section 301*), WT/DS152/R, (22 December 1999).

US – Shrimp

Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (*US-Shrimp*), WT/DS58/AB/R, (12 October 1998).

Appellate Body Report on United States – Import prohibition of certain shrimp and shrimp products, Recourse to article 21.5 of the DSU by Malaysia, (*US — Shrimp (Article 21.5 — Malaysia)),* WT/DS58/AB/RW, (22 October 2001).

US – Softwood Lumber IV,

Appellate Body Report on United States – final countervailing duty determination with respect to certain softwood lumber from Canada, (*US – Softwood Lumber IV),* WT/DS257/AB/R, (19 January 2004).

US – Steel and Aluminium Products

United States – certain measures on steel and aluminium products request for consultations by India, WT/DS547/1, G/L/1238, G/SG/D53/1, (23 May 2018).

Communication from United States in United States – certain measures on steel and aluminium products request for consultations by China, WT/DS544/1, G/L/1222, G/SG/D50/1, (9 April 2018).

US – Steel Safeguards

Panel Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, (*US – Steel Safeguards*), WT/DS248/R, WT/DS249/R,

WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R, (11 July 2003).

Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, (*US – Steel Safeguards*), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003).

US – Tuna

Appellate Body Report on United States – measures concerning the importation, marketing and sale of tuna and tuna products, (*US – Tuna II*), WT/DS381/AB/R, (16 May 2012).

US – Wheat Gluten

Appellate Body Report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, (*US - Wheat Gluten*), WT/DS166/AB/R, (22 December 2000).

US – Wool shirts and Blouses

Appellate Body Report on United States – measure affecting imports of woven wool shirts and blouses from India, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, (25 April 1997).

List of abbreviations

AA	Agreement on Agriculture
AB	Appellate Body
ACFTA	ASEAN China Free Trade Area
AD	Anti-dumping
ADA	Anti-dumping Agreement
AEC	African Economic Community
ALADI	Latin American Integration Association
ASEAN	Association of South East Asian Nations
CARIFORUM	Caribbean Forum
COMESA	Common Market for Eastern and Southern Africa
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTG	Council for Trade in Goods
DoD	Department of Defense
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Communities
ECOWAS	Economic Community of West African States
EDSM	Enhanced Dispute Settlement Mechanism
ETSG	European Trade Study Group
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
FAO	Food and Agriculture Organisation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GSP	Generalised System of Preferences
ICJ	International Court of Justice
ILC	International Law Commission
ITC	International Trade Commission
LDC	Least Developed Country
MERCOSUR	Mercado Comum do Sul; Southern Common Market
MFN	Most Favoured nation

MUTRAP	(EU-Vietnam) Multilateral Trade Assistance Project
NAFTA	North American Free Trade Agreement
NGR	Negotiating Group on Rules
NT	National Treatment
ORC	Other Regulations of Commerce
ORRC	Other Restrictive Regulations of Commerce
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SA	Agreement on Safeguards
SADC	Southern African Development Community
SACU	Southern African Customs Union
SEOM	Senior Economic Officials Meeting
SCM	Subsidies and Countervailing Measures
SSG	Special Safeguards
SSM	Special Safeguard Mechanism
Tralac	Trade Law Center
UAE	United Arab Emirates
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention on the Law of Treaties
VER	Voluntary Export Restraint
WTO	World Trade Organization

1 Safeguard measures in world trade law

1.1 Introduction

The number of trade restrictive measures are currently at historically high levels,[1] while a fundamental element of WTO law is that the Member countries have agreed not to raise their tariffs above the negotiated levels included in their respective schedules of concession. These schedules are the results of comprehensive WTO multilateral trade negotiations. Under precisely specified conditions the Member countries are, however, allowed to use trade defence measures in the form of raised tariffs or quantitative restrictions on certain imported products in order to protect their domestic industries from being injured. The most common examples of such exceptions are anti-dumping measures and countervailing measures, which offset dumped imports and subsidized goods. Another exception is the possibility of using emergency safeguard measures which limit imports temporarily. Rules on safeguard measures can also be found in Regional Trade Agreements (RTAs). This thesis is about the rules on safeguard measures and some of the legal challenges and problems related to them. Exceptions from the principle of non-discrimination are examined throughout this thesis and whether or not there is a space to discriminate under the safeguard rules.

The imposition of customs duties and other trade restricting measures are covered by certain fundamental general principles of WTO law, such as the non-discrimination principle which ensures that Members do not discriminate against their trading partners or between foreign and domestic goods. This is further elaborated in the Most Favoured Nation (MFN) principle in Article I General Agreement on Tariffs and Trade (GATT) and the National Treatment (NT) principle in Article III GATT. There are preferential as well as non-preferential exceptions from the MFN-principle. The two main examples of preferential exceptions from the MFN-principle are GATT Article XXIV, which allows customs unions and free trade areas, and the so-called Enabling Clause which is the legal basis for preferences targeted at developing countries.

[1] WTO Annual report by the Director-General, Overview of developments in the international trading environment, WT/TPR/OV/22, (29 November 2019).

WTO law has also left some room for non-preferential exceptions from the non-discrimination principle meaning that in certain situations countries are allowed to take discriminative actions in the form of raised customs duties or other protectionist measures. Anti-dumping measures and countervailing duties are such exceptions from the MFN-principle since they clearly discriminate against imports of certain goods from certain countries. As a general principle, however, safeguard measures must not be imposed on imports from certain countries only. They must be applied to imports irrespective of its origin and thus applied on an MFN basis. This means that safeguard measures under the WTO rules should be non-discriminative and consequently selective measures would not be possible to apply. Hence, they are applicable to all WTO Members. As will be further elaborated on in this study, there are also exceptions to this rule, which perhaps can question the applicability of and intention with the WTO rules on safeguards.

Even though safeguard measures are not the most commonly used trade defence measure, it is a highly controversial one. So far, all disputed multilateral safeguard measures have been found to violate WTO law, thus ruling in favour of the complainant. Notably, it is roughly a third (62 out of 191[2]) of all notified safeguard measures that have been brought to the WTO DSB. One reason could be that the rules are not clear enough implying that they need to be improved, or that safeguard measures are applied incorrectly implying that the rules are clear enough but simply not applied in a correct manner. It could also imply that the rules are clear enough and applied correctly, but simply that the DSB interpretation in the disputes on the object and purpose of safeguard measures has failed. What does this mean in regard to the object and purpose behind the rules? In the preamble it is stated that the Agreement on Safeguards is applicable to all WTO Members. What does "applicable to all" mean? Is the Agreement on Safeguards applicable to all? Do the rules provide the re-establishment of multilateral control over safeguards and eliminate measures that escape such control as stated in the preamble? Or does the uncertainty lead to the lack of control? To answer these questions, the original intent and purpose of multilateral rules on safeguard measures must be established. Is the purpose to provide an emergency action on imports of particular products as stated in Article XIX and hence a protection? Or is the purpose to promote trade liberalization and consequently free trade? Does one purpose supersede the other or should they be read together?

Not only WTO law, but also most RTAs, contain rules on safeguard measures. The GATT from 1947 included rules on safeguards and so does the current GATT 1994. The WTO rules governing safeguard measures are found in GATT Article XIX, in the Agreement on Safeguards and in Article V of the Agreement on Agriculture. Safeguard measures in the latter agreement are referred to as Special Safeguard

[2] As of 30 June 2020, see www.wto.org.

Measures (SSG). In this study, safeguard measures under WTO law are called *multilateral safeguard measures*.[3]

Alongside the multilateral trade negotiations within the WTO, many Members become involved in RTAs.[4] This kind of agreement often leads to more far-reaching trade liberalization than the WTO agreements, mainly because the exception rule for customs unions and free trade areas in GATT Article XXIV requires that nearly all trade barriers in an RTA are eliminated in order for it to be accepted by the WTO rules.[5] Due to the fact that substantially all the trade within the free trade area will take place at a tariff level close to zero, imports from the countries involved will increase. For some countries, safeguard measures could then be the only way to deal with increased imports (import surges) and prevent domestic producers from suffering from these imports. This indicates the importance of retaining safeguard measures when signing agreements of this kind as they may provide the only means for preventing domestic industries from collapsing, thus in a sense providing an incentive to actually conclude such agreements. The most recently concluded RTAs tend, therefore, to include rules on safeguard measures. Safeguard measures in RTAs are referred to as *regional safeguard measures* in this thesis.[6]

One difference between multilateral and regional rules on safeguard measures is that the former can raise the tariff level above the MFN level, while the latter raise the level of duties up to the MFN level. Two scenarios present probable conflicts between regional safeguard measures and multilateral safeguard measures according to Lee. The first scenario is when a *regional* safeguard measure is applied at a level which exceeds the rate of duty applicable to non-RTA members on an MFN basis.[7] This would mean that the regional parties have a higher duty than WTO Members, thus potentially being discriminated as will be examined more below. The other scenario is when the RTA requires that the imports from RTA parties shall be excluded from the application of safeguard measures.[8] This second scenario implies that the regional parties have better terms than all WTO Members and thus

[3] They might as well be called global, or WTO safeguard measures, but here the word *multilateral* has been chosen in order to correspond to *regional* agreements.

[4] RTA is a catch-all term for free trade agreements among two or more countries. Such an agreement does not necessarily have to involve countries that constitute a geographical region. In the WTO, regional trade agreements (RTAs) are defined as reciprocal trade agreements between two or more partners. With few exceptions WTO Members are parties to one or several RTAs.

[5] Article XXIV GATT requires *inter alia* that 'duties and other restrictive regulations of commerce […] are eliminated with respect to substantially all the trade'. See more in Chapter 4.

[6] Regional safeguard measures can also be referred to as intra-regional safeguard measures, or internal safeguard measures. See for example Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press, vol 7, no 1, (2004), pages 109-142.

[7] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3rd Ed., Edward Elgar, (2014), page 260.

[8] Ibid.

potentially constitutes a discriminatory practice against the latter. This will also be examined below. Both multilateral and regional rules on safeguard measures in RTAs often include forum of choice clauses, which means that overlaps of jurisdiction can occur when for example two fora examine the same dispute. This could mean that both the rules and practices on safeguard measures are interpreted differently in the different dispute settlement systems and that one forum states that safeguard measures are in compliance while another forum says that it is not. Further, some RTAs include waiver clauses to WTO law, meaning that the parties have agreed that the WTO DSB do not have jurisdiction and that the parties have waived the right to take the dispute to the WTO DSB. This practice of clauses just mentioned likely presents a third scenario of conflicts between regional and multilateral rules on safeguard measures.

It has now been shown that the rules on safeguards give rise to a multitude of legal questions and some will be examined further in this thesis. Before presenting the research questions, there are some areas that need to be introduced somewhat further in order to understand what this thesis is about and how the study has been undertaken. Therefore, the history of Article XIX and the Agreement on Safeguards as well as the balancing of free trade and protection and lastly overlaps of jurisdictions will be introduced. These sections will basically define and present the problems with rules on safeguard measures that is dealt with in this thesis.

1.1.1 History of safeguard measures

The origin of an escape clause was linked to the drafting of the Charter for the proposed International Trade Organization (ITO) in 1946.[9] The US submitted a draft charter for an international trade organization. The proposal was somewhat designed to resemble the US-Mexico Agreement escape clause.[10] This draft contained provisions for "Emergency Action on Imports of Particular Products" in Article 29. A memorandum explains further:

> "These relevant provisions (of Article XIX) follow closely in substance those in the first detailed escape clause, contained in Article XI of the 1942 trade agreement with Mexico… At the time the United States was putting escape clause comparable to Article XIX into bilateral trade agreements and was proposing the multilateral negotiation of comparable language it had no authority to take action under such

[9] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1719.

[10] General Agreement on Tariffs and Trade, Modalities of application of Article XIX, Note by the Secretariat, L/4679, (5 July 1978), para. 4.

> clause in other than a non-discriminatory manner and therefore must have contemplated its non-discriminatory use". [11]

An interpretative note was also added to the former Article XIX at the Havana Conference:

> "It is also understood that any suspension, withdrawal or modification under paragraph 1(a), 1(b) and 3(b) must not discriminate against imports from any Member country, and that such action should avoid, to the fullest extent possible, injury to other supplying Member countries."[12]

A representative from the UK found that paragraphs 1 and 3(c) could be misinterpreted and the Sub-Committee agreed that an interpretative note was needed. The Sub-Committee stated:

> "The Sub-Committee was unanimous in its understanding of this Article that action taken by Members under paragraphs 1(a), 1(b) and 3(b) – as distinct from paragraph 3(a) – should not involve any discrimination against the trade of any Member. As the text as drafted might leave rooms for doubts on this point, it was felt that this intention, as interpreted by the Sub-Committee, should be expressly stated in the Charter. The Sub-Committee decided therefore to recommend that this interpretation be embodied in a footnote attached to the Article and forming part of the Charter". [13]

This caused some reactions from Members, which stated that the Article concerned emergency actions and was therefore an exception from the general principle of non-discrimination. The representative from the UK however stated that "since concessions were negotiated on a non-discriminatory and most-favoured-nation basis, their withdrawal should also be on that basis… The intent of the footnote was that any action, except that taken under paragraph 3(a), should be in conformity with the most-favoured-nation concept".[14]

Some changes were made at the Havana meeting of the ITO, and even though the ITO never came into existence, the contracting parties have in the past interpreted Article XIX GATT with the revisions made at the Havana Conference.[15] Article XIX was part of the GATT 1947 which continued provisionally in force until its

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[11] Ibid.

[12] Ibid, para.5.

[13] Ibid, para. 8.

[14] Ibid, para. 10.

[15] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1720-1721.

provisions became part of the GATT 1994.[16] The issue with non-discrimination and selectivity continued though.[17]

In 1964, the Executive Secretary stated that:

> "there can be no serious question that the intention of the drafters of Article XIX was that action taken … should be of a non-discriminatory character. This indeed is a logical counterpart of the provisions of Article I and Article XIII. This is also borne out by the legislative history … The fact however that it was necessary to record this understanding in the legislative proceeding also suggests, however, that the language itself is not conclusive. It is also a fact that the drafters did not have the particular problem of market disruption in their minds, and we cannot necessarily have been the same if this particular problem had then been as acute as it has become."[18]

This shows that it is likely that the intention behind Article XIX was different from the situation that was at hand later. Historically, the pre-requisites to impose safeguard measures according to Article XIX are that:

1. "Imports must be increasing in quantity
2. Imports must be increasing as a result of unforeseen developments and of existing GATT obligations; and
3. The increasing imports must cause serious injury to a domestic industry."[19]

When all three conditions are satisfied, a WTO Member can impose safeguard measures. The party imposing the measures must however fulfil some obligations, some procedural and some substantive. Stewart describes that the substantive requirements may discourage the parties from using Article XIX.[20] The fact that no disputed safeguard measure so far has been found to be in accordance of WTO law, perhaps shows that the intention was to discourage. The substantive requirements Stewart refers to are the non-discrimination application as well as the compensation and retaliation.

Before the Agreement on Safeguards, GATT Members wanted clarification of Article XIX provisions as well as strengthening them. Article XIX was seen as weak

[16] https://www.wto.org/english/docs_e/legal_e/legal_e.htm, visited at 5th October 2019.

[17] In this thesis, selectivity is basically when a safeguard measure can be applied selectively, with the possibility to exclude parties, and therefore considered as discriminatory.

[18] General Agreement on Tariffs and Trade, Modalities of application of Article XIX, Note by the Secretariat, L/4679, 5 July 1978, para. 13.

[19] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1724.

[20] Ibid.

and permissive and thus leaving the Members with the discretion to apply defence measures as see fit,[21] by for example allowing grey area measures.

Some concern was also raised regarding the use of safeguard measures in trade relations between developed and developing countries. Certain developing countries proposed that they should be exempted from the application of safeguard measures by developed nations, meaning that there should be an exception from the non-discrimination principle in their favour. At the same time they also wanted guarantees against selective application of safeguard measures and they argued that safeguard measures should in no case be applied by developed nations to adversely affect the growth of developing countries' production and exports.[22] Thus, developing countries wanted a more restrictive use of safeguard measures. Compensation and some structural adjustments were also of importance to developing countries, as well as the injury criteria.[23] The result of the Tokyo Round was however that no changes were made but a report identified some key areas of disagreement.[24]

1. Selectivity
2. Surveillance
3. Dispute settlement
4. Serious injury
5. Structural adjustments[25]

A standing Committee on Safeguards was established in November 1979 and The Ministerial Declaration of 1982 declared that a comprehensive agreement on safeguards should review some of the elements above.[26] During the discussions that followed there was a deadlock regarding the non-discrimination/selectivity and also whether there was a need to eliminate grey area measures.[27] A report from 1985

[21] Ibid, page 1745.

[22] These developing countries were Brazil, Nigeria and Pakistan, see Rai, Sheela, *Recognition and Regulation of Safeguard Measures Under GATT/WTO*, Routledge Research in International Economic Law, (2011), page 24.

[23] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1748-1750.

[24] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1752 and GATT, Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT (1979).

[25] GATT, Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT (1979), pages 94-95.

[26] Ministerial Declaration of 29 November 1982, GATT, L/5424, pages 12-13.

[27] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1754-1755.

called "Trade Policies for a Better Future: Proposals for Action" highlighted the fact that the trade restrictions taken outside of GATT provisions undermined the GATT.[28]

At the start of the Uruguay Round negotiations, the areas of disagreement was still selectivity, grey area measures, compensation and retaliation, structural adjustments, special rules for developing countries etc.[29] Some Members such as the EC, stated that grey area measures could be under the safeguard control if selectivity was permitted.[30] Thus, there is a close link between selectivity and grey area measures since the former target specific markets while safeguard measures where more or less applied on a non-discrimination basis. Selectivity would allow for some flexibility in the application of safeguard measures.

During the Tokyo Round, US had allied with some developing countries opposing the EC's limited selectivity approach. In the Uruguay Round negotiations, the US had changed its view and proposed some flexibility in the application of selective safeguards.[31] According to Stewart, the US suggested the options provided in the table below.

[28] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1756 and GATT Secretariat, Trade Policies for a Better Future: Proposals for Action (1985).

[29] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1768-1781.

[30] Ibid, page 1769.

[31] United States Thoughts on Safeguards, MTN.GNG/NG9/W/12, (December 9 1987).

Table 1: Stewart's analysis of US options during Uruguay Round negotiations[32]

Options	Selectivity Allowed	Incentives/Disincentives
MFN with specified period of phase-out of non-conforming measures	No	Grey-area measures permitted with procedures established to ensure transparency
MFN but selectivity in exceptional circumstances allowed	Yes	MFN measures 1. Longer maximum total duration than for selective measures 2. Degressivity "as feasible" regarding measures extending over three years 3. Reduction of compensation/retaliation rights Selective measures 1. Shorter duration than MFN measures 2. Mandatory degressivity after first year 3. No reduction of compensation retaliation rights
MFN and selectivity equally permissible	Yes	1. All measures subject to disciplines 2. No grey-area measures permitted

At the Midterm Review, three key principles could be established:

1. "Safeguard measures should be of a limited duration
2. Safeguard measures should be non-discriminatory, and
3. Grey-area measures that result in selective application should be proscribed".[33]

The discussions that followed in regard to selectivity, concerned for example the targeting of competitors. Also, if allowing selectivity, it would "shift the political burden of a safeguard action from the importer to the exporter because, under the plan, affected exporters would have to request an extension of the safeguard action to other suppliers".[34]

[32] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1767; Table 4 Analysis of U.S. Options Regarding Coverage of Grey-Area Measures, and Submission of United States, GATT MTN.GNG/NG9/W/23, (June 13, 1989).

[33] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1781 and GATT, Trade Negotiations Committee Meeting at Ministerial Level, Montreal, December 1988, MTN.TNC/7(MIN), December 9, 1988), page 17.

[34] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), page 1787 and New of the Uruguay Round, NUR 034, (February 23, 1990), page 2-3.

The Director-General Arthur Dunkel issued a draft of a final safeguard package,[35] where safeguards in general must be applied on an MFN basis but allowed some flexibility. However, the flexibility should be phased out within some years of the agreement coming into force.

The negotiation of the Agreement on Safeguards was pursued based on the belief that the availability of safeguard relief would enhance and not reduce free trade:[36]

> "Indeed, the negotiation of a comprehensive Safeguards Agreement was seen as a way to encourage WTO Members to employ open, transparent and established procedures in considering temporary import relief, under rules that would ensure to the greatest extent possible fair and equitable treatment of foreign producers and importers, and the least distortive form of trade relief."[37]

Thus, the history of the Agreement on Safeguards shows that there is a close link between selectivity and grey area measures and that this caused some disagreement on the drafting of the rules. It also shows that neither selectivity nor grey area measures were permitted due to the non-discrimination principle and that the Agreement is applicable to all Members. The intention with the Agreement was to create a safety valve – an emergency clause – while at the same time limiting the discriminatory options of protecting the industries. Thus, balancing between free trade and protection.

1.1.2 Balancing free trade and protection

As will be attended to again below, a reading of the texts as outlined in the Agreement on Safeguards and Article XIX might not provide the precise scope of the rights and obligations. Therefore, an interpretation of the texts is often needed. Article 3.2 in the Dispute Settlement Understanding (DSU) provides that the Members recognise the right to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The Vienna Convention on the Law of Treaties (VCLT) highlight in Article 31 that:

[35] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT MTN.TNC/W/FA, (December 20, 1991).

[36] United States – Definitive Safeguard Measures On Imports of Certain Steel Products, (WT/DS248-249, 251-254, 258-259), Written Rebuttal of the United States, (26 November 2002), para. 4. Found at https://ustr.gov/sites/default/files/uploads/agreements/morocco/pdfs/dispute_settlement/ds248/asset_upload_file923_6331.pdf

[37] Ibid., para. 6.

> "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".

The object and purpose of the rules on safeguard measures is closely connected to the balance of free trade and protection and is here used as a context for interpretation of safeguard rules. Free trade and liberalization as outlined in this thesis are not the same thing. Trade liberalization should in this thesis be seen as a process which promotes and enables free trade. Thus, trade liberalization is the process of making trade free from protectionism. Free trade can be viewed as being on one side of a scale while protectionism can be seen to be on the other side of the scale, thus liberalization is aiming towards free trade. WTO is not just about liberalizing trade; it is also about maintaining trade barriers when needed and dealing with rules of trade between nations by establishing some fundamental principles. The rules on safeguard measures serve to improve and strengthen the international trading system, as emphasised in the preamble to the Agreement on Safeguards. It provides for a protection while liberalizing, without discriminating any WTO Members. Basically, safeguard measures can be said to provide trade protection to promote trade liberalization. In its defence of its application of safeguard measures on imports of certain steel products, the US stated that safeguard measures are a tool to facilitate trade liberalization:

> "From the inception of the GATT in 1947, the availability of safeguard relief (incorporated in Article XIX) was considered to be a critical component of the international system of rulesbased trade. One of the primary motives for the inclusion of a safeguard provision was the conviction that the existence of a "safety valve" would facilitate trade concessions.[38] The common-sense logic behind this notion was that, in the absence of such a provision, trade negotiators may decline to make reciprocal trade concessions for fear of adverse political consequences in the future if an increase in imports were to seriously injury a domestic industry.[39] Accordingly, the suggestion that the safeguard provision is somehow disfavored as a form of unjustified protectionism – a claim that pervades the submissions of most of the Complainants – is incorrect. From the beginning, safeguard measures have been seen as an essential tool to facilitate the broader goal of trade liberalization."[40]

Although this is expressed by the US, the overall purpose of the Agreement on Safeguards indeed seems to be to permit the temporary protection of a domestic

[38] Original footnote: K. Dam, The GATT: Law and International Economic Organization 99 (1970) (Exhibit US-87).

[39] Original footnote: A. Sykes, "Protection as a Safeguard: A Positive Analysis of the GATT 'Escape Clause' with Normative Speculations," 58 U. Chi. L. Rev. 255, text at notes 75-76 (Winter 1991) (Exhibit US-88).

[40] United States – Definitive Safeguard Measures On Imports of Certain Steel Products, (WT/DS248-249, 251-254, 258-259), Written Rebuttal of the United States, (26 November 2002), para. 3.

industry under certain circumstances, while at the same time facilitate trade liberalization.

The idea of safeguard measures is to offer a temporary protection while the industries are adjusting to the new circumstances. For example, the industries affected by import surges might have to re-educate. However, there also exist arguments against such measures. The protection might slow down the necessary changes since there is no pressure and incentive to make such changes.[41] Sykes also argued that:

> "safeguards should be understood as a mechanism for the reimposition of temporary protection when commitments to liberal trade impose unexpectedly severe political burdens on officials in importing nations, and when temporary protection will impose comparatively modest political costs on trading partners."[42]

From an economic perspective, it would perhaps sometimes be more efficient to use non-trade measures to achieve the necessary changes. Another argument is that the measures might not provide the necessary time to adjust or that it does not benefit the affected industries to improve its competitiveness.[43] Thus, the different pros and cons must be taken into consideration before deciding to impose safeguards measures. Suffice it here to notice that from the consumer's perspective, the lowest price is the most desirable outcome. From the seller's perspective, maximising gain is the most desirable, which is not always dependent on a high or low price. From a producer's perspective, the most desirable outcome is two-fold. The domestic producer of like or directly competitive products will suffer from cheaper imports of the same goods, while the foreign producer of the imported goods will benefit from open markets. It is the domestic producer that may be injured and in the long run this could affect the availability of jobs. The rational choice would thus be to allow some protectionist measures to improve the position of the least advantaged.[44]

Increased production in and exports from one country may, for different reasons, cause decreased production and prices in another state. This is where safeguard measures enter the scene. Safeguard measures are intended to protect industries from the economic harm caused by these unexpected surges in imports. However, this also demonstrates the importance of the principle of non-discrimination in the

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[41] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3 ed., Edward Elgar Publishing Limited, (2014), page 11.

[42] Sykes, Alan O., The Safeguard mess: A critique of WTO Jurisprudence, *The University of Chicago Law School*, May 2003, page 2.

[43] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3 ed., Edward Elgar Publishing Limited, (2014), pages 12-13.

[44] Michael J. Hahn, Balancing or Bending? Unilateral Reactions to Safeguard Measures, *Journal of World Trade*, 39(2): 301-326, (2005), page 302.

application of safeguard measures since no importer is supposed to benefit over another when all imports are targeted by a measure. If a measure is directed selectively against specific imports, the imports that are not targeted will simply enjoy the benefit of lower or zero import duties. In general, if cheap imported goods are subjected to safeguard measures, their price will increase and thus eventually they could change direction and be exported to another country which might also face injury to the domestic production. In that sense, safeguard measures (as well as other trade defence measures) can easily have the effect of simply re-routing exports.

There can be some similarities with contracts where economic theory suggests that contracting parties seek a pareto efficient solution, meaning that both GATT and the Agreement on Safeguards are "contracts" and that parties to contracts are likely to include provisions that are efficient or "Pareto"[45] optimal from their perspective and thereby allow a Pareto improvement *ex ante* (before the event).[46] Before the creation of the Agreement on Safeguards in 1994, two views on GATT Article XIX existed. One viewed the "escape clause" as a way to restore competitiveness or to facilitate orderly contraction in declining industries. The other viewed the "escape clause" as an *ex post* (after the event) safety valve for protectionist pressures, *i.e.* safeguard measures are supposed to be used as a protection not a way to liberalize further. Due to this linkage between *ex ante* liberalization and *ex post* protection there were calls for the improvement of Article XIX.[47] A relevant question is though whether either view has to prevail: perhaps both can exist at the same time. However, one can say that, without the clause, greater protection would be likely to arise in the form of domestic legislation to protect injured industry.[48] As emphasised by the US in its defence for imposing safeguard measures on certain steel products:

> "In short, the Safeguards Agreement reflects a carefully balanced bargain – a bargain that the parties relied upon in establishing and becoming Members of the WTO. That Agreement must be interpreted and applied based on the ordinary meaning of its terms, in their context and in light of the object and purpose of the Agreement, namely to permit temporary safeguard measures in appropriate circumstances, and to

[45] A legal rule is Pareto efficient if it could not be changed so as to make one person better off without making another person worse off. See for example Cornes, Richard and Todd Sandler, *The theory of externalities, public goods, and club goods*, 2nd ed, Cambridge University Press (1996).

[46] Sykes, Alan O., Protectionism as a "Safeguard": a positive analysis of the GATT "Escape Clause" with normative speculations", *The University of Chicago Law Review*, Vol. 58, No. 1 (1991), pp. 255-305, page 258 and Steven Shavell, *Damage for Breach of Contract*, 11 Bell J Econ 466 (1980).

[47] Sykes, Alan O., Protectionism as a "Safeguard": a positive analysis of the GATT "Escape Clause" with normative speculations", *The University of Chicago Law Review*, Vol. 58, No. 1 (1991), pp. 255-305, page 259.

[48] Ibid, page 273.

encourage the use of this mechanism rather than the non-transparent measures that had previously proliferated."[49]

Nevertheless, safeguard measures can be alleged as a safety net for the endurance of the domestic industries and thus governments are better able to persuade the domestic populations to accept further liberalisations of trade.[50] In that sense, the existence of safeguard measures could assist to liberalize trade further. Armingeon also wrote "In the current WTO, the traditional trade law principles of most-favoured nation and national treatment operate against state failure in the form of protectionism".[51] The Marrakech Declaration of 15 April 1994 addresses this and points out that the Uruguay Round will strengthen the world economy and lead to more trade. In particular the stronger and clearer legal framework adopted for the conduct of international trade, including a more effective and reliable settlement mechanism is welcome.[52] An objective of the WTO dispute settlement system is also to provide security and predictability to the multilateral trading system, as stated in Article 3.2 of the DSU.

This balance between free trade and protectionism might differ in multilateral agreements from regional agreements. There can be conflicts between legal regimes about which regime has jurisdiction. WTO law is only one of many international regimes, which exist in what is commonly referred to as a "normative jungle".[53] The challenges are to find a coherent regulatory solution and that there is no common institutional mechanism overviewing all international regimes. The solutions also must take economic and political considerations.[54]

Safeguard measures constitute a special kind of remedy in international trade; it is an extraordinary duty as already mentioned. As such, it not only regulates under what circumstances it can be applied, but also regulates and limits other kinds of measures which were more or less under no control (*i.e.* grey area measures). Due to recent activities such as the US Ad Valorem duty, it does however seem unclear what defines a safeguard measure and if there could be any conflict of norms when it comes to its application. If other measures can be applied instead of safeguard

[49] United States – Definitive Safeguard Measures On Imports of Certain Steel Products, (WT/DS248-249, 251-254, 258-259), Written Rebuttal of the United States, (26 November 2002), para. 9.

[50] Lee, Yong-Shik, *Safeguard measures in world trade*, The legal analysis, 3 ed., Edward Elgar Publishing Limited, (2014), pages 20-21.

[51] Armingeon, Klaus Et Al., Constitutionalisation of international trade law, in Cottier, Thomas and Delimatsis, Panagiotis, *The Prospects of International Trade Regulation; from fragmentation to coherence*, Cambridge University Press, (2011), page 76.

[52] Marrakech Declaration of 15 April 1994, Article 1.

[53] Lindroos, Anja, *Adressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, (2005), 74 Nordic Journal of International Law, page 27.

[54] Cottier, Thomas and Delimatsis, Panagiotis, *The Prospects of International Trade Regulation; from fragmentation to coherence,* Cambridge University Press, (2011), page 3.

measures it does seem like its purpose is not that clear. Safeguard measures can also be regulated in different legal systems, such as national laws, RTAs or at multilateral level which could constitute some conflict of norms as mentioned above. This is reviewed through the whole thesis.

There are also different views on whether the WTO DSB has created uncertainty or discourage the use of safeguard measures, as emphasised by the US in its defence on safeguard measures for certain steel products:

> "Parties to the Uruguay Round negotiations were concerned that the compensation and retaliation costs that then existed were prohibitively high, created a disincentive for the use of safeguards measures, and exerted pressure on GATT members to resort to other means to address import surges, such as VERs and other so-called "grey area measures." The suggestion of the Complainants that the Panel should view the Safeguards Agreement with disfavor and, accordingly, interpret it narrowly, is flatly inconsistent with the objective of encouraging the use of a transparent WTO mechanism where appropriate".[55]

Different views on the interpretation of the rules on safeguard measures is however not the only issue, if the authority to handle a dispute has been waived or no institution has authority to handle a dispute, how can the WTO rules on safeguard measures be upheld? For example, in the case of the US Ad valorem duty on steel and aluminium, US applied a national law to defend their domestic industries from increased imports. The norms that generate the WTO's legal instruments focus on ensuring that Members do not discriminate between trading partners, except as permitted by the exceptions.

1.1.3 Overlaps of jurisdiction

The WTO system has been referred to as preserving a concept of modern sovereignty. Globalization and international collaboration require states to be bound by international rules which can be interfering in the domestic territory of sovereign states. WTO law requires Members not to adopt barriers to trade for protectionist reasons only. This is particularly the case when it comes to trade remedies.[56] There are specific rules for when a trade remedy or trade defence measure can be used, and these will be presented in the following chapters. Trade defence measures, and

[55] United States – Definitive Safeguard Measures On Imports of Certain Steel Products, (WT/DS248-249, 251-254, 258-259), Written Rebuttal of the United State, (26 November 2002), para. 8.

[56] Soprano, Roberto, *WTO Trade Remedies in International Law, their role and place in a fragmented international legal system*, Routledge Research in International Economic Law, (2019), page 36.

particularly safeguard measures, can though in some cases be the cause of overlaps of jurisdiction and forum issues.

The WTO dispute settlement system has evolved to become "an international tribunal of historic global achievement".[57] WTO law is considered as *Lex Specialis*, but it cannot be read in isolation from general international law.[58] WTO is without doubt part of the international law, according to Pauwelyn.[59] The applicable law in WTO dispute settlements is not defined as in other courts such as International Court of Justice (ICJ). Once the jurisdiction is established, it is less obvious what law panels and the Appellate Body may apply.[60] The WTO dispute settlement system is based on the DSU; which is the starting point for defining the function of WTO panels and the Appellate Body. However, other procedural rules besides the DSU can be relied upon.[61] According to Article 1.1 DSU, claims under the WTO agreements are the only claims that can be brought before panels and the Appellate Body. Article 3.2 DSU proposes that the intention of the dispute settlement system is to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[62]

As will be shown below, overlaps of jurisdiction can arise in certain cases.

The interpretation of Article 3.2 DSU suggests that the customary principles of interpretation of public international law also apply in WTO dispute settlements.[63] It was stated by the panel in *Korea – Procurement* that:

> "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of

[57] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 3.

[58] Appellate Body Report on United States – Standards for reformulated and Conventional Gasoline, *(US – Gasoline),* WT/DS2/AB/R, (20 May 1996), para. 17.

[59] Pauwelyn, Joost, *Conflict of Norms in Public International Law. How WTO Law relates to other rules of international law.* Cambridge Studies in International and Comparative Law. Cambridge University Press (2003), page 27.

[60] Ibid, page 13.

[61] Ibid, page 163.

[62] Dispute Settlement Understanding Article 3.2.

[63] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 14.

> international law apply to the WTO treaties and to the process of treaty formation under the WTO".[64]

As a conclusion, customary law applies in the WTO context and not only in respect of customary rules of interpretation. Thus, in areas where the WTO agreements do not contract out from it, customary international law applies in the trade relations – and thus is applicable in WTO dispute settlement. Pauwelyn also proposes two ways by virtue of which non-WTO law can be applied in WTO disputes. The first is that panels and the Appellate Body can apply international law as a "fallback" or in defence of a claim of a WTO violation, except where Members have contracted out of international law. This has been done by the Appellate Body.[65] Nonetheless, this is perhaps not as easy as it sounds, as highlighted in for example the case *EC and certain member States — Large Civil Aircraft*:[66]

> "An interpretation of "the parties" in Article 31(3)(c) should be guided by the Appellate Body's statement that "the purpose of treaty interpretation is to establish the common intention of the parties to the treaty."[1915] This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party.[1916] At the same time, we recognize that a proper interpretation of the term "the parties" must also take account of the fact that Article 31(3)(c) of the Vienna Convention is considered an expression of the "principle of systemic integration"[1917] which, in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment"[1918] in a manner that gives "coherence and meaningfulness"[1919] to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members."

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[64] Panel report on Korea – measures affecting government procurement, (*Korea – Procurement*), WT/DS163/R, (1 May 2000), para. 7.96. Original footnote in the paragraph has been deleted above.

[65] Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, (*EC – Poultry*), WT/DS69/AB/R, (13 July 1998), Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)*), WT/DS121/AB/R, (14 December 1999), Appellate Body Reports on European Communities - Measures Concerning Meat and Meat Products, (*EC – Hormones*), WT/DS26 and WT/DS48, (13 February 1998), and Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (*US-Shrimp*), WT/DS58/AB/R, (12 October 1998).

[66] Appellate Body Report on European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft, (*EC and certain member States — Large Civil Aircraft*), WT/DS316/AB/R, (18 May 2011), para. 845.

In the cases where the special regime of WTO law does not clearly contract out from general international law, then the WTO system falls back on international law to fill the gaps.[67] The second way, which is not supported by jurisprudence according to Pauwelyn, suggests that in the event of a conflict between WTO law and international law, the latter law may outrule WTO rules in particular respects.[68] However, the panels and the Appellate Body can always interpret WTO law in such a way that there is no conflict with the non-WTO rule, determine the conflict through the use of conflict of norms principles, or decide that WTO law does not allow countermeasures.[69]

In this thesis three types of overlaps of jurisdiction will be discussed:

> when two fora claim to have jurisdiction over the matter – which disclose a factual conflict,
>
> when one forum claims to have jurisdiction and the other one offers jurisdiction – which could lead to a potential conflict, and
>
> when the dispute settlement mechanism of two different fora are available to examine the matter on a non-mandatory basis – which would be a conflict if the two fora examine the dispute at issue and end up with different results.[70]

These overlaps of jurisdictions will be explored when examining one of the questions in this thesis, namely if the Agreement on Safeguards is applicable to all WTO Members as emphasised in the preamble and how forum of choice clauses in RTAs are dealt with.

Procedural overlaps occur when a country challenges another country under a regional trade agreement first and then before the WTO or vice versa. This is also referred to as the institutional perspective when discussing fragmentation of international law, and which was under the examination of the International Law

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[67] Soprano, Roberto, *WTO Trade Remedies in International Law, their role and place in a fragmented international legal system*, Routledge Research in International Economic Law, (2019), page 33.

[68] Joost Pauwelyn, *Conflicts of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge Studies in International and Comparative Law, (2003), pages 478-86.

[69] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 18.

[70] Kyung, Kwak and Marceau, Gabrielle, Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, International Economic Law, (Oxford, 2006), page 468.

Commission (ILC).[71] An *overlap of substantial rules* occurs when a claim is brought before a court and special rules on applicable law and conflict exist, which could be outside or within the dispute settlement mechanism. This thesis will in relation to the rules on safeguard measures examine forum of choice clauses or forum shopping in RTAs and if these comply with WTO law.

1.2 Research aim and research questions

According to the preamble, the Agreement on Safeguards is applicable to all Members. It will be examined in this thesis what "applicable to all" means and in relation to that investigate whether it is possible to discriminate under the safeguard rules.

As mentioned, safeguard measures should be applied on a non-discriminatory basis, *i.e.* directed at all imports of a particular product irrespective of its origin. The enquiry of how the WTO-principle of non-discrimination is upheld in the case of safeguard measures does, in its turn, lead to several sub-questions.

Firstly, one must find the answer to the question of whether selective and discriminative safeguard measures are at all allowed according to WTO law and thus provide the possibility to exclude certain parties.

Secondly, to be able to answer whether selective safeguard measures are allowed in regional trade agreements, we must begin with the issue of whether safeguard measures may be incorporated in regional trade agreements concluded under GATT Article XXIV. This question is furthermore complicated since developing countries can notify their regional trade agreements not only under GATT Article XXIV but also under the Enabling Clause. Therefore, it will also be examined if it is allowed to include safeguard measures in regional trade agreements notified under the Enabling Clause. Should this be the case, it will be examined if GATT Article XXIV and the Enabling Clause allow for selective safeguard measures and thus the exclusion of certain parties in the application of regional safeguard measures.

Rules on multilateral safeguard measures and regional safeguard measures can be described as two different remedies which deal with problems arising from two different initiatives. That is why regional safeguard measures have their own justification alongside the multilateral ones.

Summarizing from the above, the following research questions are reviewed in this thesis:

[71] However, they examine the substantive aspect in fragmentation of international law.

- When should an applied measure be analysed under the Agreement on Safeguards and what distinguishes a safeguard measure from other trade restrictive measures?
- Safeguard measures should be applied on a non-discriminatory basis, *i.e.* directed at all imports of a particular product irrespective of its origin. How is this principle upheld, and when are selective safeguard measures allowed according to WTO law?
- Is it allowed to include rules on safeguard measures in RTAs notified under GATT Article XXIV and/or the Enabling Clause?
- When are selective safeguard measures allowed to be used in RTAs and is it allowed to exclude certain parties in the application of safeguard measures according to Article XXIV and the Enabling Clause?
- Forum of choice clauses in RTAs regarding rules on safeguard measures imply that it is either the RTA dispute settlement mechanism or the WTO DSB that ought to handle a dispute. If RTAs prevail over WTO law, is the Agreement on Safeguards applicable to all?

These questions serve as the general framework for the study. They are in their turn divided into several more specified sub-questions which are presented and discussed in their relevant contexts.

How the study will be performed will be described in the next section.

1.3 Research methodology and material

The previous sections have outlined the background and some of the legal problems with rules on safeguard measures that will be highlighted and analysed in this thesis. The following chapters will identify, describe and assess the rules and practice of safeguard measures. How this study has been performed and the methodology used is further described below.

In this thesis a legal dogmatic method is used to review, analyse and assess the rules on safeguard measures in order to fulfil the aim of the thesis and to answer the research questions. The safeguard rules under WTO law and under RTAs are described and analysed. The method is therefore used to foremost illustrate and describe the current legal situation, but also to criticise it. Some comparisons are also done to describe some of the differences and similarities between multilateral and regional rules on safeguard measures as well as to identify potential conflicts.

Legal doctrine or legal dogmatic research can be described as:

> "research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field or institution and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law."[72]

The objective of a traditional legal methodology, in this regard, is to describe and analyse the legal rules to be found in primary sources. Furthermore, to describe the current status of law by systematise and describe legal rules and to suggest observations and comments to identify the area of research; safeguard measures. To build further on existing research, this study also uses legal doctrine and doctrinal analysis where legal opinions are evaluated,[73] as described in the next section.

The research methodology in this thesis is closely related to some principles or interpretation aspects in connection to WTO law. In order to understand the purpose of the Agreement on Safeguards, it is essential to study the wording of the legal text and the rationale behind the case law, *i.e.* the object and purpose, as well as legal doctrine. As indicated above, the method of interpreting the Agreement on Safeguards by the DSB is based on the same principles as interpreting WTO Agreements; "focusing on the text of the WTO Agreements through customary norms of treaty interpretation as set out in Article 31-3 of the Vienna Convention on the Law of Treaties".[74]

Article 31(1) VCLT contains the main principle of treaty interpretation and stipulates that 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'. Therefore, an essential part of this thesis is devoted to examining the context of the rules on safeguard measures in the light of its object and purpose. In this thesis, the "object and purpose" of safeguard measures means the combination of the textual aim as charted in the preamble. The history of the creation of safeguard measures is also used to support those findings of the object and purpose, *i.e.* the balance between free trade and protection. In accordance with the rule on treaty interpretation, it "must rely primarily on the terms of a treaty while context and the treaty's object and purpose must inform its meaning".[75]

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[72] Smits, Jan M., What is legal doctrine? On the aims and methods of legal-dogmatic research, *Maastricht European Private Law Institute*, Working Paper No. 2015/06, page 5.

[73] See for example Martin H. Redish, The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine, 85 Colum. L. Rev. 1378 (1985), and Posner, A. Richard, The Present Situation in legal Scholarship, *The Yale Law Journal* Vol. 90, No. 5, *Symposium on Legal Scholarship: Its Nature and Purposes* (April, 1981), pp. 1113-1130, Posner, Richard A. *The Problematics of Moral and Legal Theory*, Harvard University Press, (1999), and Peczenik, A. *A theory of legal doctrine*, (2001), 14 Ratio Juris, 75.

[74] Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 2.

[75] Jonas, S. David, and Saunders, N. Thomas, The Object and Purpose of a Treaty: Three Interpretive Methods, *Vanderbilt Journal of Transnational Law*, Vol 43, Number 3, (May 2010), page 578.

Consequently, the balance of free trade and protection is used as a context of interpreting the safeguard rules as mentioned above.

In connection to 'context', Article 31(2) VCLT specifies that, in addition to the text including preamble and annexes, any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty, can be used as a means of interpretation. Together with the context, according to Article 31(3) VCLT, any subsequent agreement or practice regarding the interpretation of the treaty shall also be taken into consideration. Consequently, RTAs including rules on safeguard measures will be reviewed and in particular how these relate to WTO law.

Context has also been interpreted by the Appellate Body in *China – Auto Parts*:

> "The realm of context as defined in Article 31(2) is broad. "Context" includes all of the text of the treaty — in this case, the WTO Agreement — and may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" and "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". Yet context is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue. Thus, for a particular provision, agreement or instrument to serve as relevant context in any given situation, it must not only fall within the scope of the formal boundaries identified in Article 31(2), it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language."[76]

This means that the research strategy is based on analysing the legal rules on the Agreement on Safeguards, the interpretation and literature, but also go beyond that and examine the context of the rules on safeguard measures. The panels and the Appellate Body interpret the WTO agreements within their jurisdiction in a contextual and effective manner.[77] It is the privilege of the interpreter to decide how the context comes into play.[78] The panels and the Appellate Body have a broader understanding of context than is described in Article 31 VCLT as it includes other codified and non-codified principles of interpretation.[79] The Appellate Body has

[76] Appellate Body Reports on China — Measures Affecting Imports of Automobile Parts, (*China – Auto Parts*), WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, (15 December 2008), para. 151.

[77] See Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, International Economic Law, Oxford University Press, (2009).

[78] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, International Economic Law, Oxford University Press, (2009), page 213.

[79] Ibid, page 272.

also recognised the principle of effectiveness.[80] The application of this principle gives meaning to the text only to the extent necessary and relevant to ensure effectiveness.[81]

Thus, the rules on safeguard measures will be examined regarding their context and in the light of their objects and purposes, as well as in terms of their effectiveness. This strategy enables a critical approach to the thesis. By using the purpose of the Agreement on Safeguards as stated in the preamble as a base, this thesis will explore whether the purpose of Agreement on safeguards actually is fulfilled and if not, whether the root of the problem lies in the design of the rules or in the application.

There has previously not been much examination on the features of a safeguard measure and interpretations on what a safeguard measure is. If there is uncertainty as to whether a measure is a safeguard measure and also when selective measures can be imposed, this creates uncertainty as to what WTO Members can and cannot do. Under the "rule of law", nations rely on predictability of the world trade laws and how for example trade defence measures will be used. This predictability emphasises the economic aspects of applying trade defence measures, such as safeguard measures, since other nations will then understand the implications it will have on international trade.

As will be pointed out in Chapter 2, the DSB can for example investigate whether a given primary rule is applicable to the facts or if it is subject to contrary applicable law.[82] Most often, the disputes brought before the DSB in regards to safeguard measures has considered whether the measures has been applied in accordance with the Agreement on Safeguards as well as Article XIX GATT. In Chapter 2, the applicable law will be analysed, and it will be examined if and when the Agreement on Safeguards is applicable. This will be done by using the methods for interpreting rules on safeguard measures under WTO law.

Chapter 6 discusses the jurisdiction of the WTO DSB and it is for example pointed out that Article 11 DSU state that the panel:

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[80] Ibid, page 282. See for example also Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 ("*US – Offset Act (Byrd Amendment)"),* WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003), para. 271; Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, (US — Gasoline), WT/DS2/AB/R, 29 April 1996, p. 21; Appellate Body Report Japan — Taxes on Alcoholic Beverages (Japan — Alcoholic Beverages II), WT/DS8/AB/R ; WT/DS10/AB/R ; WT/DS11/AB/R, 4 October 1996, pp. 106, 111; Appellate Body Report on Korea – Definitive safeguard measure on imports of certain dairy products, (*Korea — Dairy*), WT/DS98/AB/R, (14 December 2009), para. 80; Appellate Body Report on Argentina – safeguard measures on imports of footwear, (*Argentina – Footwear (EC*)), WT/DS121/AB/R, (14 December 1999), para. 81.

[81] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, International Economic Law, Oxford University Press, (2009), page 278.

[82] Bartels, Lorand, Jurisdiction and Applicable Law in the WTO, *Society of International Economic Law*, Working Paper No. 2016/18, pages 1-2.

> "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

So far, the most common disputes between the WTO Members have concerned differences of interpretation of substantive provisions of the WTO Agreements.[83] Some disputes have however examined the institutional aspects of WTO law and overlaps of jurisdiction, as elaborated in Chapter 6. The authority to interpret WTO Agreements are highlighted in Article IX:2 of the Marrakech Agreement and the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the Marrakech Agreement and of the Multilateral Trade Agreements.[84] Waivers of WTO obligations are also handled in Article IX. Conflict of norms, comparative dispute settlement mechanisms and constitutional relationship between RTAs and WTO, are areas of legal pluralism and constitutions of the WTO.[85] Relevant rules of international law, as well as Article XXIV GATT and interpretation of the RTAs can support to interpret these areas as emphasised in Chapter 6.

As described above, some comparisons are also made. One of the main themes of the study is the relation between the rules on multilateral safeguard measures on the one hand and regional safeguard measures on the other. The trade agreements chosen for this study and why will be described further below in section 1.3.3. This thesis basically makes comparisons between different multilateral and regional solutions regarding the design, application and to some extent interpretation of the rules on safeguards. Comparisons are also made between different kinds of trade measures in order to try to find an answer to what safeguard measures are and how forum of choice clauses are dealt with. Comparisons are made between RTAs in connection to safeguard measures, WTO law and forum of choice clauses. It is however not a comparative study as such, the study does not review different legal systems in detail. Thus, it is not a study on a legal pluralism per se, but rather the focus is on what happens when dealing with different sets of jurisdictions and the complexity with handling different legal sources when using a legal dogmatic method. In the comparisons between multilateral and regional rules on safeguard

[83] Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 67.

[84] Marrakesh Agreement Establishing the World Trade Organization,

[85] See for example Cottier, Thomas and Foltea, Marina, Constitutional Functions in the WTO and Regional Trade Agreements, in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, (2006) and Kyung Kwak and Marceau Gabrielle. Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements in Bartels, Lorand and Ortino, Federico, *Regional Trade Agreements and the WTO Legal System*, International Economic Law, Oxford, (2006).

measures, an assessment is made with the assumption that the rules on regional safeguard measures should comply with WTO law. Furthermore, there is especially one section in the thesis where national measures (the US Ad valorem duties on steel and aluminium) are compared and assessed whether they comply with WTO law. Legal systems can be compatible, but they can also come into conflict.

As referred to above, Lee has presented two scenarios with probable conflicts between rules on regional safeguard measures and multilateral safeguard measures. The first scenario is when a *regional* safeguard measure is applied at a level which exceeds the rate of duty applicable to non-RTA members on an MFN basis.[86] The other scenario is when the RTA requires that the imports from RTA parties shall be excluded from the application of safeguard measures.[87] There are more areas though, such as when there are different foras interpreting and handling the dispute. As will be seen in this thesis, there is a difference between multilateral and regional safeguard measures and when they can be applied. Safeguard measures can exist on national level, regional level and multilateral level under different circumstances for the markets, making it difficult to understand when, if and to whom a measure can be applied.

1.3.1 Material studied and prior research

The material examined comprises first of all the multilateral WTO rules on safeguard measures, *i.e.* GATT Article XIX and the Agreement on Safeguards.[88] Furthermore, the project's focus on rules on safeguard measures in RTAs means that attention has been paid to the exception to the rules for customs unions and free trade areas to be found in GATT Article XXIV and in the Enabling Clause, the latter being the basis for allowing special trade preferences to developing countries.

When studying rules on safeguard measures in RTAs, a selection needed to be made among the large number of existing agreements. For the purpose of this study, some RTAs have been examined more thoroughly when it comes to forum of choice clauses. These agreements will be presented below.

The reports from the different panels and the Appellate Body which concern safeguards measures as well as the relationship between RTAs and WTO have been

[86] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3rd Ed., Edward Elgar, (2014), page 260.

[87] Ibid.

[88] This thesis does not examine Article 5 of the Agreement on Agriculture. During the negotiations in the WTO a decision was made to introduce a new special safeguard measure (SSM) in the agricultural sector. See Decision Adopted by the General Council on 1 August 2004, WT/L/579, para. 42.

considered. In addition, numerous articles and books have shed light on and contributed to different aspects of the topic.

Some years ago, several books and articles were published in the area of safeguard measures. Some examples are *Safeguard Measures in World Trade* by Yong-Shik Lee,[89] *The WTO Agreement on Safeguards* by Alan O. Sykes[90] and *Recognition and Regulation of Safeguard Measures Under GATT/WTO* by Sheela Rai[91], *Selective Safeguard Measures in Multilateral Trade Relations: Issues of Protectionism in GATT, European Community and United States Law*[92] by Marco Bronckers. Both Sykes[93] and Lee[94] have also published several articles on safeguard measures.

According to Lee, there are still some ambiguities in the provision of the Agreement on Safeguards.[95] Sykes argues that the Appellate Body has failed to provide standards as to when safeguards are permissible.[96] Lee disagrees with Sykes and holds that the measures reviewed in these disputes all failed to comply with obvious requirements under the Agreement on Safeguards. Contrary to Sykes, he is of the opinion that the requirements have been well established by the panels and the Appellate Body. However, he admits that there is still some ambiguity regarding the interpretation of the term "unforeseen developments".[97] Lee does however propose a number of changes to the Agreement on Safeguards in order to enhance clarity

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[89] Lee, Yong-Shik, *Safeguard Measures in World Trade Law, The Legal Analysis,* Kluwer Law International, 2nd ed, (2005).

[90] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press. (2006).

[91] Rai, Sheela, *Recognition and Regulation of Safeguard Measures Under GATT/WTO*, Routledge Research in International Economic Law, (2011).

[92] Bronckers, M.C.E.J., Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law, Kluwer (1985).

[93] Sykes, Alan O., The Safeguard mess: A critique of WTO Jurisprudence, The Law School The University of Chicago, May 2003, Sykes, Alan O., The "Safeguard mess" revisited – a reply to Professor Jones, *World Trade Review* (2004), 3:1, 93-97, Sykes, Alan O., *The WTO Agreement on safeguards.* Oxford University press. (2006) and Sykes, Alan O., The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute. 7 *Journal of International Economic Law* 3 (2004).

[94] Lee, Yong-Shik, Reclaiming Development in the World Trade System, Cambridge University Press, (2006), Lee, Yong-Shik, Safeguard Measures: Why Are They Not Applied Consistently With the Rules?, Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards, 36 *Journal of World Trade* (2002), pages 641-673, Lee, Yong-Shik, Not without a clue: Commentary on "the Persistent Puzzles of Safeguards", *Journal of World Trade* 40(2), (2006) pp. 385-404 and Lee, Yong-Shik, Comments on the Recent Debate on Safeguards – Difference in Perspectives, Not a Failure of Appreciation, *Journal of World Trade* 40(6), (2006) pp. 1145-1147.

[95] Lee, Yong-Shik, *Safeguard Measures in World Trade, The Legal Analysis,* Edward Elgar, 3rd ed., (2014), page 177.

[96] Sykes, Alan, O., The Safeguard Mess: A critique of WTO Jurisprudence, *Chicago John M. Olin Law & Economics* Working Paper No. 187, page 1 and 31.

[97] Lee, Yong-Shik, Not without a clue: Commentary on "the Persistent Puzzles of Safeguards", *Journal of World Trade* 40(2):385-404 (2006), page 386.

and consistency of the rules on safeguards.[98] Thus, Lee ultimately believes that the measures are not applied correctly by the WTO Members while Sykes argues that the root of the problem lies in the design of the WTO rules.

Sykes states:

> "the safeguards decisions to date by the WTO Appellate Body have failed to articulate any coherent doctrine as to when safeguard measures are allowable. Rather than providing useful guidance for the resolution of textual conundrums, they make it increasingly difficult for WTO members to employ safeguard measures at all. Every safeguards measure that has been challenged has been ruled to be a violation of WTO law, and there is no end in sight to this string of adverse rulings. If the WTO continues on its present course, considerable pressure may develop for a return to "extra-legal" measures such as voluntary restraint agreements, measures that the WTO Agreement on Safeguards sought to eliminate."[99]

However, for some time the research interest for safeguard measures seems to have decreased. There has also not been a lot of research on the definition of safeguard measures. Nor has there been thorough research on forum of choice clauses when it comes to rules on safeguard measures. Due to the new activities on the application of multilateral safeguard measures, research is expected to pick up in the near future. Thus, there is a need to define the applicability of the WTO rules on safeguard measures as well as the implications of the regional rules on safeguard measures. This thesis has the ambition to describe and analyse some of these new activities. Hence, this thesis contributes to existing studies by building on other legal dogmatic studies, but it also makes comparisons between multilateral and regional rules on safeguard measures to establish new areas of research.

Some research has been done on the issue of overlapping jurisdictions and the relationship between RTAs and multilateral trade agreements. For example, Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law relates to other rules of international law*, and Lorand Bartel and Federico Ortino's *Regional Trade Agreements and the WTO Legal System*.[100] Another volume is Richard Baldwin and Patrick Low's *Multilateralizing Regionalism – Challenges for the Global Trading System*.[101] James H. Mathis' book *Regional Trade Agreements*

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[98] Lee, Yong-Shik, *Safeguard Measures in World Trade, The Legal Analysis*, Edward Elgar, 3rd ed., (2014), page 328.

[99] Sykes, Alan, O., The Safeguard Mess: A critique of WTO Jurisprudence, *Chicago John M. Olin Law & Economics* Working Paper No. 187, (2003), page 3.

[100] Bartels, Lorand and Ortino, Federico, *Regional Trade Agreements and the WTO Legal System*, International Economic Law, Oxford, (2006).

[101] Baldwin, Richard, Evenett, Simon and Low, Patrick, Multilateralizing non-tariff RTA commitments, in Richard Baldwin and Patrick Low (ed), *Multilateralizing Regionalism – Challenges for the Global Trading System,* The Graduate Institute Geneva, (2009).

in the GATT/WTO: Article XXIV and the Internal Trade Requirement,[102] provides information about the connections between GATT Article XXIV and regional trade agreements. Also Roberto Soprano, *WTO Trade Remedies in International Law, their role and place in a fragmented international legal system*[103] and Thomas Cottier and Panagiotis Delimatsis, *The Prospect of International Trade Regulation, from fragmentation to coherence*,[104] as well as Howse Robert, Ruiz-Fabri Hélene, Ulfstein Geir and Zang Michelle Q, *The Legitimacy of International Trade Courts and Tribunals*, *Studies on international courts and tribunals,*[105] does bring knowledge in the area. This study contributes by using rules on safeguard measures as a base for studying RTAs and overlaps of jurisdiction.

1.3.2 Interpretation of safeguard measures

This section will introduce how the panels and the Appellate Body interpret the Agreement on Safeguards. However, before that an introduction to the WTO is in place.

The WTO is run by its member governments and all major decisions are made by the membership. The rules are prescribed by the members themselves under agreed procedures that they themselves negotiated, including the possibility of imposing trade sanctions. The sanctions are authorized by the membership as a whole but executed by member countries. The Ministerial Conference is the highest authority and can take decisions on all matters under any of the multilateral trade agreements, if so requested by a Member.[106] The General Council acts on behalf of the Ministerial Conference and conduct its functions in between the Ministerial Conference meetings, and in different constellations they form the Council itself, the Dispute Settlement Body and the Trade Policy Review Body.[107] Three more councils and six other bodies report to the General Council. At the meetings of the Ministerial Conference and the General Council, each Member of the WTO has one vote.[108]

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[102] Mathis, James H., Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement, The Hague: T.M.C. Asser Press, (2002).

[103] Soprano, Roberto, *WTO Trade Remedies in International Law, their role and place in a fragmented international legal system*, Routledge Research in International Economic Law, (2019).

[104] Cottier, Thomas and Delimatsis, Panagiotis, *The Prospect of International Trade Regulation, from fragmentation to coherence*, Cambridge University Press, (2011).

[105] Howse Robert, Ruiz-Fabri Hélene, Ulfstein Geir and Zang Michelle Q, *The Legitimacy of International Trade Courts and Tribunals, Studies on international courts and tribunals,* Cambridge University Press, (2018).

[106] Agreement establishing the WTO, Article IV.1.

[107] Ibid, Article IV.2-4.

[108] Ibid, Article IX.1.

In accordance with Article IX Marrakech Agreement, the Ministerial Conference and the General Council has exclusive authority to adopt interpretations of the WTO Agreement. This was also underlined by the Appellate Body in *US – Wool Shirts and Blouses*:

> "As India emphasizes, Article 3.2 of the DSU states that the Members of the WTO 'recognize' that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[109]
>
> We note, furthermore, that Article IX of the WTO Agreement provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements.[110]"[111]

The difference between an authoritative interpretation and an interpretation in dispute settlement was noted in *US – FSC*:

> "Under the WTO Agreement, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the DSU, the rulings and recommendations of the DSB serve only 'to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements.'"[112]

[109] (footnote original) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the DSU.

[110] (footnote original) Japan – Taxes on Alcoholic Beverages, AB-1996-2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

[111] Appellate Body Report, United States - Measure affecting imports of woven wool shirts and blouses from India, *(US – Wool Shirts and Blouses),* WT/DS33/AB/R, (25 April 1997), pages 19-20.

[112] Appellate Body Report on United States — Tax Treatment for "Foreign Sales Corporations", *(US – FSC),* WT/DS108/AB/R, (24 February 2000), fn. 127.

Article 3.2 DSU state:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

It is thus clear that the WTO DSB has the authority to *clarify* the provisions of the covered agreements, but only address those claims which must be addressed in order to *resolve the matter in issue in the dispute*. The authority to interpret is also to be worked out "on the basis of a recommendation by the Council overseeing the functioning of that agreement".[113] This also means that the Panel and the Appellate Body can only be involved in interpretations due to a specific dispute between parties, while the General Council and the Ministerial Conference have a wider scope and can interpret irrespective of a dispute.

However, the Appellate Body has given clarifications despite it being irrelevant to a specific case. One example being the *US – Steel Safeguards* regarding causation.[114] It should be noted that the Appellate Body has been criticized for debating subjects outside those required to resolve disputes before it, filling gaps that the WTO Members left in the Covered Agreements, and unlawfully making new law under the appearance of legal interpretations which are in turn treated as precedents.[115] The DSU has also been criticized for lack of clarity.[116]

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[113] Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 69.

[114] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, *(US – Steel Safeguards),* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), para. 484.

[115] Suttle, Oisin, *Rules and Values in International Adjudication: The case of the WTO Appellate Body*, International and Comparative Law Quarterly, Vol 68, Issue 2, (April 2019), page 399 and Office of the United States Trade Representative (USTR), 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program (2018) 22-8.

[116] Horlick, Gary and Coleman, Judith, The Compliance Problems of the WTO, (2007), *Arizona Journal of International & Comparative Law,* page 141 and Davey, William, Compliance Problems in the WTO Dispute Settlement, (2009), *Cornell International Law Journal*, vol. 42, pages 119-128.

Interestingly, there is no absolute doctrine of precedent in the WTO.[117] In *US – Stainless Steel (Mexico),* the Appellate Body stated:

> "It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the ratio decidendi contained in previous Appellate Body reports that have been adopted by the DSB.
>
> …
>
> Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." (footnotes omitted)[118]

Hence, the WTO DSB regularly refer to its own case law. The Appellate Body is an adjudicatory body that will resolve the same legal question in the same way in a subsequent case.[119] According to Article 3.2. DSU, WTO dispute settlement "is a central element in providing security and predictability to the multilateral trading system".

The question of precedent is apparently also one of the reasons for the US to block the appointment of AB Members.[120] Lester and Bacchus also refer to Article 3.2 DSU and state that:

> "'Security and predictability' is just another way of referring to the certainty and the foreseeability that traders need to engage in trade. Consistent reasoning over time in the clarification of WTO obligations through dispute settlement is a key element of ensuring this 'security and predictability'. If legal reasoning about the meaning of an obligation were to change from one case to the next, the multilateral trading system would have neither 'security' nor 'predictability'. The global flow of trade would be

[117] Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 74, and see also Appellate Body Report Japan – Taxes on Alcoholic Beverages, *(Japan – Alcoholic Beverages),* WT/DS8-11/AB/R, (1 November 1996).

[118] Appellate Body Report on United States – Final anti-dumping measures on stainless steel from Mexico, *US – Stainless Steel (Mexico),* WT/DS344/AB/R (30 April 2008), para 158 and 160.

[119] Charnovitz, Steve, How WTO Dispute Settlement Succumbed to the Trump Administration, *GL Law Faculty Publications & Other Works*, (2019), page 11.

[120] Bacchus, James & Lester, Simon. 'The Rule of Precedent and the Role of the Appellate Body'. *Journal of World Trade* 54, no. 2 (2020): 183–198, page 185.

disrupted and diminished, and the inevitable result would be fewer global gains from trade."

However, legal interpretation differs from regular authoritative interpretations which is "binding on the parties and any organ which decides on their rights and duties on a basis of delegated authority".[121] The Appellate Body has stated that the objective of authoritative interpretations "is to clarify the meaning of existing obligations, not to modify their content".[122] Similarly, WTO law is not meant to advance judicially and is to remain the same in WTO dispute settlement.[123]

According to Qureshi, the judicial interpretation is also subject to two limitations;

- The DSB cannot add or diminish the rights and obligations provided in the covered agreements (as seen above in Article 3.2 DSU)
- The DSB are to interpret the WTO agreements in accordance with "customary rules of interpretation of public international law" [124] (as emphasised above and below)

Qureshi also states that "the institutionalization of both legislative and judicial interpretative functions in the WTO has meant that the latter has had to be interpreted in the shadow of the former".[125]

The method of interpreting the Agreement on Safeguards, is based on the same principles as interpreting WTO Agreements; "focusing on the text of the WTO Agreements through customary norms of treaty interpretation as set out in Article 31-3 of the Vienna Convention on the Law of Treaties".[126]

Article 31 of the VCLT has been discussed in for example the *US – Gasoline* case:

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[121] See Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 26. Qureshi calls this "legislative interpretation" and state that WTO interpretation differ from it since it is "binding on the membership as a whole", Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 74.

[122] Appellate Body Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, (*EC – Bananas III*), WT/DS27/AB/R, (9 September 1997), para. 383.

[123] Bacchus, James & Lester, Simon. 'The Rule of Precedent and the Role of the Appellate Body'. *Journal of World Trade* 54, no. 2 (2020): 183–198, pages 188-189.

[124] See Qureshi, H., Asif, Interpreting WTO Agreements, Problems and Perspectives, Cambridge University Press, (2015), and for example the Appellate Body Reports on *United States – Standards for reformulated and Conventional Gasoline,* WT/DS2/AB/R, (20 May 1996), and *Japan – Taxes on Alcoholic Beverages,* WT/DS8-11/AB/R, (1 November 1996).

[125] Qureshi, H., Asif, *Interpreting WTO Agreements, Problems and Perspectives,* Cambridge University Press, (2015), page 81.

[126] Ibid, page 2.

> "That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the Marrakesh Agreement Establishing the World Trade Organization35 (the "WTO Agreement"). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[127]

The Appellate Body has fairly often referred the ordinary meaning to what is stated in dictionaries.[128] This will be attended to again further below in Chapter 2.

While it is not totally clear what the US want to change in regards to the blocking of new members to the Appellate Body, it is at least clear that it is the disputes in anti-dumping, countervailing duties and safeguard measures that have raised the concern.[129] Stewart and Drake believe that the "WTO decisions are undermining the ability of the U.S. and other countries to effectively enforce their trade remedy laws, laws which provide the vital first line of defense for domestic industries and workers injured by dumped and subsidized imports."[130] As mentioned, the Appellate Body has also been criticized for debating subjects outside those required to resolve disputes before it, filling gaps that the WTO Members left in the Covered Agreements, and unlawfully making new law under the appearance of legal

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[127] Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, (*US — Gasoline),* WT/DS2/AB/R, 29 April 1996, p. 17.

[128] See for example Appellate Body Report on European Communities – Customs classification of frozen boneless chicken cuts, (*EC – Chicken Cuts*), WT/DS269/AB/R WT/DS286/AB/R, (12 September 2005), paras. 175-176 and the Appellate Body Report on United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (*US — Gambling*), (WT/DS285/AB/R, WT/DS285/AB/R/Corr.1), (7 April 2005), para. 164.

[129] See Stewart, Terence P. and Drake, Elizabeth J., *How the WTO Undermines U.S. Trade Remedy Enforcement*, (February 2017), available at http://s3-us-west-2.amazonaws.com/aamweb/uploads/research-pdf/WTOReport_R3.pdf. See also, Appellate Body Report, United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WTO Doc. WT/DS294/AB/ (adopted on May 9, 2006); Appellate Body Report, United States — Continued Existence and Application of Zeroing Methodology, WTO Doc. WT/DS350/AB/R (adopted on February 19, 2009), Appellate Body Report, United States — Measures Relating to Zeroing and Sunset Reviews, WTO Doc. WT/DS322/AB/R (adopted on January 23, 2007); Appellate Body Report, Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada, WTO Doc. WT/DS264/AB/R (adopted on September 1, 2006); Appellate Body Report, Argentina- Safeguards Measures on Imports of Footwear, WTO Doc. WT/DS121/AB/R (adopted on January 12, 2009), Appellate Body Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS370/R (adopted on March 25, 2011).

[130] Stewart, Terence P. and Drake, Elizabeth J., *How the WTO Undermines U.S. Trade Remedy Enforcement*, (February 2017), page 1.

interpretations which are in turn treated as precedents.[131] Suttle states that this raises fundamental questions about the nature of legal reasoning. To which extent "adjudicators' decisions can, or should be, determined exclusively by reference to the texts, practices and conventions that are conventionally labelled sources, and about how far adjudicators may (or must) grapple with the substantial values at stake in their decisions".[132] Interestingly, as mentioned above, the WTO DSB has never ruled in favour of the respondent in disputes concerning safeguard measures.

Article 3.4 in the Dispute Settlement Understanding (DSU) state:

> "Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

Article 3.7 DSU:

> "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

This is also supported in *Argentina – Import Measures*, where the Appellate Body stated that the "proper exercise of judicial economy is linked to the aim of securing "a positive solution to a dispute", as reflected in Article 3.7 of the DSU, as well as to the duty imposed on panels by Article 11 of the DSU to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[133]

Appeals in the Appellate Body shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel according to Article 17.6. A panel should in accordance with Article 11:

> "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the

[131] Suttle, Oisin, Rules and Values in International Adjudication: The case of the WTO Appellate Body, *International and Comparative Law Quarterly, Vol* 68, Issue 2, (April 2019), page 399 and Office of the United States Trade Representative (USTR), 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program (2018) 22-8.

[132] Suttle, Oisin, Rules and Values in International Adjudication: The case of the WTO Appellate Body, *International and Comparative Law Quarterly,* Vol 68, Issue 2, (April 2019), page 399.

[133] Appellate Body Reports, (*Argentina – Import Measures)*, Argentina – Measures affecting the importation of goods, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, (15 January 2015), para. 5.189 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 331).

> relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

However, it is not the responsibility of the Appellate Body nor the panels to determine what the rules and procedures of the DSU ought to be, the authority to amend the DSU or to adopt such interpretations is the responsibility of the WTO Members.[134]

In *Argentina – Footwear (EC),* the Appellate Body stated:

> "We note that the very terms of Article 4.2(c) of the Agreement on Safeguards expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the Agreement on Safeguards. More particularly, given the express language of Article 4.2(c), we do not see how a panel could ignore the publication requirement set out in Article 3.1 when examining the publication requirement in Article 4.2(c) of the Agreement on Safeguards. And, generally, we fail to see how the Panel could have interpreted the requirements of Article 4.2(c) without taking into account in some way the provisions of Article 3. What is more, we fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."[135]

The Appellate Body has referred to the "objective assessment" in some cases, and has come to the conclusion that the panel needs to do an independent and objective assessment, which also mean that they can assess not only what has been raised by the parties as seen in Chapter 2.[136] The governing law is WTO law, rather than public

[134] Appellate Body Report on United States – Import measures on certain products from the European Communities, (*US — Certain EC Products*), WT/DS165/AB/R, (11 December 2000), para. 92.

[135] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)*), WT/DS121/AB/R, (14 December 1999), para. 74.

[136] See for example Appellate Body Report on European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft, (*EC and certain member States — Large Civil Aircraft*), WT/DS316/AB/R, (18 May 2011), para. 1128, Appellate Body Report, US – Countervailing Measures (China), WT/DS437/AB/R, (18 December 2014), para. 4.198 and paras. 4.188-4.190 and 4.196, Appellate Body Report on Russia – Anti-dumping duties on light commercial vehicles from Germany and Italy, (*Russia – Commercial Vehicles*), WT/DS479/AB/R, (22 March 2018), paras. 5.125-5.127.

international law.[137] However, no one seems to argue against Pauwelyn's opinion that WTO law is *part* of public international law.[138]

The purpose of the Agreement on Safeguards is to clarify and reinforce GATT Article XIX (and other GATT provisions). The aim is to restore multilateral control over safeguards and eliminate all measures that are not included in the Agreement. It also aims to support structural alterations on the part of industries negatively affected by increased imports. Such emergency actions are clearly supposed to be used in extraordinary cases only. The fact that no actions as of yet have been found to be consistent with WTO law confirms this interpretation. Thus, the complaining Member has so far won all cases where safeguard measures have been questioned. An illustrative proof is the statement of the Appellate Body in the dispute in *Argentina – Footwear (EC)*:

> "In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions.' And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy."[139]

Furthermore, the Appellate Body found that the object and purpose of GATT Article XIX also confirmed its interpretation. The Appellate Body held that since safeguard measures are a fair-trade remedy, and thereby different from anti-dumping and countervailing duties, they must only be used on extraordinary occasions. Accordingly, the prerequisites for taking such actions, their extraordinary nature must be taken into account.[140]

This view was later confirmed in the dispute *US – Line Pipe* in which the Appellate Body recognised that there is a tension between the appropriate scope of the right to

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[137] Steger, Debra, The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation' in *Ten Years of WTO Dispute Settlement* (International Bar Association 2007).

[138] Pauwelyn, Joost, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press (2003), page 25.

[139] Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 93. See also Appellate Body Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (14 December 1999), para. 86.

[140] Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 87.

apply safeguard measures and the need to ensure that safeguard measures are not applied against fair trade beyond what is necessary to provide extraordinary and temporary relief, *i.e.* some kind of proportionality is required.[141]

As the rules on safeguard measures to be examined in this thesis are contained in various international treaties, legal sources for interpretation prescribed in international law will be used. The point of departure here are the rules for interpretation included in the Vienna Convention on the Law of Treaties (VCLT)[142], which is a codification of customary international law.[143] These rules can be used to interpret any international treaty and have also been accepted by the Dispute Settlement Body of the WTO as a means of interpreting the WTO agreements.[144] The VCLT applies to treaties between States as laid out in Article 1, and thus also applicable on RTAs between any of the parties to the VCLT.

Article 31(1) VCLT contains the main principle of treaty interpretation as already mentioned. The uncertainty with safeguard measures makes it necessary to interpret the purpose, rather than relying on the text itself and a textual approach to what is written in the articles. Article XIX and the Agreement on Safeguards are textually different, and the purpose cannot be found in the texts only. Thus, there is a need to review the context of safeguard measures and the purpose.

Regarding the term 'context', Article 31(2) VCLT stipulates that, in addition to the text including preamble and annexes, any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty, can be used as a means of interpretation.

Together with the context, according to Article 31(3) VCLT, any subsequent agreement or practice regarding the interpretation of the treaty shall also be taken into consideration. When it comes to the GATT, this means examining the extensive practice of the DSB.[145] Finally, any relevant rules of international law applicable to the relations between the parties shall be taken into account.

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[141] Appellate Body Report on United States – Definitive Safeguard Measures on imports of circular welded carbon quality Line Pipe from Korea. *(US – Line Pipe),* WT/DS202/AB/R, (8 March 2002), para. 84.

[142] Done at Vienna, 23 May 1969, 1155 United Nations Treaty Series 331. Entry into force on 27 January 1980, in accordance with article 84(1).

[143] See Lennard, Michael, 'Navigating by the Stars: Interpreting the WTO Agreements', *Journal of International Economic Law* (2002), pp. 17-89, at p. 17.

[144] See the Appellate Body Reports on *United States – Standards for reformulated and Conventional Gasoline,* WT/DS2/AB/R, (20 May 1996), and *Japan – Taxes on Alcoholic Beverages,* WT/DS8-11/AB/R, (1 November 1996).

[145] By January 2019, 577 disputes had been brought to the WTO. 61 of those disputes concerned safeguard disputes. In all of these, the safeguard measure in question has been found to be inconsistent with the WTO rules, which suggests that the rules are difficult to comply with. See Lee, Yong-Shik, 'Safeguard Measures: Why Are They Not Applied Consistently With the

1.3.3 Selection of Regional Trade Agreements

As already mentioned, the thesis has a focus on rules on safeguard measures in multilateral and regional trade agreements. For this aspect of the work, some regional trade arrangements such as the Association of Southeast Asian Nations (ASEAN), the Southern African Customs Union (SACU) and the Economic Partnership (EPAs), have been selected to serve as illustrative examples and grounds for more in depth studies. Some other agreements are also referred to as illustrative examples such as the Southern Common Market (MERCOSUR), the Southern African Development Community (SADC) and the Gulf Cooperation Council (GCC).

There are some differences between customs unions and free trade agreements that could be essential in regard to safeguards and which will be discussed further in this thesis. Notification of a regional trade agreement can occur under either GATT Article XXIV or the Enabling Clause – or both which further adds to the complexity of the situation.

One reason for choosing the mentioned agreements is that they represent the different kinds of agreements, namely free trade agreements notified under GATT Article XXIV (EPAs and EU-SADC), free trade agreements notified under the Enabling Clause (ASEAN/AFTA), customs unions notified under GATT Article XXIV (SACU) and customs unions notified under the Enabling Clause (MERCOSUR). The GCC has been notified under both Article XXIV and the Enabling Clause. Thus, these agreements can be used in order to reflect on several issues concerning safeguard measures and RTAs.

Since this study to a large extent deals with matters concerning safeguards, RTAs, and WTO law it should be clarified which WTO organs that are put to supervise the conclusion of such regional trade agreements. The WTO Committee on Regional Trade Agreements (CRTA) has two principal duties, namely to examine RTAs and to consider the systemic implications of the agreements for the multilateral trading system and the relationship between them.[146] RTAs falling under GATT Article XXIV are notified to the Council for Trade in Goods (CTG) which approves the terms of reference and transfers the agreement to the CRTA for examination. Notification of agreements falling under the Enabling Clause is made to the Committee on Trade and Development (CTD). The examination ensures the transparency of RTAs and allows WTO Members to evaluate the agreement's consistency with WTO law. Interestingly, no examination report has been finalized since 1995 due to lack of consensus. This shows that RTAs are rather problematic and controversial to legally review. Also, what happens if an RTA is ruled to be

Rules?, Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards, 36 *Journal of World Trade* (2002), pp. 641-673, at p. 671.

[146] WTO, Committee on regional trade agreements, WT/L/127, (7 February 1996) and www.wto.org.

inconsistent with WTO law? Does it have to be dissolved? This scenario is very unlikely, but it is an interesting question.

Disputes have nevertheless occurred between parties to RTAs without debating the legality of the RTA. Dispute settlement can be divided in three groups: (i) diplomatic or political mechanisms (for example the Latin American Integration Association, ALADI); (ii) standing tribunals (for example the Court of Justice of the European Union); and (iii) referral to ad hoc panels (for example NAFTA, ASEAN, MERCOSUR).[147] Most of the relatively complex dispute settlement systems have not been used though, such as the SACU dispute settlement system which otherwise resemble that of the WTO system. This is also the case in Latin America and Africa where efforts to implement mandatory trade dispute settlement mechanisms have had little success.[148]

1.4 Delimitations

This thesis does not intend to provide any technical details on how to conduct safeguard investigations nor instructions on how to apply safeguard measures consistent with WTO law. The intention is not to provide any thorough analysis on public international law per se. Also, this thesis will not examine other international tribunals and rulings which deals with overlaps of jurisdiction or treaty interpretation. This thesis focuses on WTO's - and some RTA's - dispute settlement mechanisms concerning safeguard measures. Courts or institutions and how they function will not be examined in this thesis. Also, this thesis will not examine whether the WTO DSB has exceeded its judicial mandate or whether the enforcement of national or regional measures has done so. In the introduction, it is also stated that this study examines the practice of WTO Members of applying safeguard measures, however the majority of the applications which have not been scrutinized by the DSB are not within the scope of this thesis.

There are several ways of supporting domestic industries in the context of international trade. This study focuses on *e.g.* multilateral safeguard measures as defined in GATT Article XIX and the Agreement on Safeguards.[149] These measures involve quantitative restrictions and tariff increases. Another type of measure, which developing countries can apply, is the use of GATT Article XVIII,

[147] WTO, World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 172.

[148] Gants, David A., Assessing the Impact of WTO and Regional Dispute Resolution Mechanisms on the World Trading System, forthcoming in *Establishing Judicial Authority in International Economic Law*, edited by Jemielniak, Nielsen and Olsen.

[149] Safeguard measures are sometimes referred to as "emergency" safeguard measures since they are only supposed to be used in specific "emergency" situations.

governmental assistance to economic development. However, due to its limited scope, this study does not examine Article XVIII. Neither are rules and clauses that allow for the protection of "infant industries" scrutinized.

Safeguard measures in the form of quantitative restrictions can be regarded as discriminatory since they allow for some imports but not for others. According to GATT Article XIII a non-discriminatory administration of quantitative restrictions is however required. Bronckers believes that the use of quantitative restrictions *de facto* makes safeguard measures discriminatory.[150] The fact that allocative procedures are allowed under the Agreement on Safeguards Article 5.2 adds up to that discussion. However, this thesis cannot due to the limited size scrutinize this interesting topic and this subject has been debated by academics already.[151]

The Enabling Clause deals with both regional trade agreements concluded by developing countries and *preferential* trade arrangements to the benefit of developing countries. Preferential trade arrangements are unilateral trade preferences offered by developed countries to developing countries. They include Generalized System of Preferences (GSP) schemes as well as other non-reciprocal preferential schemes. These preferential trade arrangements are not scrutinized in the study even though they are sometimes mentioned.

Safeguard measures and international trade are closely linked to economic theories and statistical studies as mentioned above. However, this thesis does not provide an economic study of safeguard measures and the economic impact of the application of safeguard measures will not be examined. There have been several studies performed which calculate the economic impact of safeguard measures.[152] Also, there might be more parties than the domestic ones that will be affected by import surges and the subsequent application of safeguard measures, such as those who export to third countries. That broader kind of study is not within the scope of this research. There is of course a natural and close relationship between the legal and economic fields here, but this study focuses on the former.

The cause of import surges is of course an important and interesting subject. There are probably numerous reasons *why* there is an increase in imports in any particular situation. Studies in the field requires knowledge in statistics and methods for the calculation of import levels. The issue is therefore not included in this study.

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[150] Bronckers, M.C.E.J., *Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law*, Kluwer (1985).

[151] See Bronckers, M.C.E.J., *Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law*, Kluwer (1985).

[152] See for example Beshkar, Mostafa, Trade skirmishes safeguards: A theory of the WTO dispute settlement process, *Journal of International Economics*, Vol 82, Issue 1, (September 2010), pages 35-48; Bown, Chad P. and McCulloch, Rachel, The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact, in Plummer, Michael G. (ed), *Empirical Methods in International Trade*, (2004), pages 145-169.

Lastly, this thesis examines how to define what a safeguard measure is. The intention is not to define what other measures are or are not. Thus, Chapter 6 which focuses on choice of forum, will not examine where or whether security exceptions or national interest should or should not be examined by WTO DSB. Security exceptions are not within the scope of this thesis, although it is mentioned in a comparative manner. Also, this thesis does not intend to solve any issues with the DSB or the Appellate Body or provide any answers to the questions relating to potential law-making power of the DSB. Merely it emphasizes that there are issues that affect the area of safeguard measures. Neither is it a thesis describing the Dispute Settlement System as such. It is merely a description on the purpose of safeguard measures and some problems in relation to that.

1.5 Thesis structure

Chapter 1 consists of an introduction to the thesis and contains research aims, methodological descriptions, material, etc. This introductory Chapter describes the subject and area of research; rules on safeguard measures, and also how the study is performed.

Chapter 2 intends to examine under what circumstances the Agreement on Safeguards is applicable on a measure. Reports from panels and the Appellate Body at WTO DSB are examined as well as recently filed, but not yet settled, cases at WTO. The cases deal with the issue of describing what a safeguard measure is, compared to for example other trade defence measures and ordinary customs duties, and when the rules on safeguard measures are applicable. Retaliation is also presented as a mean for affected WTO Members to be compensated for the higher tariffs. It also reviews whether the re-establishment of multilateral control over safeguards and eliminating measures that escape such control has been effective.

This Chapter somewhat builds upon and updates an article written for a conference:[153] "The US Ad Valorem tariffs on steel and aluminium are in fact safeguard measures?" (2018) ETSG conference found at https://www.etsg.org /ETSG2018/papers/374.pdf

Chapter 3, 4 and 5 build upon and update a licentiate degree thesis by this author called "Safeguard measures and exceptions from the principle of non-discrimination", published as "Safeguard measures in Multilateral and Regional Trade Agreements",[154] (2015) and can be found at https://www.tralac.org/

[153] Lissel, Elenor, *The US Ad Valorem tariffs on steel and aluminium are in fact safeguard measures?* (2018), ETSG Conference.

[154] Lissel, Elenor, *Safeguard measures in Multilateral and Regional Trade Agreements*, (2015), tralac.

publications/article/8273-safeguard-measures-in-multilateral-and-regional-trade-agreements.html.

The rules on multilateral safeguard measures in WTO law are described in Chapter 3 and the relationship between GATT Article XIX and the Agreement on Safeguards is also reviewed. The third Chapter also seeks to answer the question whether it is allowed to apply selective or discriminative measures according to WTO law. It also describes the design, interpretation and application of special safeguard measures. In WTO law, they are described as special safeguards (SSG) and the special safeguard mechanism (SSM). The SSM is so far under proposal and not yet in operation. These two special safeguard measures are also compared to each other.

The causation sections in Chapter 3 and 5 are built upon and update a previously published article by this thesis author called "Justification for Safeguard Measures: Causality in WTO Law and Regional Trade Agreements"[155] in Festskrift till Christina Moëll, (2017) to be found at https://www.jure.se/ns/default.asp?url=visatitel.asp?tuid=23502.

Chapter 4 describes the implications of allowing or disallowing safeguard measures in RTAs with regard to GATT Article XXIV and the Enabling Clause. Article XXIV gives specific guidelines under which WTO Members are allowed to enter into regional arrangements which grant more favourable conditions to trade between the parties than to another WTO Member's trade. The Enabling Clause provides for further differentials and for more favourable treatment for developing countries. Some RTAs are used as examples to describe the situation such as the SACU, the EPAs, the ASEAN and the MERCOSUR.

Chapter 5 examines how rules on safeguard measures are designed in RTAs and whether there exists a development perspective. Several RTAs are compared to each other as well as to WTO law in order to note differences and similarities in the application of safeguard measures. The focus here is on the ASEAN and the EPAs which are described more thoroughly while some other RTAs are described for comparative reasons. Here the intention is to illustrate some of the major difficulties with regional rules on safeguard measures. The intention is also to compare differences in purposes between RTAs against the purpose of the multilateral agreements. It also examines when and if it is allowed to exclude certain parties and thus apply discriminative safeguard measures in relation to RTAs, Article XXIV and the Enabling Clause.

Chapter 6 examines forum of choice clauses and whether RTAs can prevail over WTO law. It describes the jurisdiction of the WTO dispute settlement mechanism and overlaps of jurisdiction. This Chapter focuses on the question whether the Agreement on Safeguards is applicable to all WTO Members, but from the angle

[155] Lissel, Elenor, Justification for Safeguard Measures: Casuality in WTO Law and Regional Trade Agreements, in *Festskrift till Christina Moëll,* (2017), Jure.

where a Member cannot complain to the WTO DSB due to forum clauses in the RTA.

This Chapter is somewhat built upon a chapter by this thesis's author called "Can FTA prevail over WTO law? Choice of Forum and Choice of Law Clauses in FTAs"[156] (2018) in the book Monitoring Regional Integration in Southern Africa, Yearbook 2017/18 found at www.tralac.org.

Finally, a summary of the thesis and conclusions are presented in Chapter 7.

[156] Lissel, Elenor, Can FTA prevail over WTO law? Choice of Forum and Choice of Law Clauses in FTAs" in the book *Monitoring Regional Integration in Southern Africa, Yearbook 2017/18,* (2018), tralac.

2 Safeguards and other measures

2.1 Introduction

This Chapter serves to introduce trade defence measures and examine when an applied measure should be analysed under the Agreement on Safeguards. A more thorough introduction of the rules on safeguard measures follows this Chapter.

The preamble of the Agreement on Safeguards states that the Members recognize that there is a need to re-establish multilateral control over safeguards and eliminate measures that escape such controls such as discriminatory and selective safeguard measures. It also states that the Agreement is applicable to all Members and based on the basic principles of GATT 1994. If the purpose with the Agreement on Safeguards is to re-establish control and eliminate measures that escape such control, it is important to establish what a safeguard measure is and what distinguishes a safeguard measure from other measures. The results help to answer what happens if a WTO Member claims that it has not applied safeguard rules under WTO law but something else, or a Member claims that it has applied a safeguard measure when others claim it has not.

As described in Chapter 1, the DSB makes an objective assessment of the matter before it, and thus assesses whether the safeguard measures have been applied in accordance with WTO law. There are however a few cases where the panels and the Appellate Body have examined whether the Agreement on Safeguards is applicable to the case. There has not been much research on this matter and there are only a few cases as mentioned. One of the first things that could happen in a dispute, is to examine and establish what rules are applicable on the dispute and whether a given rule is applicable to the facts or if it is subject to other law.[157] In this case, are the rules on safeguard measures applicable or not on the facts in the case? If it is not, then there is no need to examine if the rules have been applied accordingly. If it is, the next step would be to examine whether the application has been made in compliance with the safeguard rules and this will be elaborated in the next Chapter. This Chapter will instead focus on the applicability of the rules on safeguard

[157] Bartels, Lorand, Jurisdiction and Applicable Law in the WTO, *Society of International Economic Law*, Working Paper No. 2016/18, pages 1-2.

measures and establish what distinguishes safeguard measures from other measures. The aim here is to put the Agreement on Safeguards and Article XIX GATT into context and define the line between safeguards and other trade measures.

Thus, this Chapter will elaborate on the few cases there are and try to establish the basis for what a safeguard measure is as exemplified through case law and whether a trade restricting measure qualifies as safeguard under the Agreement on Safeguards. First, by examining the WTO rules on safeguard measures in relation to other trade defence measures and then examine some cases. Lastly, this Chapter will review what actions other WTO Members can take if and when a safeguard measure has been applied, in order to better understand the implications and consequences of safeguard measures. This section intends to further illustrate why perhaps one party would prefer that a measure is a safeguard measure and why the other party would want to defeat it.

2.2 Trade defence measures

2.2.1 Introduction

Safeguard measures are only one of several trade defence measures available under WTO law. In order to get a better understanding of the totality of which safeguard measures are a part, the two other most common trade defence measures, anti-dumping and countervailing measures, will be briefly described and compared to safeguards. It must be emphasised that the aim here is not to conduct an in-depth comparative analysis but only to highlight some differences and similarities and to illustrate the interrelation between the various measures to emphasize what safeguard measures are and when the rules are applicable.

One interesting example of how trade defence measures have been used is the already mentioned *United States – Certain Measures on Steel Products* and related cases, which will be attended to again further below. The EU notified the Committee on Safeguards that it would impose provisional safeguard measures on certain steel products in July 2018 as a reaction to the US Ad Valorem tariffs.[158] The reason for imposing the measures is the result of "unforeseen developments that finds its source in a number of factors establishing and aggravating imbalances in the international trade of the products concerned".[159] The imbalances in the steel sector

[158] Notification under article 12.4 of the agreement on safeguards before taking a provisional safeguard measure referred to in article 6. Notification pursuant to article 9, footnote 2 of the agreement on safeguards (Certain steel products), G/SG/N/7/EU/1, G/SG/N/11/EU/1, 18 July 2018.

[159] Ibid, page 1.

are accentuated by distortive subsidies and government support measures. This has resulted in increasing imports and overall price depression. Secondly, some markets used trade policy and trade defence measures to protect their domestic producers. Thirdly, the US section 232 measures are likely to cause substantial trade diversion of steel products into the EU.[160]

Thus, the imposition of safeguard measures seems to be the result of the use of unfair trade practices, combined with the use of other trade remedies and trade distortion, which has caused rerouting of trade. EU filed a notification of a proposal to impose a measure,[161] and the European Commission imposed safeguard measures with respect to certain steel products for a period of three years.[162] So far, China, South Korea, Turkey, India, Switzerland, Russia, and more, has requested consultations

[160] Ibid, page 2.

[161] Notification under article 12.1(b) of the agreement on safeguards on finding a serious injury or threat thereof caused by increased imports notification of a proposal to impose a measure notification pursuant to article 9, footnote 2 of the Agreement on Safeguards European Union (Certain steel products), G/SG/N/8/EU/1, G/SG/N/10/EU/1, G/SG/N/11/EU/1/Suppl.1, 4 January 2019.

[162] Regulation (EU) 2019/159, OJ L 31, 1.2.2019, p. 27.

under Article 12.3 of the Agreements on Safeguards in regards to that measure.[163] The complaint from Turkey has now resulted in an establishment of a panel.[164]

The increased production in and exports from one country cause decreased production and prices in another state. This is where safeguard measures enter the scene and the whole idea of safeguard measures are intended to protect industries from the economic harm caused by these unexpected surges in imports. However, in the above case it has also been the use of trade remedies that causes the trade disruption. The chosen route to deal with these imbalances is to apply more trade remedies in the form of safeguard measures.

Russia has also proposed suspension of concessions and other obligations referred to in paragraph 2 of Article 8 of the Agreement on Safeguards in regards to steel products.[165] Canada has imposed a safeguard measure on certain steel products as

[163] Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, China, G/SG/193, 8 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, Republic of Korea, G/SG/194, 8 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, Turkey, G/SG/195, 9 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, India, G/SG/196, 10 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, Switzerland, G/SG/197, 10 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, Russian Federation, G/SG/198, 11 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, Republic of Moldova, G/SG/199, 14 January 2019.

Committee on Safeguards, Imposition of a safeguard measure by the European Union on imports of certain steel products request for consultations under article 12.3 of the agreement on safeguards, the separate customs territory of Taiwan, Penghu, Kinmen and Matsu, G/SG/200, 21 January 2019.

[164] WT/DS595/, European Union — Safeguard Measures on Certain Steel Products, meeting on 28 August 2020 of the Dispute Settlement Body.

[165] Council for Trade in Goods, Committee on Safeguards, Russian Federation, G/SG/N/12/RUS/3, G/L/1304, 2 April 2019.

well.[166] Other countries have proposed similar actions but towards specific kinds or aluminium or steel products such as flat-rolled products and wire rods.

The EU safeguard measures on steel products are also accompanied by both anti-dumping and/or countervailing duties. Thus, "such cumulation of anti-dumping and/or anti-subsidy measures with the safeguard measures imposed by the same regulation may lead to an effect on trade greater than desirable, thus warranting examination in due course."[167] The Commission writes "Some interested parties note that such a combination of measures could place an undesirably onerous burden on certain exporting producers seeking to export to the Union, which may have the effect of denying them access to the Union market."[168] One interested party also stated that in order to ensure predictability and legal certainty, the anti-dumping measures should be amended. The response from the Commission was:

> "The Commission recalled, in this regard, that the effect of safeguard measures arise only once the relevant level of the tariff-rate quota is exhausted (specific or erga omnes) and the applicable above-quota tariff duty is imposed. Until that moment, the Commission considers that the full level of the applicable anti-dumping/anti-subsidy measures continues to be necessary and justified, in order to remedy the effect of unfairly dumped/subsidised imports. The question of a combined effect, therefore, becomes relevant only once the applicable quantitative threshold is exhausted and additional safeguard duties applied."[169]

According to the European Commission, *erga omnes* is the legal term for obligations or rights 'towards all.' For instance, if a product's customs duty is *erga omnes*, it is applicable to imports from all countries. *Erga omnes* is also, as stated on the EU Commission trade help desk website, known as the Most Favoured Nation principle.[170] The *erga omnes* application will be attended to again in Chapter 6. The conclusion from the Commission is though that some amendments are needed to ensure that the measures does not have an effect greater than that intended or desirable.

The above show that safeguard measures sometimes are used to combat unfair trade, also in combination with anti-dumping and/or countervailing measures. So, what are anti-dumping and countervailing measures?

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[166] Council for Trade in Goods, Committee on Safeguards, Canada, G/SG/N/6/CAN/4-G/SG/N/7/CAN/1-G/SG/N/11/CAN/1, 12 October 2018.

[167] COMMISSION IMPLEMENTING REGULATION (EU) 2019/1382 of 2 September 2019 amending certain Regulations imposing anti-dumping or anti-subsidy measures on certain steel products subject to safeguard measures, OJ L 227/1, page 1.

[168] Ibid.

[169] Ibid, page 2.

[170] https://trade.ec.europa.eu/tradehelp/tips-eu-tariffs

2.2.2 Anti-dumping and countervailing measures

The WTO rules on anti-dumping measures are found in GATT Article VI and in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-dumping Agreement or ADA). An anti-dumping measure is based on the requirements that there be dumped imports, material injury to a domestic industry in the importing country and a causal link between the dumped imports and the injury. Roughly speaking, dumping in this context means that a manufacturer in one country exports a product to another country at a price which is below the price in the home market or below the costs of production.[171]

The WTO rules on countervailing measures are found in GATT Article VI and in the Agreement on Subsidies and Countervailing Measures (SCM). Subsidized imports that are known to be damaging domestic producers can be charged with an extra duty known as countervailing duty. Countervailing measures are sometimes referred to as the parallel to anti-dumping measures. But the requirements for imposing countervailing measures are even more complex than those for applying anti-dumping measures.

There are two ways of dealing with subsidized imports. Under the SCM, a country can, within the framework of the WTO Dispute Settlement Procedure, apply to have the subsidy withdrawn or to have its adverse effects removed. Alternatively, the country can launch its own investigation and impose countervailing measures on subsidized imports that are found to be hurting its domestic producers.

The Agreement on Subsidies and Countervailing Measures recognizes in Article 27 that subsidies can play an important role in the economic development of developing countries and provides special and differential treatment to such Members. The Anti-dumping Agreement establishes in Article 15 that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures. Constructive remedies should be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

2.2.3 Comparing the three types of measure

Dumping and subsidies share several similarities, but there are also some fundamental differences between the two. Dumping is an act performed by a company, while a subsidy is the act of a government or a government agency, whether it is paying it directly or requiring companies to subsidize certain

[171] Article VI of the GATT 1947 and Article 2.1 AD Agreement, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

customers. The Anti-dumping Agreement only affects acts governments may take against dumping. The SCM disciplines both subsidies and the reactions to them.

One main difference between anti-dumping and countervailing measures on the one hand, and safeguard measures on the other is that the former are aimed at targeting *unfair* trade practices while the latter may be used in cases of *fair* trade. It is important however, to notice that neither dumping nor the granting of subsidies compose *unlawful* behaviour *per se* according to GATT,[172] except for the subsidies explicitly prohibited by Article 3 SCM. Another major difference is that safeguard measures are aimed at a *product* irrespective of its origin while anti-dumping and countervailing measures are aimed at exports of a particular product from a certain *country*. Anti-dumping and countervailing measures are thus exceptions to the MFN principle while safeguard measures are as a main rule applied on an MFN basis.

A difference between the rules on safeguards measures and those on anti-dumping is that, for the Anti-dumping Agreement to come into play, a complaint must be supported by a significant proportion of the domestic producers of the products concerned.[173] In the Agreement on Safeguards there is no such requirement although there are other conditions that need to be fulfilled.

Some examples at the WTO Member state level further illustrate the differences. For one example, when imposing safeguard measures in the EU, it is only the Member States who may request the Commission to undertake an investigation.[174] In anti-dumping proceedings, any natural or legal person can act on behalf of the concerned industry and request the Commission to impose anti-dumping measures.[175] In the US it is the President who makes the final decision to impose safeguard measures after taking into consideration the national economic interest although domestic industries start the matter off by making a petition to the International Trade Commission (ITC) for import relief.[176] In anti-dumping proceedings the President plays no formal role, rather the ITC and the Department

[172] Hahn, Michael J., Balancing or Bending? Unilateral Reactions to Safeguard Measures, *Journal of World Trade* 39(2): 301-326, (2005), page 309.

[173] Article 4 in the Anti-dumping Agreement, see also Swedish National Board of Trade, *The Agreement on Safeguards: Use of the instrument, problem areas, and proposals for change*, (Stockholm, November 2004), page 47.

[174] Article 2, Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports. Official Journal of the European Union L 84/1 31/3/2009.

[175] Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, Official Journal L 056, 06/03/1996 P. 0001 – 0020, Article 5.

[176] Section 201, Trade Act of 1974 (Global Safeguard Investigations), Import Relief for Domestic Industries. Also known as the escape clause.

of Commerce takes the decision.[177] These differences can have a significant impact when there is a choice between anti-dumping measures and safeguard measures.

The significant features in WTO Law of the three trade defence measures are shown in the table below.

Table 2: Comparing safeguard, anti-dumping and countervailing measures

	Safeguard measures	Anti-dumping measures	Countervailing duties
Injury	Serious injury	Material injury	Injury
Targets	All imports (without discrimination)	Companies that engage in dumping	Countries that subsidize
Purpose	Combat fair trade but import surges	Combat unfair trade practices	Combat unfair trade practices

However, it is not only the formal and procedural differences that have an effect on the choice. It is also a matter of the level of injury that needs to be proven in an individual case. The significance of the injury condition in anti-dumping and safeguard measures in GATT and the implementing WTO agreements varies. When determining injury in safeguard proceedings, an assessment must be made whether the increased imports have caused or threatened to cause *serious* injury to the domestic industry producing the like or directly competitive product. In anti-dumping proceedings an assessment is made whether the imports have caused or threaten to cause *material* injury in accordance with GATT Article VI. As regards the difference in meaning between "serious" and "material" the Appellate Body in *US – Lamb* ruled that:

> "We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'. Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures …".[178]

The finding of serious injury is far more difficult than that of material injury and the authorities enjoy a wider discretion in deciding whether injury has occurred in anti-dumping cases. In the absence of further definition, material injury is interpreted de

[177] Hansen, Wendy L. and Prusa, Thomas J, Does administrative protection protect? A reexamination of the U.S. Title VII and escape clause statutes, *Regulation*, 16(1), 1993, 35-43 and Hansen, Wendy L. and Prusa, Thomas J, The road most taken: the rise of Title VII protection, *The World Economy*, No 18, (1995), page 299.

[178] Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, (*US — Lamb*), WT/DS177/AB/R and WT/DS178/AB/R, (1 May 2001), para. 124.

facto as "any injury".[179] It is suggested that material injury is more a matter of political considerations than of economical calculations.[180] The Agreement on Subsidies and Countervailing Measures however only refers to "injury".[181]

Also, in the Agreement on Safeguards, there is a requirement of proportionality. It is stated in Article 5.1 that a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Furthermore, as mentioned, the Appellate Body in *US – Line Pipe* recognised that there is a tension between the appropriate scope of the right to apply safeguard measures and the need to ensure that safeguard measures are not applied against fair trade beyond what is necessary to provide extraordinary and temporary relief.[182] Both anti-dumping and countervailing duties seem to be applied according to a *lesser duty rule*, meaning that duties are imposed at a level lower than the margin of dumping or lower than the subsidy but adequate to remove injury. In the Anti-dumping Agreement Article 8.1 it is stated that price increases in underprice undertakings shall not be higher than necessary to eliminate the margin of dumping. Also in Article 9.3 it is stated that the amount of the anti-dumping duty shall not exceed the margin of dumping.[183] In the Agreement on Subsidies and Countervailing Measures it is stated for example in Article 19.2 that the countervailing duty to be imposed shall be the full amount of the subsidy or less.

Anti-dumping measures are to be applied on a non-discrimination basis in accordance with Article 9.2. It states that:

> "when an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted."[184]

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[179] Aggarwal, Aradhna, *The Anti-dumping Agreement and Developing Countries, An introduction*, Oxford University Press, (2007), page 83.

[180] Ibid, page 86. Supported by Hansen, Wendy L. and Prusa, Thomas J, Cumulation and ITC decision making: The sum of the parts is greater than the whole, *Economic Inquiry*, Vol. 34, No. 4, (1996), pp. 746-69 and Tharakan and Waelbroeck, Determinants of Anti-dumping and Countervailing decisions in the European Communities, in Dewatripont and Ginsburgh (eds) *European Economic Integration: A challenge in the changing world,* North Holland, Amsterdam, London, and Tokyo, (1992), pp. 181-199.

[181] Article 15 of the Agreement on Subsidies and Countervailing Measures.

[182] Appellate Body Report on United States – Definitive Safeguard Measures on imports of circular welded carbon quality Line Pipe from Korea. *(US – Line Pipe),* WT/DS202/AB/R, (8 March 2002), para. 84.

[183] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[184] Ibid.

Also, the Agreement on Subsidies and Countervailing Duties states in Article 19.3 that "when a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied … on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury…". However, these clauses are very different from the one found in the Agreement on Safeguards since the above is to be applied on all imports that are found to be dumped or subsidized. Safeguard measures are to be applied on a non-discriminatory basis even though the trade is fair as mentioned.

2.2.4 Applications of the three types of measures

According to WTO statistics, anti-dumping measures are applied far more often than the other two measures. The frequency, with which the three trade defence measures are used, is shown in this table:

Table 3: Applications of safeguard, anti-dumping and countervailing measures[185]

	Safeguards measures	Anti-dumping measures	Countervailing measures
Chile	9	14	2
EU	25	348	41
India	22	703	3
Indonesia	20	64	0
Jordan	9	0	0
Philippines	9	13	0
Turkey	17	199	1
US	8	484	153
Total	**185**	**3887**	**303**

The table demonstrates the most frequent users of safeguard measures and the extent to which these countries use other trade defence measures.

As already observed, safeguard measures are used infrequently, especially by comparison to anti-dumping measures. Although they are, in total, used less often than the other two trade defence measures, some developing countries are among the most frequent users of safeguards. One example is Indonesia, which has

[185] Statistics received from http://www.wto.org, visited on 30 May 2020. The statistics on safeguard measures cover the period 29/03/1995 to 31/12/2019, while anti-dumping measures and subsidies and countervailing measures cover 01/01/1995 to 30/06/2019. The statistics for the European Union (EU) above include measures taken by countries before they became members of the EU. This table demonstrate that the 8 largest users of safeguard measures are less frequent users of subsidies and countervailing measures. Some of the largest users of safeguard measures are equally some of the largest users of anti-dumping measures while Jordan does not use them at all.

increased its use of safeguards in recent years.[186] Indonesia's practice has been criticised by other countries. One of the safeguard measures imposed by Indonesia was applied to protect domestic producers of wheat flour. Turkey, which exports wheat flour to Indonesia, has argued that the injury is rather related to protection against "larger producers" as such than to injurious import surges.[187]

The data also shows that some countries, such as Jordan, primarily use safeguards, while others, such as India, the EU and the US mainly use anti-dumping and countervailing measures. As mentioned, Indonesia has made the greatest number of notifications in recent time but other countries such as Turkey, Egypt and Russia have also made several notifications.[188] This shows that the use of safeguard and new investigations with a view to applying safeguard measures is increasing.[189]

The basic motive behind the design of the rules on safeguard measures was to deal with "grey area measures" as mentioned. However, one way for WTO Members to circumvent the rules was to impose anti-dumping measures. This is illustrated by the fact that both the EU and the US, who were among the most frequent users of grey area measures, are now the most frequent users of anti-dumping measures.[190] Several scholars believe that a large number of anti-dumping measures are actually used instead of safeguard measures. They argue that less than 10 per cent of anti-dumping measures are motivated by non-protectionist interests, which leaves the rest as *de facto* safeguard measures.[191] A reason behind this could be the intricate conditions which have to be fulfilled before applying safeguard measures. Many of the new users (*e.g.* developing countries) of safeguard measures were not traditional users of anti-dumping measures. The relevant question is still whether safeguard measures are too difficult to use, or anti-dumping measures are too easy to use. If one can be used instead of the other, it is important to understand why this is so.

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[186] See statistics on the website of the WTO, www.wto.org, visited on 30 May 2020.

[187] ICTSD, Bridges Weekly Trade News Digest, Vol. 16, Number 43, 12th December 2012.

[188] For statistics, visit www.wto.org. Russia became a WTO Member in 22 August 2012 which is the reason why Russia is not among the countries in table 3.

[189] See statistics on the website of the WTO, www.wto.org, visited on 30 May 2020.

[190] Swedish National Board of Trade, *the Agreement on Safeguards: Use of the instrument, problem areas, and proposals for change*, (Stockholm, November 2004), page 44f.

[191] Willig, Robert, *Economic effects of antidumping policy* in Lawrence, R., ed., Brookings Trade Forum 1998, Washington DC, (1998), page 78; Messerlin, Patrick, *Measuring the Costs of protection in Europe: European Commercial Policy in the 2000s*, Institute for International Economics, Washington DC, (2001), page 163; Morkre, Morris E., and Kelly, Kenneth H., Do unfair trade imports injure domestic industries? *American Economic Review*, (September 1994); Shin, Hyun Ja, *Possible Instances of Predatory pricing in recent U.S. Antidumping cases*, Brookings Trade Forum (1998) and Bourgeois, Jacques H.J., and Messerlin, Patrick A., *The European Community's experience*, Brookings Trade Forum (1998). Found in Swedish National Board of Trade, *The Agreement on Safeguards: Use of the instrument, problem areas, and proposals for change*, (Stockholm, November 2004), page 44.

An illustrative example of a case when anti-dumping measures may have been used instead of safeguard measures is the EU case of imported preserved citrus fruit from the People's Republic of China. These imported fruits were subject to a safeguard measure until November 2007 and then subject to an anti-dumping measure.[192]

Another example is the case of certain frozen strawberries originating in the People's Republic of China. In this case, Poland requested a safeguard investigation in 2005 but withdrew the request after the lodging of an anti-dumping complaint later that year.[193] It should be noted that some affected countries have expressed concern in cases where safeguard measures on the other hand have replaced anti-dumping measures.[194]

An interesting observation is that products which have been the object of terminated safeguard investigations or measures were also subject to anti-dumping duties by other countries. For example, in the case of terminated safeguard investigations by Brazil on imports of CD-R and DVD-R, the same products was subject to EU anti-dumping measures.[195] Footwear from the People's Republic of China, Vietnam, India and Macao was subject to anti-dumping measures by the EU while Jordan and the Philippines reported the termination of existing safeguard measures on footwear and on glass mirrors, respectively.[196] This means that the same good is subject to both safeguard measures and anti-dumping measures by different countries at the same time.

[192] Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China. Official Journal of the European Union L 350/35, 30/12/2008. The measure expired at the end of 2013.

[193] Council Regulation (EC) No 407/2007 of 16 April 2007 imposing definitive anti-dumping measures and releasing the provisional duty imposed on imports of frozen strawberries originating in the People's Republic of China. Official Journal of the European Union L100/1, 17/4/2007.

[194] For example India's safeguard measure on N1, 3-dimethyl butl-N Phenyl paraphenylenediamine (also known as Px-13 or 6-PPD), where the United States and the European Union expressed concern, see WTO, Committee on Safeguards, G/SG/N/8/IND/21, G/SG/N/10/IND/12, G/SG/N/11/IND/7, (20 June 2011) and www.wto.org, news items 27 October 2011, visited on 22 November 2011.

[195] Cases R420 and R420a against India and Taiwan and AD500 against Hong Kong, Malaysia and People's Republic of China.

[196] Cases R459 against People's Republic of China and Vietnam, R434 against People's Republic of China and Macao, AD499 against Vietnam and People's Republic of China and finally AD495 against People's Republic of China and India.

2.3 Jurisprudence on what a safeguard measure is

2.3.1 Introduction

The "when" and "if" safeguard measures have been applied, seem to be somewhat debatable, since there appear to be no clear definition of "safeguard measure". Therefore, this section will highlight some common traits in cases about safeguard measures. Some cases deal with jurisdictional issues, where one party argue that the WTO DSB does not have jurisdiction for various reasons. A more thorough analysis on jurisdictional issues will however be attended to in Chapter 6.

2.3.2 Dominican Republic – Safeguard measures

The difference between an ordinary customs duty and an extraordinary customs duty was discussed in *Dominican Republic – Safeguard Measures*. In this case, the Dominican Republic argued that the WTO DSB lacked jurisdiction since the measure at issue was not higher than the binding agreed in its schedule of concessions even if it was higher than the tariffs provided for in the regional free trade agreement. The Dominican Republic had though notified that it imposed safeguard measures but claimed later that the measure at issue was an increase of MFN and hence the lack of jurisdiction. The panel however did not find it necessary to rule on the request of lack of jurisdiction.[197] This will be attended to further in Chapter 6.

The Dominican Republic argued that the tariff did not constitute an additional tariff, nor an alternative tariff, but rather an increase in the MFN tariff.[198] The tariff or measure at issue could not be applied under Article XIX due to its object and purpose, *i.e.* to enable a Member temporarily to rebalance the level of its concessions when faced with specific unforeseen developments. Rather, a Member can freely raise its tariffs up to a level below the bound rate.[199] The panel confirmed that this is not unusual behaviour.[200] The panel also agreed that the Agreement on Safeguards expressly authorizes certain waivers from the MFN principle, particularly under Article 9. Even so, the panel did not consider it correct that there

[197] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 8.1(b).

[198] Ibid, para. 7.28.

[199] Ibid, para. 7.30.

[200] Ibid, para. 7.57. One example of a country that raises the tariff levels is Vietnam which has raised the tariff levels of poultry and frozen meat in 2008 and 2011.

would be a conflict, as the Dominican Republic had suggested, between Article XIX and the Agreement on Safeguards if GATT Article XIX:1(a) is interpreted to include the possibility of suspending the MFN obligation in GATT Article I:1. In this particular dispute, the measures at issue did mean a suspension of the MFN-obligation and thus represented the suspension of an obligation incurred by the Dominican Republic.[201]

The panel in *US – Steel Safeguards*, held that "the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product."[202] The panel in *Dominican Republic – Safeguard Measures* underlined the need for a reasoned and adequate explanation regarding the identification of the obligation incurred by the importing Member:

> "It is not clear from this passage that the competent authority considered the tariff concession with respect to the products in question to be the obligation of the Dominican Republic under the GATT 1994 that caused the alleged increase in the imports in question. This passage does not contain any finding in this respect. Consequently, and in the absence of any indication in the resolutions of the Commission, or in any other relevant document, it is not possible to conclude that the report of the competent authority contains a reasoned and adequate explanation of how the Dominican Republic incurred obligations under the GATT with respect to tubular fabric and polypropylene bags, within the meaning of Article XIX:1(a) of the GATT 1994."[203]

The Dominican Republic also argued that the Ad Valorem tariff of 38 per cent did not suspend the obligations under Article II:1(b) of the GATT 1994 since it did not exceed the binding in the WTO.[204] Simply put, Article II:1(b) prohibits the levying of ordinary customs duties above the binding and/or the levying of other duties or charges of any kind. The panel referred to the Appellate Body Report on the *Chile – Price Band System* in order to determine if this suspension of obligations under Article II.1(b) was the case.[205] In *Chile – Price Band System* the Appellate Body stated that the form which the duty takes is not relevant, *i.e.* there was no need to

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[201] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), paras. 7.72 and 7.73.

[202] Panel Report on United States – Definitive Safeguard Measures on imports of certain Steel Products*, (US – Steel Safeguards),* WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R, (11 July 2003), para. 10.140.

[203] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para 7.149.

[204] Ibid, para. 7.76.

[205] Ibid, para 7.84.

decide whether a duty imposed on an import at the border constitutes an ordinary customs duty. The vital feature of ordinary customs duties is rather that any change is sporadic and unrelated to an underlying scheme of formula and that it is below the bound rate.[206]

It should be mentioned here that it must also be demonstrated that the importing Member is actually subject to the appropriate obligations, including the making of tariff concessions, under GATT.[207] This requirement was discussed in the case of discussion, *Dominican Republic – Safeguard Measures*.[208] Here, the panel reviewed the Appellate Body report on *Argentina – Footwear* which affirmed that "safeguard measures result in the temporary suspension of concessions or withdrawal of obligations, such as those in Article II and Article XI of the GATT 1994".[209] In the dispute at issue the Dominican Republic had not applied tariffs higher than the binding in its schedule of concessions.[210] But it did still:

1. apply a measure with the aim of remedying a situation of serious injury due to an increase in imports;
2. apply a measure where the procedure used was based on Article XIX and the Agreement on Safeguards; and
3. notify the measure taken as a safeguard measure to the WTO Committee on Safeguards.[211]

The panel examined the context, object and purpose of the relevant agreements and concluded that the challenged measures were applicable under GATT Article XIX and the Agreement on Safeguards. Since the measures did suspend the obligations of the Dominican Republic under the GATT 1994, the question as to whether the

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[206] Appellate Body Report, Chile – Price Band System, Chile – Price Band System and safeguard measures relating to certain agricultural products, *(Chile – Price Band System),* WT/DS207/AB/R, (23 September 2002), paras. 232-233.

[207] UNCTAD, *Dispute Settlement. World Trade Organization 3.8 Safeguard Measures*. United Nations, (New York and Geneva 2003), page 11.

[208] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012). El Salvador was concerned about certain aspects of the Dominican Republic's safeguard measures and the underlying investigation.

[209] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), paras 7.50-7.53.

[210] The Dominican Republic adopted a duty of 38 per cent ad valorem on imports of polypropylene bags and tubular fabric but argued that Article XIX was not applicable and that that the dispute concerned alleged violations of free trade agreements signed by the Dominican Republic, over which the Panel lacked jurisdiction.

[211] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), paras 7.56-7.57.

measure may be considered a safeguard (even assuming that it did not suspend any obligation under the Agreement or withdraw or modify concessions), was considered a purely theoretical issue that had no practical relevance for determining the present dispute.[212]

The panel in *Dominican Republic – Safeguard Measures* concluded, however, that the wording "ordinary customs duties" in Article II:1(b) did refer to duties collected at the border which constitute customs duties and not extraordinary or exceptional duties.[213] The Dominican Republic was considered to have applied an extraordinary duty which was distinct from the ordinary customs duty.[214]

Consequently, a measure taken, according to the above, is a safeguard measure when:

1. the tariffs are raised, even though they are not higher than the bound tariffs, and
2. the aim is to remedy serious injury due to increased imports, and
3. the measure taken is based on the procedures under the Agreement on Safeguards and/or Article XIX GATT.

Thus, the basis for establishing if a measure is a safeguard measure, it seems as if the procedures for imposing the measure were of significance. For example, was the measure based on the procedures under the Agreement on Safeguards or Article XIX? This implies that any measure based on the procedure of the Agreement on Safeguards, for example notifying an initiation of a procedure to apply safeguard measures under the Agreement, together with raised tariffs with the aim to remedy injury is enough to be a safeguard measure. This limits the scope significantly and it does seem strange if a safeguard measure cannot be applied if the base procedures has not been used, then it would be possible to avoid that stage and simply impose another measure – even though it is a safeguard measure.

2.3.3 Indonesia – Iron or Steel Products

As will be examined further in Chapter 6, the *Indonesia – Iron or Steel Products* concerned an alleged increase of the MFN duty. One of the complaining parties was also party to an FTA with Indonesia and as such it was not subject to the MFN rate. Indonesia argued that it had applied a safeguard measure, likely because if they had simply increased the MFN rate then the suppliers from the FTA countries would not be affected by the measure. Hence, since the FTA party would not be affected, they

[212] Ibid, para. 7.90.

[213] Ibid, para. 7.85.

[214] Ibid, para. 7.86.

would be able to continue to export their products at the same price. This case is then basically the opposite from the above, here they increased the MFN but argued that it was a safeguard measure – in the case above, they applied a safeguard measure but claimed it was an increase in the MFN tariff rate. All parties to the dispute was in some kind of agreement that the measure was in fact a safeguard measure.

In *Indonesia – Iron or Steel Products*, Viet Nam requested consultations with Indonesia regarding a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products and the investigation and determinations leading thereto on 1 June 2015. Viet Nam claimed that the measures were inconsistent with amongst others the Agreement on Safeguards and Article XIX GATT.

Prusa and Vermulst wrote an article about this case, called "If it looks like a duck, swims like a duck, and quacks like a duck, then it is not a duck".[215] They state that the ruling is welcome because it ends the confusion that came with the previous case; the *Dominican Republic – Safeguard measures* and that the facts in the cases are relatively similar.[216]

Despite that the dispute did not concern whether the tariff increase was or was not a safeguard measure, the panel examined what constitutes a safeguard measures and hence if the measure at issue was a safeguard measure or not. They concluded that:

> "It is apparent from this language that the "measures provided for" in Article XIX:1(a) are measures that suspend a GATT obligation and/or withdraw or modify a GATT concession, in situations where, as a result of a Member's WTO commitments and developments that were "unforeseen" at the time that it undertook those commitments, a product "is being imported" into a Member's territory in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products".[36] The text of Article XIX:1(a) also makes clear that such measures must result in the suspension, withdrawal, or modification of a GATT obligation or concession for a particular purpose – that is, they must operate "to the extent and for such a time as may be necessary to prevent or remedy such injury"."[217]

[215] Prusa, Thomas J. and Vermulst, Edwin A., Indonesia – Safeguard on Certain Iron or Steel Products: If it looks like a duck, swims like a duck, and quacks like a duck, then it is not a duck, *EUI Working Papers, RSCAS 2019/83 Robert Schuman Centre for Advanced Studies Global Governance Programme-372*, (2019).

[216] Ibid, pages 7-8.

[217] Panel report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/R, WT/DS496/R, (*Indonesia – Iron or steel products*), 18 August 2017, para. 7.13.

The panel thus concluded that not any measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a). It is only measures:

> "suspending, withdrawing, or modifying a GATT obligation or concession that a *Member finds it must be temporarily released from* in order to pursue a *course of action necessary to prevent or remedy serious injury* that will constitute "safeguard measures"."[218] (Emphasis added)

The panel also referred to the panel in *Dominican Republic – Safeguard Measures*, where it had found that the words:

> ""obligation" and "concession" in the last part of Article XIX:1(a) refer to the "obligations" and "concessions" in the first part of Article XIX:1(a)[38], implying that Article XIX:1(a) contemplates the suspension of a GATT obligation or concession the effect *of which has in some way resulted in the increased imports causing or threatening to cause serious injury*."[219](Emphasis added)

Indonesia had no binding tariff obligation with respect to the product at issue in *Indonesia – Iron or Steel Products*. Thus, Indonesia is free to impose "any amount of duty it deems appropriate on imports of galvalume, including the specific duty applied". This means that Indonesia unilaterally raised the MFN Ad Valorem duty on imports of galvalume from 12.5% to 20%.[220]

Indonesia also argued that the tariff obligations under the ASEAN-Korea (10%) and the ASEAN Trade in Goods (0%) prevented it from increasing the tariffs. Thus, the imposition of tariffs originating in countries including its RTA partners means that the "GATT obligation being suspended … is the GATT exception under Article XXIV of the GATT 1994."[221] The raised tariffs where only a suspension of the obligations under Article XXIV and not modifying a GATT obligation or concession as such. Likely, Indonesia wanted to apply a multilateral safeguard measure to be able to apply a duty on *all* imports (except for some developing country imports). The tariff obligations under the different RTAs required lower tariffs than the imposed 20%. If Indonesia would instead have applied a regional safeguard measure, this would require several actions since Indonesia was part of several RTAs and it could also have been politically sensitive. By applying multilateral safeguard measures, it would target all imports without discrimination.

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[218] Ibid. para. 7.14.

[219] Ibid. para. 7.16.

[220] Ibid. para. 7.18.

[221] Ibid. para. 7.19.

The panel then stated that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners.

> "Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its ASEAN trading partners is established in the ASEAN Trade in Goods Agreement, not in Article XXIV."[222]

As a result, the panel found that the specific duty does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.[223] Furthermore, an importing Member is free to initiate a safeguard investigation and even though it found evidence for imposing a safeguard measure, it can choose not to. The importing Member will have three choices:

> (a) impose a measure suspending, withdrawing, or modifying a GATT obligation or concession to the extent necessary to prevent or remedy the serious injury established in the underlying investigation and facilitate adjustment (that is, impose a safeguard measure);
>
> (b) take some other WTO-consistent action to otherwise address the serious injury established in the underlying investigation; or
>
> (c) take no action and impose no measure at all, despite having established the right to do so.[224]

The panel then stated that any WTO Member can use their right under the Agreement on Safeguards to prevent or remedy serious injury to its domestic industry. This can though only be done if the chosen remedial course of action suspends, withdraws, or modifies a relevant GATT obligation or concession for that purpose. [225]

Thus, if Indonesia would have wanted to apply a safeguard measure, it could have applied an import quota, to be able to suspend, withdraw or modify relevant GATT obligations or concessions. The panel thus concluded that a criterion that thus must be fulfilled, is the suspension, withdrawal or modification of relevant GATT obligations or concessions.

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[222] Ibid. para. 7.20.

[223] Ibid. para. 7.26.

[224] Ibid. para. 7.36.

[225] Ibid. para. 7.41.

The panel report was appealed, and the Appellate Body were to consider whether the panel had:

(i) exceeded the scope of its terms of reference or failed to carry out an objective assessment of the matter (raised by Indonesia); and

(ii) whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 (raised by all participants);

The Appellate Body concluded that:

> "in order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. *First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession*. Second, the suspension, withdrawal, or modification in question must be *designed to prevent or remedy serious injury* to the Member's domestic industry caused or threatened by increased imports of the subject product.
>
> …
>
> As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards."[226] (Emphasis added)

The Appellate Body upheld the overall conclusion that the measure at issue does not constitute a safeguard measure, but questioned the panel's suggestion that "in determining whether a measure is a safeguard measure, it is relevant to consider whether it was adopted in "a situation where all of the conditions for the imposition of a safeguard measure are satisfied"." Instead, an assessment of whether the conditions for the imposition of a safeguard measure have been met is only relevant "whether a WTO Member has applied a safeguard measure in a WTO-consistent manner." The Appellate Body concluded that the panel seem to have mixed the "features of a safeguard measure with the conditions for the conformity of a

[226] Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products*), (15 August 2018), para. 5.60.

safeguard measure with the Agreement on Safeguards". [227] Thus, the panel seems to have failed to examine whether the Agreement on Safeguards was applicable before examining if the application fulfilled the requirements.

When examining the design, structure and expected operation, the Appellate Body found that:

> "The imposition of the specific duty on galvalume may seek to prevent or remedy serious injury to Indonesia's industry, but it does not suspend any GATT obligation or withdraw or modify any GATT concession."[228]

To conclude, this means that a measure taken is a safeguard measure when:

1, that measure suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession, and

2, the suspension, withdrawal, or modification in question is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.

An assessment of whether the conditions for the imposition of a safeguard measure have been met is only relevant when considering whether a WTO Member has applied a safeguard measure in a WTO-consistent manner. This would mean that any measure which suspends, in whole or in part, a GATT obligation or withdraw or modifies a GATT concession and that measure is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product – is a safeguard measure. This would also mean that any such measure falls under the Agreement on Safeguard's control.

Even though there is no explicit statement of a temporary nature of the measures, it implies that there must be an extraordinary situation which is being alleviated by an extraordinary measure.

2.3.4 India – Iron and Steel Products

In *India – Iron and Steel Products*, the panel also examined whether the measure at issue was in fact a safeguard measure or not despite that the parties to the dispute did not question the applicability.

Japan had requested consultations with India concerning certain measures imposed by India on imports of iron and steel products into India on 20 December 2016. This resulted in a panel report in 2018 where amongst other the panel considered whether

[227] Ibid. para. 5.62.

[228] Ibid. para. 6.7.

Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the present dispute.[229] India had initiated a safeguard investigation on 7 September 2015 and later imposed definitive safeguard measures. Japan argued that India had acted inconsistently with Article XIX and the Agreement on Safeguards. Even though the parties did not question the applicability of Article XIX and the Agreement on Safeguards to the dispute, the panel saw it appropriate to examine whether the measure falls within the scope of the Agreement on Safeguards.[230]

The panel referred to *US – Steel Safeguards* where it was noted that:

> "It is precisely by "setting forth findings and reasoned conclusions on all pertinent issue of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment of the matter before it" in accordance with Article 11. …[A] panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities. Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994."[231]

However, even though a panel is not supposed to make a *de novo* review, *i.e.* decide the issues without reference to the conclusions or assumptions made in the previous report, this should not mean that they cannot examine a measure that initially was not assumed to be a safeguard measure by the competent authority. Each party claiming a violation of a provision of a WTO Agreement bears the burden of demonstrating and proving its claim.[232]

> "[A] panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its

[229] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products*), WT/DS518/R, 6 November 2018.

[230] Ibid, para. 7.30.

[231] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, *(US – Steel Safeguards),* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), para. 299.

[232] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products),* WT/DS518/R, 6 November 2018, para. 7.10, and the Appellate Body Report, *US – Wool Shirts and Blouses,* DSR 1197:1, p. 337.

> claims, regardless of whether such applicability has been disputed by the parties to the dispute."[233]

The panel continues by stating that Article XIX:1(a) and the Agreement on Safeguards refer to measures which suspend obligations under the GATT 1994, "when unforeseen developments and the effect of such GATT obligations have resulted in an increase in imports that causes or threatens to cause serious injury to the relevant domestic producers."[234]

Thus, safeguard measures are any measure that

(i) suspend tariff concessions when

(ii) unforeseen developments have occurred which result in an increase in imports which either cause or threatens to cause serious injury to the relevant domestic producers.

The panel thus re-introduced the unforeseen development requirement in the application of safeguard measures. This will be attended to in Chapter 3.

As already mentioned above, the panel also referred to *Indonesia – Iron or Steel Products:*

> "[I]n order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole."[235]

The panel examined whether the measures at issue were in fact ordinary customs duties. They concluded that the fact that the measure at issue did not result in total duties on the importation of the product concerned that exceeded the rate bound by

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[233] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products),* WT/DS518/R, 6 November 2018, para. 7.30, and Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products*), (15 August 2018), para. 5.33.

[234] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products),* WT/DS518/R, 6 November 2018, para. 7.33.

[235] Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (Indonesia – Iron or steel products), (15 August 2018), para. 5.60.

India in its tariff concessions, did not nevertheless imply that the duties resulting from the measure had the nature of an ordinary customs duty.[236] In broad terms, a safeguard measure is an "extraordinary" and "exceptional" measure, and thus even referred to as an emergency clause, rather than an "ordinary" measure.[237] It was concluded by the panel that "the measure at issue does not possess the essential attributes or qualities of ordinary customs duties."[238]

The panel found that the measure at issue was a suspension of obligations incurred by India and that the measure was designed to remedy an alleged situation of serious injury to the domestic injury and that the provisions of Article XIX and the Agreement on Safeguards was applicable, but that the measure was not applied in accordance with the rules.[239]

The panel also concluded that:

> "We are aware that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law."[240]

Thus, the fact that a Member does not by domestic law call a measure a safeguard measure, it doesn't have to mean that a safeguard measure has not been applied.

Clearly, there is still ambiguity on when a safeguard measure *is* applied and *how* to apply it. The above cases show that there is "no end in sight to this string of adverse

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[236] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products),* WT/DS518/R, 6 November 2018, para. 7.38.

[237] Ibid, para. 7.42.

[238] Ibid, para. 7.43.

[239] Ibid, paras. 8.1-8.2.

[240] Appellate Body Reports on China — Measures Affecting Imports of Automobile Parts, (*China – Auto Parts*), WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, (15 December 2008), para. 178. See also Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products),* (15 August 2018), para. 5.60 (referring to Appellate Body Report on European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft, (*EC and certain member States — Large Civil Aircraft*), WT/DS316/AB/R, (18 May 2011), (2nd complaint), paras. 586 and 593; Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 ("*US – Offset Act (Byrd Amendment)"),* WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003), para. 259; Appellate Body Report on United States – final countervailing duty determination with respect to certain softwood lumber from Canada, (*US – Softwood Lumber IV*), WT/DS257/AB/R, para. 56; Appellate Body Report on United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, (*US – Corrosion-Resistant Steel Sunset Review*), WT/DS244/AB/R, (15 December 2003). fn 87; Canada – certain measures affecting the renewable energy generation sector and Canada – Measures Relating to the Feed-in Tariff Program, (*Canada – Feed-in Tariff Program*), WT/DS412/AB/R, WT/DS426/AB/R, (6 May 2013).para. 5.127).

rulings" as implicated by Sykes. Before going further, another case will be examined where the applied measures have been questioned whether they are or are not safeguard measures. The panel report has been appealed and the Appellate Body has stated that it does not know when it is ready to circulate a report.[241]

2.3.5 United States – Certain Measures on Steel and Aluminium Products

This case has not been settled yet,[242] but even though the US has argued that it has not applied safeguard measures in the case of the Ad Valorem tariffs on steel and aluminium, many other WTO Members believe the tariffs are in fact safeguard measures. For this reason, the applied tariffs will be examined here to support the final conclusions to the research questions, to try to draw some conclusions on what a safeguard measure is as well as when and if the rules on safeguard measures have been applied.

The US decision to impose duties/tariffs for steel and aluminium was based on a Section 232 investigation. These investigations are conducted under the authority of the Trade Expansion Act of 1962, and the purpose is to determine the effect of imports on the national security. [243] Investigations may be initiated based on applications from interested parties, requests from any department or agency, or self-initiated by the Secretary of Commerce. [244] Based on the findings from the investigation, the President can determine whether to use his statutory authority to adjust the imports.

To determine the effect on the national security, the quantity of the article in question or other circumstances related to its import shall be considered. The following shall be considered as well:

1, Domestic production needed for the projected national defense requirements;

[241] India – Certain measures on imports of iron and steel products, communication from the Appellate Body, WT/DS518/10, (22 February 2019).

[242] The panel has stated they expect to issue its final report in the autumn 2020 United States – Certain measures on steel and aluminium products, communication from the Panel, WT/DS556/17, (10 September 2019). The panel has though not delivered its report as of January 13, 2021.

[243] II Statute, Title 19 Customs Duties, Chapter 7 Trade Expansion Program Trade Agreements 19 U.S.C. § 1862

[244] III Regulations, Title 15, Commerce and Foreign Trade, Effect of imported articles on the National Security, 15 CFR 705.3.

2, The capacity of domestic industries to meet projected national defense requirements;

3, The existing and anticipated availabilities of human resources, products, raw materials, production equipment and facilities, and other supplies and services essential to the national defense;

4, The growth requirements of domestic industries to meet national defense requirements and the supplies and services including the investment, exploration and development necessary to assure such growth; and

5, Any other relevant factors.[245]

The Department shall also with regard for the quantity, availability, character and uses of the imported article under investigation, consider the following:

1, The impact of foreign competition on the economic welfare of any domestic industry essential to our national security;

2, The displacement of any domestic products causing substantial unemployment, decrease in the revenues of government, loss of investment or specialized skills and productive capacity, or other serious effects; and

3, Any other relevant factors that are causing or will cause a weakening of our national economy.[246]

Thus, a determination of quantity of the imports as well as other circumstances and factors such as impact of foreign competition, unemployment, decrease in revenues and factors that cause a weakening of the national economy, is made during the investigation. The law has been enacted since 1962, but the justification of the adjustments mentioned previously are similar to the ones seen today in recent RTAs, as seen in the following chapters, when it comes to imposing regional safeguard measures.[247]

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[245] Ibid, 705.4 (a).

[246] Ibid, 705.4 (b).

[247] Section 232 Investigations, program guide, The Effect of imports on the National Security, Investigations conducted under the Trade Expansion Act of 1962, as amended June 2007. Bureau of Industry and Security Office of Technology evaluation. See also See for example Partnership Agreement between the Members of the African, Caribbean and pacific Group of States of the one part, and the European Community and its Member States, of the other part, (The Cotonou Agreement) ACP/CE/en55. Annex V. Article 8 and Article 25 (2) Economic Partnership

The President can either take "such action as deemed necessary to adjust the imports of the article so that such imports will not threaten to impair the national security" or take no additional action.[248] Based on the findings from the investigation in January 2018, the President decided to adjust the imports of steel articles by imposing a 25 percent Ad Valorem tariff on steel articles, imported from all countries except Canada and Mexico.[249] An Ad Valorem tariff of 10 percent was imposed on aluminium articles, imported from all countries except Canada and Mexico.[250] The exemptions was however later changed and some of the countries exempted from the tariffs are instead subject to an absolute quota.[251]

In a memorandum from the Department of Defense (DoD) to the Department of Commerce, it is clear that DoD believes "that the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security". However, the US military requirement for steel and aluminium each only represent roughly three percent of US production and thus DoD does not believe that the imports impact the ability of DoD programs to acquire steel and aluminium necessary to meet national defence requirements. Their suggested way forward is to focus on correcting Chinese overproduction and countering their attempts to circumvent existing anti-dumping tariffs rather than target key allies. [252] This conclusion is very interesting since the Department of Commerce concluded that protectionism is needed to protect national security. This is however a two-edged sword, since availability of the products at issue is essential for national security while the US argues the "threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency"."[253] Thus, the US wants to rely

Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, (30.10.2008), *Official Journal of the European Union*, L 289/I/3.

[248] III Regulations, Title 15, Commerce and Foreign Trade, Effect of imported articles on the National Security, 15 CFR 705.11 (b).

[249] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/ visited on 14th June 2018.

[250] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-aluminum-united-states/ visited on 14th June 2018.

[251] https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel visited on 14th June 2018.

[252] Secretary of Defense, Memorandum for Secretary of Commerce; https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiossneakpeek&stream=top-stories visited on 14 June 2018.

[253] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-adjusting-imports-steel-united-states/

on their own ability rather than imports. Also, the US is the world's largest steel importer.[254]

In its response to China's request for consultation, it stated that "the United States did not take action pursuant Section 201 of the Trade Act of 1974, which is the law under which the United States imposes safeguard measures".[255] Simon Lester also believes that every "Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI of the GATT 1994".[256]

Previously, most other investigations under Section 232 have either showed that no threat exists to national security or that no actions were necessary. Apart from investigations on; oil in 1975 and oil in 1979 which resulted in termination of imports of oil from Iran, crude oil from Libya in 1982 which resulted in an embargo, and metal-cutting and metal-forming machine tools that led to voluntary restraint agreements in 1986. Interestingly, voluntary restraint agreements were a result of lacked provisions in GATT Article XIX which caused problems in the discipline of safeguard measures which was mentioned in the previous Chapter. These problems included irregular agreements that prevailed over safeguard measures.[257] Such agreements were generally bilateral and typically exporters were asked to "voluntarily" agree on quantitative export limitations. These agreements were thus called "voluntary export restraints", "voluntary restraint agreements" and "orderly marketing arrangements" and they became known as "grey area measures" as mentioned above.[258] Grey area measures were the alternative to safeguard measures and since they were often more beneficial in an economic sense, many exporting nations agreed to the restrictions they imposed.[259] In a sense, these grey area measures allowed the imposition of selective safeguard measures.[260] At the same time they circumvented the right to compensation for affected countries contained in the rules on safeguards.

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[254] https://www.trade.gov/steel/countries/pdfs/imports-us.pdf

[255] Communication from United States in United States – certain measures on steel and aluminium products request for consultations by China, WT/DS544/1, G/L/1222, G/SG/D50/1, 9 April 2018.

[256] See webpage http://worldtradelaw.typepad.com/ielpblog/2018/04/the-us-china-national-securitysafeguardstariff-fight.html, visited on 14 June 2018.

[257] Lee, Yong-Shik, *Safeguard Measures in World Trade Law, The Legal Analysis*, Kluwer Law International, 2nd ed, (2005), page 27.

[258] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press, (2006), pages 21-22.

[259] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press, (2006), page 23.

[260] For a more comprehensive background on the subject of selective safeguards see Bronckers, M.C.E.J., *Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law*, Kluwer (1985).

Another interesting addition to these activities is Truman's seizure of the entire American steel industry in 1952. A limited national emergency had been proclaimed and there was a strike in the steel industry. Truman stated in a speech on radio that:

> "Our national security and our chances for peace depend on our defense production. Our defense production depends on steel."

On the 2nd June 1952, the Supreme Court ruled that President Truman's seizure order was unconstitutional. Justice Hugo Black, wrote:

> "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

Four of the justices believed that the national emergency in the spring of 1952 was not severe enough to justify the government takeover of privately-owned steel companies. However, under more extreme circumstances such an action by a president may be constitutional, they implied.[261]

Safeguard measures or Ad Valorem tariffs on steel and aluminum?

India has, joined by China, Hong Kong, Thailand, Russia and the EU, complained to the WTO about the US duties and stated that the measures at issue, operating independently and/or together, appear to be inconsistent with the United States' obligations under:

- Articles XIX:1(a), XIX:2 of the GATT 1994 and Articles 2.1, 2.2, 3.1, 4.1, 4.2, 5.1, 7, 9.1, 11.1(a), 12.1, 12.2 and 12.3 of the Agreement on Safeguards.
- Article 11.1(b) of the Agreement on safeguards and Article XI:1 of the GATT 1994 to the extent that the United States seeks, through the adoption of the measures at issue, any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.
- Article II:1(a) and (b) of the GATT 1994, because the United States has imposed import duties on certain steel and aluminium products in excess of the duties set forth and provided in Part -I of the United States' Schedule of Concessions and Commitments annexed to the GATT 1994.
- Article I:1 of the GATT 1994, because the measures at issue do not apply uniformly to all imports of certain steel and aluminium products into the United States irrespective of their origin.

[261] US Supreme Court: Youngstown, Sheet & Tube Co. v. Sawyer, 343 U.S. 579, Argued: May 12-13, 1952 Decided: 103 F.Supp. 569, affirmed.

- Article XI:1 of the GATT 1994, because the measures implicitly introduce restrictions in the form of quotas.[262]

In addition, EU has filed a similar compliant on their own,[263] as well as Canada,[264] and Mexico,[265] which all were joined by Japan. China had also already in April 2018 filed a request for consultation where some countries asked to join the consultations.[266] At the Goods Council meeting, the EU said that "no exception in the General Agreement on Tariffs and Trade (GATT) is capable of justifying an import restriction taken outside of the framework of trade remedies for the purpose of protecting a domestic industry against foreign competition."[267]

The main question in this section is thus; are the US Ad Valorem tariffs for steel and aluminium in fact safeguard measures?

The purpose of the Trade Expansion Act is "(1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining and commerce; (2) to strengthen economic relations with foreign countries through the development of open and non-discriminatory trading in the free world; and (3) to prevent Communist economic penetration.[268] The idea is to expand trade but the act also include some articles in order to restrict foreign trade, such as Section 201 and 232. John F. Kennedy stated:

> "This act recognizes, fully and completely, that we cannot protect our economy by stagnating behind tariff walls, but that the best protection possible is a mutual lowering of tariff barriers among friendly nations so that all may benefit from a free flow of goods. Increased economic activity resulting from increased trade will provide more job opportunities for our workers (…). Lowering of our tariffs will provide an increased flow of goods for our American consumers. Our industries will be stimulated by increased export opportunities and by freer competition with the

[262] United States – certain measures on steel and aluminium products request for consultations by India, WT/DS547/1, G/L/1238, G/SG/D53/1, 23 May 2018, pages 2-3.

[263] United States – certain measures on steel and aluminium products request for consultations by the European Union, WT/DS548/1, G/L/1243, G/SG/D54/1, 6 June 2018.

[264] United States – certain measures on steel and aluminium products request for consultations by Canada, WT/DS550/1, G/L/1245, G/SG/D55/1, 6 June 2018.

[265] United States – certain measures on steel and aluminium products request for consultations by Mexico, WT/DS551/1, G/L/1246, G/SG/D56/1, 7 June 2018.

[266] United States – certain measures on steel and aluminium products request for consultations by China, WT/DS544/1, G/L/1222, G/SG/D50/1, 9 April 2018.

[267] https://www.wto.org/english/news_e/news17_e/good_10jul17_e.htm, visited 1 February 2019.

[268] Trade Expansion Act of 1962, Section 102.

> industries of other nations for an even greater effort to develop an efficient, economic, and productive system."[269]

The Trade Expansion Act came in a time where grey area measures were allowed, and so far, no cases on Section 232 has ruled that it is inconsistent with WTO law, but it is likely that the steel and aluminium tariffs will change that. As indicated above, safeguard measures are any measure that suspend tariff concessions when unforeseen developments have occurred which result in an increase in imports which either cause or threatens to cause serious injury to the relevant domestic producers. It is at least clear that the US measure has suspended tariff concessions and also that it is used as a result of increased imports which cause or threaten to cause injury to the domestic industry.

The tariffs are also argued to resemble voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or the import side through the measures at issue. Thus, it can also be argued that the US tries to bring back the grey area measures. Clearly, the aim to restore multilateral control over safeguards and eliminate all measures that are not included in the Agreement on Safeguards has not been upheld in this case.

Conclusion

The cases above that have examined, or are about to examine, what a safeguard measure is have either reviewed whether it is an ordinary duty, an extraordinary duty or a national security exception. In this section the different types of exceptions will be examined.

As laid out in for example the *Dominican Republic – Safeguard Measures* and *India – Iron or Steel Products,* there are some differences between an extraordinary duty and an ordinary duty.

[269] John F. Kennedy, Remarks Upon Signing the Trade Expansion Act, October 11, 1962. Found online by Gerhard Peters and John T. Wolley, The American Presidency Project, http://www.presidency.ucsb/ws/?pid=8946.

Table 4: Extraordinary duties (safeguard measures) and ordinary customs duties

	Extraordinary customs duties	**Ordinary customs duties**
Suspension	The measure suspends, in whole or in part, a GATT obligation or withdraw or modify a GATT concession.	No suspension, but if the bound rate and applied rate is significantly different, ordinary customs duties can be levied to decrease imports, up to the bound rate. Applied in accordance with MFN.
Injury	The suspension, withdrawal, or modification in question is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.	No injury
Target	Increase in imports which cause or threatens to cause serious injury to domestic production	May apply to imports of the products listed in its Schedule

Thus, there are some significant difference between extraordinary and ordinary duties such as the suspension of concessions, as also emphasized by the panels and Appellate Body.

As outlined above, there are "extraordinary exceptions", *i.e.* safeguard measures, but there are also general exceptions (Article XX GATT), and national security exceptions (Article XXI). By comparing the rules on safeguard measures to Article XX and Article XXI GATT we get the following table.

Table 5: Difference between safeguard measures and other exceptions

	Article XIX	**Article XX**	**Article XXI**
Exception	Provide for an exception to be able to restrict imports	Provide for a general exception to be able to restrict imports	Provide for a security exception to be able to restrict imports
Aim	Protect domestic industry in extraordinary situations	Protect public morals, human and animal life, etc.	Protect security interests
Injury	Serious injury	No injury, but for some protections it must be necessary	No injury, but must be necessary
Constraint/ condition	The country imposing the measures must prove that the domestic industry was seriously injured by the increased imports.	The party invoking the exception must prove the necessity of the exception for some of the paragraphs.	Subjective approach if the country imposing the exception "consider it necessary" to do so.
Scope	A safeguard measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. The suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.	Restrictions cannot be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade	Can only be applied in (i) situations concerning security interests or (ii) security interests concerning fissionable materials; traffic in arms, ammunition and implements of war; and taken in time of war or other emergency in international relations, or (iii) under the United Nations Charter for the maintenance of international peace and security.

The reason for making the comparison is due to that the US has imposed national security measures, which other WTO Members believe to be safeguard measures. However, the measures target different aspects of trade and national security exceptions are similar to safeguard measures in the way that the Member interrupt the rules and national security is offered as the excuse, while for example environmental regulations where the responding party argues that the regulation is *not* in violation.[270]

Due to the extraordinary situation, if any relevant law, Article XXI on security exceptions could be applicable in the Ad Valorem case as argued by the US.

[270] Lester, Simon and Zhu, Huan, Closing Pandora's Box, *The Growing Abuse of the National Security Rationale for Restricting Trade,* Policy Analysis Cato Institute, (June 25, 2019), page 8.

Nevertheless, even though the US argues that they have not applied safeguard measures, it could still be the case as noted above.

Article XXI reads:

> "Nothing in this Agreement shall be construed:
>
> (*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
>
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
>
> (iii) taken in time of war or other emergency in international relations; or
>
> (*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." *(Emphasis added)*

The self-judging statement "it considers" and "taken in time of war or other emergency in international relations" might raise some questions. Who is authorized to determine the justification of imposing Article XXI? As the EU argued, no exception in "the GATT is capable of justifying an import restriction taken outside of the framework of trade remedies for the purpose of protecting a domestic industry against foreign competition."[271]

So far there has not been many cases which has cited Article XXI, together with a couple of cases that are in consultations or panel compositions and also an unadopted report by the panel.[272] These cases do not refer to safeguard measures but will be presented briefly below for illustrative purposes. First some older circumstances will be presented.

[271] https://www.wto.org/english/news_e/news17_e/good_10jul17_e.htm, visited 1 February 2019.

[272] United States - Trade Measures affecting Nicaragua, 3L/6053, unadopted, dated 13 October 1986.

In the case *India – Import restrictions,* there has been no ruling but only request for consultations.[273] In this particular case, India had argued that it imposed import restrictions based on Article XX and/or Article XXI. The US, and later Japan, Australia and Switzerland requested to join the consultations.[274] The EU opposed that the import restrictions constituted infringement of Articles III, X, XI, XIII and XVII of GATT 1994, Article 4.2 of the Agreement on Agriculture, and Articles 1, 2 and 3 of the Agreement on Import Licensing Procedures, and thus cannot be justified under Articles XX or XXI of GATT 1994.

Also, Qatar has raised concerns over measures implemented in June 2017 by Saudi Arabia, the United Arab Emirates (UAE) and Bahrain.[275] All these countries are part of the GCC. The countries imposing the measures argued that they were imposed in accordance with Article XXI of the GATT. The UAE also claims that the matter does not fall under the competence of Goods Council nor of the WTO. Egypt said the trade restrictions fall under the "exceptional circumstances" and thus were consistent with WTO rules.[276]

The measures at issue in the Qatar request, includes all written and unwritten, published and unpublished measures adopted in the context of coercive attempts at economic isolation imposed by the UAE against Qatar. The measures individually and collectively affect trade in goods, trade in services and trade-related aspects of intellectual property rights.[277] Since UAE refused to engage in consultations with Qatar, Qatar requested a panel to be composed at DSB.[278] In September 2018 a panel was composed.[279]

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[273] Request for Consultations by the European Communities, India – Import restrictions, WT/DS149/1, G/L/265, G/AG/GEN/29, G/LIC/D/25, 12 November 1998.

[274] Communication from the United States, Request to Join Consultations, India – Import restrictions, WT/DS149/2, 24 November 1998, Communication from Japan, Request to Join Consultations, India – Import restrictions, WT/DS149/3, 25 November 1998, Communication from Australia, Request to Join Consultations, India – Import restrictions, WT/DS149/5, 26 November 1998 and Communication from Switzerland, Request to Join Consultations, India – Import restrictions, WT/DS149/4, 26 November 1998.

[275] Request for consultations by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/1, G/L/1180, S/L/415, IP/D/35, 4 August 2017.

[276] https://www.wto.org/english/news_e/news17_e/good_10jul17_e.htm, visited 1 February 2019.

[277] Request for consultations by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/1, G/L/1180, S/L/415, IP/D/35, 4 August 2017, para. 4.

[278] Request for the establishment of a panel by Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/2, 12 October 2017.

[279] Constitution of the panel established at the request of Qatar, United Arab Emirates – measures relating to trade in goods and services, and trade-related aspects of intellectual property rights, WT/DS526/3, 3 September 2018.

The Office of the United State Trade Representative has also in a written statement to WTO in regards to the case *Russia – Measures Concerning Traffic in Transit* commented on Article XXI.[280] Russia has invoked in its defence of all claims raised by Ukraine the security exception under Article XXI(b)(iii) of the GATT. This case will be described more below.

The US is of the opinion that:

> "national security are political matters not susceptible for review or capable of resolution by WTO dispute settlement. Every Member of the WTO retains the authority to determine for itself those matters that it considers necessary to the protection of its essential security interests, as is reflected in the text of Article XXI."[281]

GATT Parties and WTO Members has recognized this right of each Member in for example a note by the Secretariat on Article XXI.[282] This note describes the cases of invocation of Article XXI and the procedural guidelines. Article XXI was in the original versions of the draft Charter of the International Trade Organization combined with Article XX, where one part was focusing on general exceptions to commercial policies and the other on general exceptions to the Charter as a whole.[283] There was a tendency to try to avoid conflicts between the United Nations and the Organization in regards to political matters, and thus the former Charter referred some conflicts to the UN rather than to the Organization.

The US was quite involved in the discussions of the provision during the Geneva negotiating session on 24 July 1947.[284] The delegation stated:

> "I think there must be some latitude here for security measures. It is really a question of a balance. We have got to have some exceptions. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.

[280] https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf, visited on 1 February 2019.

[281] Ibid.

[282] GATT, Article XXI – Note by the Secretariat, MTN.GNG/NG7/W/16, (18 August 1987).

[283] Ibid, para. 2.

[284] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A Held on Thursday, 24 July 1947, E/PC/T/A/PV/33.

> We have given considerable thought to it and this is the best we could produce to preserve that proper balance."[285]

Based on this, the panel in *Russia – Measures Concerning Traffic in Transit* concluded that:

> "a. the matters later reflected in Article XX and Article XXI of the GATT 1947 were considered to have a different character, as evident from their separation into two articles;
>
> b. the "balance" that was struck by the security exceptions was that Members would have "some latitude" to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); and
>
> c. in the light of this balance, the security exceptions would remain subject to the consultations and dispute settlement provisions set forth elsewhere in the Charter."[286]

Due to the Members good-faith efforts, by avoiding using the national security exception, no major conflicts have arisen in the past nor has the DSB been able to interpret what Article XXI really means.[287] Some former cases have reviewed measures justified under Article XXI. These cases dealing with Article XXI:(b)(iii) are:

- United States – Suspension of obligations between the US and Czechoslovakia in 1951 (adopted by vote)
- Prohibition of Czechoslovakian imports by Peru in 1954 (annulled in 1967)
- Ghana – Ban on imports of Portuguese goods in 1961 (Ghana's statement "under this Article each contracting party was the sole judge of what was necessary in its essential security interests" was noted by the Contracting Parties)
- United States embargo on trade with Cuba in 1962 (when Cuba notified the US embargo, the US responded with invoking the security exception)

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[285] Ibid, p. 21.

[286] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit*), (5 April 2019). para. 7.98.

[287] Lester, Simon and Zhu, Huan, Closing Pandora's Box, The Growing Abuse of the National Security Rationale for Restricting Trade, *Policy Analysis Cato Institute*, (June 25, 2019), page 3.

- Egypt – Boycott against Israel and secondary boycott in 1970 (Several members of the Working Party supported the Egyptian view that the background of the boycott was political and not commercial)
- EC, Australia and Canada –. Trade measures against Argentina 1982 (Argentina argued that the suspensions were in violation of the General Agreement Article I:1, II, XI:1, XIII, and XXXVI-XXXVIII)
- United States – Imports of sugar from Nicaragua in 1982 (the US argued that the actions did of course affect trade, but was not taken for trade policy reasons)
- United States – Embargo on trade with Nicaragua in 1985 (US argued that the provision left it to each contracting party to judge what action it considered necessary for the protection of its essential security interest. Nicaragua requested a Panel which the US accepted, provided that "it was understood that the Panel could not examine or judge the validity of or the motivation for the invocation of Article XXI:(b)(iii) by the United States. A report was circulated)[288]

Sweden invoked Article XXI in 1975 regarding footwear and stated that the "decrease in domestic production has become a threat to the planning of Sweden's economic defence in situations of emergency as an integral part of its security policy". After some resistance as to the justification of the measures under the General Agreement, Sweden notified its termination of the quotas in 1977. [289] From a rhetorical point of view, the argument imposed by the US about steel and aluminium duties, resembles the argument of Sweden.

In 1982, the Contracting Parties adopted a "Decision Concerning Article XXI of the General Agreement" (BISD 29S/23), which basically said that Article XX constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved, but that it could create disruption and uncertainty for international trade. The Contracting Parties then decided that:

1. Subject to the exception in XXI:a, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
2. When action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.[290]

[288] GATT, Article XXI – Note by the Secretariat, MTN.GNG/NG7/W/16, (18 August 1987), paras. 15-23.

[289] Ibid, para. 24.

[290] Ibid, para. 25.

In *Russia – Measures Concerning Traffic in Transit*, Russia had stated that the panel lacked jurisdiction.[291] The panel however stated that:

> "The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[144] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction."[292]

In its argumentation, the panel referred to other WTO cases as well as other dispute settlement bodies.[293]

US agreed with Russia in the *Russia – Measures Concerning Traffic in Transit,* that the "determination of an action that is necessary for the protection of a Member's essential security interests and determination of such Member's essential security interests is at the sole discretion of that Member". Thus, the panel lacks the authority to review the invocation of Article XXI and to make findings on the claims raised in this dispute. No findings by the panel can support the DSB in making the references provided for in DSU Article 19.1 because no finding of WTO-inconsistency may be made. Thus, the US argues that the only findings that can be made are to recognize that GATT Article XXI has been invoked.[294]

The panel however finds it had jurisdiction and concluded that:

> "Consequently, Russia's argument that the Panel lacks jurisdiction to review Russia's invocation of Article XXI(b)(iii) must fail. The Panel's interpretation of Article XXI(b)(iii) also means that it rejects the United States' argument that Russia's

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[291] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit),* (5 April 2019), para. 7.4.

[292] Ibid, para. 7.53.

[293] See International Court of Justice, Questions of Jurisdiction and/or Admissibility, Nuclear Tests Case (Australia v. France) (1974) ICJ Reports, pp. 259-260; and International Court of Justice, Preliminary Objections, Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) (1963) ICJ Reports, pp. 29-31. The Appellate Body has stated that WTO panels have certain powers that are inherent in their adjudicative function. (See Appellate Body Report, Mexico – Taxes on Soft Drinks, para. 45.) This is known as the principle of Kompetenz-Kompetenz in German, or compétence de la compétence in French. The Appellate Body has held that panels have the power to determine the extent of their jurisdiction. (See Appellate Body Reports, US – 1916 Act, fn 30 to para. 54; and Mexico – Corn Syrup (Article 21.5 – US), para. 36.) (Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit),* (5 April 2019), paras.144 and 145.)

[294] https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Sub.Re.GATT.XXI.fin.%28public%29.pdf, visited 1 February 2019.

> invocation of Article XXI(b)(iii) is "non-justiciable", to the extent that this argument also relies on the alleged totally "self-judging" nature of the provision."[295]

The principle of good faith could be applied here, and one case that has examined Article XX the "General exceptions" clause was the *US – Shrimps* case.

> "One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably"."[296]

The panel in *Russia – Measures Concerning Traffic in Transit,* referred to good faith and Article 31(1) of the Vienna Convention.[297] The panel also stated that there are at the least three ways of interpreting "which it considers". It can be read:

(i) "to qualify only the word "necessary", *i.e.* the necessity of the measures for the protection of "its essential security interests"; or

(ii) to qualify also the determination of these "essential security interests"; or

(iii) to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well."[298]

The panel examined each word, conjunction, adjective, context etc. in order to conclude that:

> "the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision."[299]

This conclusion is also supported by the history of Article XXI, as mentioned above.[300] The panel also concluded that "exceptions and escape clauses built into

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[295] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (Russia — Traffic in Transit), (5 April 2019), para. 7.103.

[296] Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (US-Shrimp), WT/DS58/AB/R, (12 October 1998), para. 158.

[297] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit),* (5 April 2019), para. 7.59.

[298] Ibid, para. 7.63.

[299] Ibid, para. 7.82.

[300] Ibid, para. 7.83.

the GATT 1994 and the WTO Agreements, permit Members a degree of flexibility that was considered necessary to ensure the widest possible acceptance of the GATT 1994 and the WTO Agreements".[301]

The panel then went further to examine whether the measures constitutes an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) and also whether the measures were "taken in time of" and found that it was.[302]

In a comparison with the US Ad Valorem tariffs, some differences are noted. First, the Ad Valorem tariffs are not aimed towards a single market – as in the case between Russia and Ukraine. The tariffs are aimed towards all markets, with a few exceptions. When examining whether the measures constitutes an emergency in international relations, this would indicate that the US had an emergency in international relations with all those markets. Strangely, this emergency is not valid for a few markets which are exempted from the tariffs. The balance between on the one hand the need for security measures, while on the other the risk for disguised trade restrictions, does not really seem to have been well-adjusted. Interestingly, the aim of Article XIX was to re-establish multilateral control over safeguards and eliminate measures that escape such control – as laid out in the preamble of Article XIX – but the measures as used by the US does however seem to have reinforced the use of voluntary export restraints when giving South Korea an exemption.

The similarity found, is that the WTO DSB ought to have jurisdiction over the actions despite the US objections.

If the US application of national security exception is found to be in non-compliance with WTO law, then the DSB can authorize a suspension of concessions under which the complainants can impose tariffs or retaliation.[303] Lester and Zhu argue that the practice that most complainants has retaliated already, has little basis and undermines the confidence in the system and "leaves everyone wondering if the rules have any value".[304]

US has also threatened to impose the Section 232 measures on imports from Europe, which Bown believes can "damage the US economy, create uncertainty, poison trust and sow massive disruptions through both retaliation and copycat behavior relying on the same flimsy rationale".[305] Bown suggests that the Congress should legislate changes to Section 232 and require the Congress approval before imposing

[301] Ibid, para. 7.79.

[302] Ibid, paras. 7.120-125.

[303] Lester, Simon and Zhu, Huan, Closing Pandora's Box, The Growing Abuse of the National Security Rationale for Restricting Trade, Policy Analysis Cato Institute, (June 25, 2019), page 6.

[304] Ibid, page 7.

[305] https://www.piie.com/commentary/testimonies/transatlantic-policy-impacts-us-eu-trade-conflict, visited on 5 July 2019.

measures as well as more clearly define "national security". If the measures would be imposed, EU would most likely retaliate,[306] as it did with the US Ad valorem duties.

2.4 Retaliation

So why did India, China, Russia, and the EU, amongst others, argue that the US Ad Valorem duties are safeguard measures? Likely because – as concluded from above - they are right, but it could also be that they could be allowed to retaliate before seeking approval from the WTO DSB. This would be the case where a Member uses a retaliation measure as a defence towards a safeguard measure that has or has not been applied consistent with WTO law.

The US has in a statement at the Meeting of the WTO Dispute Settlement Body on the 11th January 2019 commented on the retaliations. US says that several WTO Members are unilaterally retaliating against the US for actions fully justified under Article XXI of the GATT. The Members are "pretending that the U.S. actions under Section 232 are so-called "safeguards", and further pretend that their unilateral, retaliatory duties constitute suspension of substantially equivalent concessions under the WTO Agreements on Safeguards." Further, US argues that it has not invoked Article XIX as a basis for its Section 232 actions and has not utilized its domestic law on safeguards to take the actions under Section 232.[307] However, as seen above, just because the US says that it has not applied safeguard measures it does not mean that it hasn't. Members have argued before that they have not applied safeguard measures and yet the WTO DSB has found they did. US has filed a complaint against the additional duties due to inconsistency with WTO law.[308]

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[306] Ibid.

[307] Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, January 11, 2019, found at https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan11.DSB_.Stmt_.as-deliv.fin_.pdf on the 26th May 2019.

[308] WTO, Turkey – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS561/2, 21 December 2018.

WTO, Canada – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS557/1/G/L/1252, 19 July 2018.

WTO, China – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS558/1/G/L/1253, 19 July 2018.

WTO, European Union – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS559/1/G/L/1254, 19 July 2018.

WTO, Mexico – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS560/1/G/L/1255, 19 July 2018.

WTO, Russian Federation – additional duties on certain products from the United States, request for the establishment of a panel by the United States, WT/DS566/1/G/L/1261, 29 August 2018.

The situation of applying safeguard measures as a response to another country's safeguard measures, has occurred in the *EC – Provisional Steel Safeguards*. The US complained and requested a panel, which has not yet been composed. The US alleged that these measures appeared to be inconsistent with the EU's obligations under the provisions of GATT 1994 and of the Agreement on Safeguards, in particular, Articles 2.1, 2.2, 3, 4.1, 4.2, 6 and 12.1 of the Agreement on Safeguards and Article XIX:1(a)of the GATT 1994. Basically, this meant that the EU had not investigated the issue, had not determined any injury nor cause of injury, it did not notify the Committee on any findings and it also excluded imports from some WTO Members.[309]

The DSU does not allocate the burden of proof, however there are some case law referring to burden of proof.

> "[A]s a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[310]

Also, in relation to *jura novit curia* as referred to in *EC – Tariff Preferences*:

> "We are therefore of the view that the European Communities must prove that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of jura novit curia, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."[311]

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[309] European Communities – provisional safeguard measures on imports of certain steel products, Request for the Establishment of a Panel by the United States, WT/DS260/4 19 August 2002.

[310] Appellate Body Report on Canada – Measures affecting the importation of milk and the exportation of dairy products, (*Canada – Dairy*), WT/DS103/AB/R, WT/DS113/AB/R, (13 October 1999), para 66. See also Appellate Body Reports on European Communities - Measures Concerning Meat and Meat Products, (*EC – Hormones*), WT/DS26 and WT/DS48, (13 February 1998), para. 104 Appellate Body Report, Chile – Price Band System, Chile – Price Band System and safeguard measures relating to certain agricultural products, (*Chile – Price Band System*), WT/DS207/AB/R, (23 September 2002), para. 134.

[311] Appellate Body report on European Communities – conditions for the granting of tariff preferences to developing countries, (*EC — Tariff Preferences*), WT/DS246/AB/R, (7 April 2004), para. 105.

Members of the WTO are allowed to retaliate under certain circumstances. If a member fails to carry out its obligations under the GATT, Article XXIII gives any contracted party the right to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. Both Article XIX and Article XXIII allows retaliation in case no mutually acceptable compensation can be agreed.[312] One explanation why it is allowed in case of safeguard measures could be the non-discrimination principle in the application where these measures target all countries, while only a few perhaps cause the import surge.

According to the Dispute Settlement Understanding Article 22.2, compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. The complaining party shall apply the general principle where the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment.[313]

The suspension of concessions or other obligations shall be temporary and only be applied until such time as:

- the measure found to be inconsistent with a covered agreement has been removed, or
- the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or
- a mutually satisfactory solution is reached.[314]

In some sense, one could argue that retaliation measures are similar to safeguard measures. But what differs a retaliation measure from safeguard measures is the serious injury to the domestic production which was caused by the increased imports. The retaliation is similar in the sense as they both suspend obligations or concessions and are of a temporary nature. However, safeguard measures are applied irrespective of the source whereas retaliation targets a specific country.

In the *EC – Hormones* for example, the Unites States obtained the right to suspend concessions equivalent to the nullification or impairment caused by the EC hormone beef ban. The European Communities filed a request for consultation with the

[312] Pauwelyn, Joost, The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In *The Law, economics and politics of retaliation in WTO dispute settlement*, Bown, Chad P. and Pauwelyn, Joost, Cambridge University Press, page 45.

[313] Dispute Settlement Understanding, Article 22.3(a).

[314] Dispute Settlement Understanding, Article 22.8.

United States since the latter had retaliated against the EC and when the measure found to be inconsistent was removed, the US continued its suspension.[315]

Countervailing measures can also be seen as a form of retaliation, where WTO Members are allowed to use appropriate countermeasures against a subsidizing Member.[316] Suspension under GATT Article XXIII can be compared to suspension in Article 60 of the Vienna Convention on the Law of Treaties where "material breach" is a ground for suspending treaty obligations. It can also be compared to countermeasures in Article 49 of the International Law Commission's Articles on State Responsibility. The latter has proportionality standards which could be compared with the equivalence in the DSU, while the former does not. [317]

Pauwelyn has examined the possible goals of WTO suspension and created the following table.

Table 6: The possible goals of WTO suspension[318]

Compensation (focus on victim)		**Sanction (focus on violator)**	
Rebalance	Damages	Induce compliance	Punishment

Safeguard measures are, as seen above, a suspension of WTO obligations and thus a "retaliation towards fair trade" in cases where the domestic industry is injured or threatens to be injured by increased imports, while other Members also can retaliate against the safeguard measure.

Under Article 8 of the Agreement on Safeguards, it is possible to either agree on "adequate means of trade compensation for the adverse effects of the measure on their trade" if a Member has applied safeguard measures, or if no agreement is reached the affected Members can suspend the "application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure".[319] If the safeguard measure "has been taken as a result of an absolute increase in imports and that such a measure conforms

[315] United States – Continued suspension of obligations in the EC – Hormones dispute, WT/DS320/AB/R, 16 October 2008.

[316] Article 4 in the Agreement on Subsidies and Countervailing Measures.

[317] Pauwelyn, Joost, The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In *The Law, economics and politics of retaliation in WTO dispute settlement*, Bown, Chad P. and Pauwelyn, Joost, Cambridge University Press, page 48.

[318] Pauwelyn, Joost, The calculation and design of trade retaliation in context: what is the goal of suspending WTO obligations? In *The Law, economics and politics of retaliation in WTO dispute settlement*, Bown, Chad P. and Pauwelyn, Joost, Cambridge University Press, page 38.

[319] Article 8.1 and 8.2 in the Agreement on Safeguards.

to the provisions of this Agreement" then the affected Member is not allowed to suspension for the first three years.[320]

Thus, if the safeguard measure is based on an absolute increase and applied consistent with Article XIX and the Agreement on Safeguards, then WTO Members are not allowed to retaliate. It is only *after* the first three years retaliation is allowed or if the measure is based on a relative increase. The difference between absolute increase and relative increase is that the former is based on the actual difference in the indicator over two periods in time, while the latter expresses a change as a percentage of the value.

> "Article 2
>
> 1. A Member1 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." (Emphasis added)

As the panel stated in *Ukraine – Passenger Cars*:

> "In our view, the rate and amount of an increase in imports during the period of investigation may indicate a likelihood of increased importation into the domestic market in the very near future. We therefore consider that the rate and amount of an increase in imports are relevant also to an analysis of threat of serious injury. Thus, in a situation where imports have increased relative to domestic production during the period of investigation, there may be a basis for concluding that the trend will continue in the very near future. As we have noted, however, there is no such conclusion in the Notice. We express no opinion as to whether a conclusion that imports were likely to continue to increase relative to domestic production (or in absolute terms) could have been made in the present case. Even if such a conclusion could have been drawn, it is not sufficient for the competent authorities to have merely noted the percentage of the relative increase without explaining what inferences were drawn from it with regard to the likely development of imports in the imminent future. As the Appellate Body has pointed out, '[a] panel must not be left to wonder why a safeguard measure has been applied'.
>
> Therefore, we find that the competent authorities have failed to properly evaluate and give a reasoned explanation of, the likely development of imports, either in absolute

[320] Article 8.3 in the Agreement on Safeguards.

> terms or relative to domestic production, and their likely effect on the situation of the domestic industry in the very near future."[321]

However, the panel has also concluded in *Argentina – Preserved Peaches,* that there is no absolute formula to determine whether increased imports justify the application of a safeguard measure:

> "[T]he point is that there is no fixed period of five years or any other length of time over which figures can simply be subtracted to yield an increase in imports in the sense of Article 2.1 and Article XIX:1(a). Accordingly, neither the mathematical increase in imports of preserved peaches in the last two years, nor the mathematical decrease over the whole five year period of analysis, is determinative."[322]

Thus, it is not an easy task to establish whether retaliation measures are justified. Also, some argue that offering compensation within the first three years could be seen as admitting the inconsistency of the measure.[323]

In the case of US Ad Valorem duties, EU filed actions in pursuant of Article 8 of the Agreement on Safeguards where it retained its rights to suspend the application of substantially equivalent concessions or other obligation, since allegedly the US failed to notify the Committee on Safeguards.[324]

2.5 Multilateral control over safeguards

The preamble to the Agreement on Safeguards state that there is a need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control. The measures to be eliminated are the grey area measures mentioned previously. This is also emphasised in Article 11.1(b) in the Agreement on Safeguards which states:

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[321] Panel Report on Ukraine — Definitive Safeguard Measures on Certain Passenger Cars, (*Ukraine – Passenger Cars*), WT/DS468/R, (26 June 2015), paras. 7.254-7.255.

[322] Panel Report on Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches, (*Argentina – Preserved Peaches*), WT/DS238/R, (14 February 2003), para.7.52.

[323] Lee, Yong-Shik, *Safeguard Measures in World Trade, The Legal Analysis*, Edward Elgar, 3rd ed., (2014), page 153.

[324] Council for Trade in Goods Committee on Safeguards, Immediate notification under article 12.5 of the agreement on safeguards to the council for trade in goods of proposed suspension of concessions and other obligations referred to in paragraph 2 of article 8 of the agreement on safeguards, G/L/1237, G/SG/N/12/EU/1, 18 May 2018.

> "Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2."

A footnote also clarifies that:

> "Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection."[325]

As stated above, Sykes believes that the continuous failing to show when safeguard measures are permissible, would lead to a revival of measures that the Agreement on Safeguards sought to eliminate.[326] The preconditions to apply safeguard measures combined with the rulings from the Appellate Body has made it almost impossible to impose safeguard measures which will be found compliant with WTO law according to Sykes.[327] However, it could also be that safeguard measures are intended to be dubious and not available to reflect the political difficulties during the creation of the Agreement on Safeguards.[328]

In the US Ad Valorem duty case, both Mexico and Canada had mutually agreed solutions in place with the US. As a consequence, US eliminated certain duties on steel and aluminium products from Mexico and Canada.[329] The re-negotiation of the NAFTA agreement between US and Mexico includes a requirement that 70% of a vehicle's steel and aluminium must originate in North America.[330] Also, the US

[325] Foot note 4 to the Agreement on Safeguards.

[326] Sykes, Alan, O., The Safeguard Mess: A critique of WTO Jurisprudence, *Chicago John M. Olin Law & Economics* Working Paper No. 187, (2003), page 3.

[327] Ibid.

[328] Jones, Kent, The Safeguard Mess Revisited: The fundamental problem, *3 World Trade Review,* (2004), pages 83-91.

[329] United States – Certain measures on steel and aluminium products, notification of a mutually agreed solution, WT/DS551/13, G/L/1246/Add.1, G/SG/D56/1/Add.1, (3 June 2019) and United States – Certain measures on steel and aluminium products, notification of a mutually agreed solution, WT/DS550/13, G/L/1245/Add.1, G/SG/D55/1/Add.1, (27 May 2019). The President of the United States has claimed in August 2020 he will reimpose the measures towards Canada.

[330] Congressional Research Service, NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA), Updated February 26, 2019, page 21.

gave South Korea an exemption, after Korea agreed to reduce its export of steel to the US to 70% of the average of the previous three years.[331]

There is no jurisprudence on the Agreement on Safeguards Article 11.1.(b), so there is no guidance from WTO DSB on the application of the text. However, as already stated, one central objective of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system in accordance with Article 3.2 of the DSU. The rulings of:

> "the Appellate Body, panels and arbitrations… are intended to reflect and correctly apply the rights and obligations as they are set out in the WTO Agreement. They must not change the WTO law that is applicable between the parties or, in the words of the DSU, add to or diminish the rights and obligations provided in the WTO Agreements (Articles 3.2 and 19.2 of the DSU)."[332]

According to Article 11.1(b) it is not allowed to seek, take or maintain *any* voluntary export restraints, orderly marketing arrangements or *any* other similar measures on the export or the import side under *agreements, arrangements and understandings* entered into by two or more Members. Thus, it seems clear that agreements on voluntary export restraints are prohibited.

As already highlighted, Article 31.2 in VCLT defines the "context" to be used in interpreting a treaty provision. "Context" is first the text of the treaty, including its preamble and annexes and secondly, "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", thirdly "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". The Appellate Body also stated in *EC – Chicken Cuts* that interpretation under Article 31 is:

[331] Vidigal, Geraldo, The Return of Voluntary Export Restraints? How WTO Law Regulates (and Doesn't Regulate) Bilateral Trade-Restrictive Agreements, 53(2) *Journal of World Trade* (2019), page 2 and Joint Statement by the United States Trade Representative Robert E. Lighthizer and Republic of Korea Minister for Trade Hyun Chong Kim, 28 March 2018, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-statement-united-states-trade, visited 9 November 2019.

[332] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm, visited 9 November 2019.

> "a holistic exercise that should not be mechanically subdivided into rigid components. Considering particular surrounding circumstances under the rubric of 'ordinary meaning' or 'in the light of its context.'"[333]

> "The Appellate Body has observed that dictionaries are a "useful starting point" for the analysis of "ordinary meaning" of a treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties "as expressed in the words used by them against the light of the surrounding circumstances"."[334]

Article 32 broaden the interpretation and state:

> "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."

The Appellate Body has also reverted to the historical background in other cases:

> "With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."[335]

Also, it is not always necessary to fulfil point a or b above:

> "We do not consider it strictly necessary in this case to have recourse to the supplementary means of interpretation identified in Article 32 of the Vienna Convention because our analysis under Article 31 has not left the meaning of the relevant provisions of the Anti-Dumping Agreement "ambiguous or obscure", nor

[333] Appellate Body Report on European Communities – Customs classification of frozen boneless chicken cuts, (*EC – Chicken Cuts*), WT/DS269/AB/R WT/DS286/AB/R, (12 September 2005), para. 176.

[334] Ibid. para. 175.

[335] Appellate Body Report on European Communities - Customs classification of certain computer equipment, (*EC — Computer Equipment*) WT/DS62/AB/R WT/DS67/AB/R WT/DS68/AB/R, (5 June 1998), para. 86.

> has it led to a "manifestly absurd or unreasonable" result. Nevertheless, we turn to examine the United States' arguments relating to the historical background of the Anti-Dumping Agreement."[336]

This shows that the preamble as well as the historical background can be taken into consideration when interpreting the Agreement on Safeguards as elaborated already in Chapter 1.

As stated above, due to that there is uncertainty with safeguard measures, it is necessary to go deeper in interpreting the object and purpose, rather than relying on the text itself and a textual approach to what is written in the articles. Article XIX was subject to a lot of criticism, partly due to that many safeguard actions were taken against selectively targeted countries outside of GATT disciplines,[337] known as grey area measures. The aim with the Agreement on Safeguards was thus to restore multilateral control over safeguards and eliminate all measures that are not included in the Agreement. The purpose of safeguard measures is to provide an escape at the same time as it controls the possibility to impose measures. This suggests that the rules on safeguard measures here rests on a contradiction: trade restrictions to promote trade liberalization, so that as long as countries can opt out from the tariff cuts it will promote trade liberalization. This indicates that the object and purpose behind regional measures is actively to provide an "escape clause" rather than to restrict their use. It is a way to restore competitiveness by enhancing competition, while at the same time provide an ex post (after the event) safety valve for protectionist pressures, by using it as a protection and not a way to liberalize further. The purpose of multilateral safeguard measures seems to be rather to restrict the possibility of using an "escape clause" and to establish a pure "emergency" measure, while regional safeguard measures allow temporary withdrawals.

In *Argentina – Footwear (EC)* the Appellate Body stated that the object and purpose of this article is to allow a Member to readjust "temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances".[338] The remedy is of an emergency character and is to be invoked in situations when, due to obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not foreseen when it undertook that obligation.[339] And since

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[336] Appellate Body Report on United States – Final anti-dumping measures on stainless steel from Mexico, *US – Stainless Steel (Mexico),* WT/DS344/AB/R (30 April 2008), para. 128.

[337] Stewart, Terence P., *The GATT Uruguay Round, A negotiating History (1986-1992*), vol. II: Commentary, Kluwer Law and Taxation Publishers, (1993), pages 1717-1718.

[338] Appellate Body Report on Argentina – safeguard measures on imports of footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 87.

[339] Ibid, para. 93. See also Appellate Body Report on Korea – Definitive safeguard measure on imports of certain dairy products, (*Korea — Dairy*), WT/DS98/AB/R, (14 December 2009), para. 86.

concessions were negotiated on a non-discriminatory and MFN basis, their withdrawal should also be on that basis.

The current trends indicate that it is not clear what measures a WTO Member can take when injured by imports and that there is uncertainty how RTAs affect the applicability of safeguard measures. Perhaps we are already experiencing the revival that Sykes mentioned, and some WTO Members has also alleged that the US actions above are similar to voluntary export restraints. However, just because one Member does something doesn't mean that all Members can do the same. As Pauwelyn puts it:

> "…WTO obligations are not of the interdependent or 'all or nothing' type — such as a disarmament treaty, a nuclear free zone treaty or much of the Antarctic treaty — referred to in both Article 60.2(c) of the Vienna Convention and Article 42(b)(ii) of the ILC Articles. Material breach of a WTO obligation does not 'radically change the position of all the other' WTO Members 'with respect to the further performance of the obligation', at least not in the sense of the provisions just referred to. In the words of the Commentary to the ILC Articles, the WTO treaty is not a 'treaty where each of the parties' performance is effectively conditioned upon and requires the performance of each of the others. The fact that one WTO Member violates its obligations under the WTO treaty does surely not allow all other WTO Members to violate theirs. The WTO's most-favoured nation (MFN) principle, for example, applies unconditionally, and not only when other WTO Members respect it. Nor does a violation by one WTO Member allow all other WTO Members to suspend the WTO treaty, in whole or in part, against all other WTO Members (the remedy provided for in Article 60.2(c)). Breach of WTO law may lead to the suspension of obligations or countermeasures by one or more complaining parties against the wrongdoer; it does not, however, permit all WTO Members to suspend the WTO treaty in whole or in part vis-à-vis all other WTO Members. As a result, WTO obligations are not interdependent, or of an 'all or nothing' type."[340]

Hence, violations may lead to the suspension of obligations or countermeasures by one or more complaining parties against the Member that is doing wrong, it does not permit all WTO Members to suspend the WTO treaty against all other WTO Members.

[340] Pauwelyn, Joost, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?, *European Journal of International Law,* (2003), Vol. 14 No. 5, 907–951, pages 927-928.

2.6 Conclusion

This Chapter has shown that there are circumstances where a WTO member would want to claim they have applied a safeguard measure, and other situations where they do not. It has also been shown that the applicability of the rules under the Agreement of Safeguards is a relevant and disputed factor. One of the reasons for this is the fact that WTO Members are parties to RTAs which can influence the applicability of safeguard measures and who is affected by it.

In the case *Dominican Republic – Safeguard Measures* the Dominican Republic claimed that this type of duty was not a safeguard measure per se, despite the fact that a notification had been made to impose safeguard measures, while the panel concluded it was a safeguard measure. The difference between an ordinary customs duty and an extraordinary customs duty was discussed in *Dominican Republic – Safeguard Measures* as mentioned above. In this case, the Dominican Republic argued that the WTO DSB lacked jurisdiction since the measure at issue was not higher than the binding agreed in its schedule of concessions even if it was higher than the tariffs provided for in the regional free trade agreement. The panel however did not find it necessary to rule on the request of lack of jurisdiction.[341] The Dominican Republic argued that the tariff did not constitute an additional tariff, nor an alternative tariff, but rather an increase in the MFN tariff.[342]

The panel in *Dominican Republic – Safeguard Measures* concluded, however, that the wording "ordinary customs duties" in Article II:1(b) did refer to duties collected at the border which constitute customs duties and not extraordinary or exceptional duties.[343] The Dominican Republic was considered to have applied an extraordinary duty which was distinct from the ordinary customs duty.[344] Thus, the measure at issue were found to be a safeguard measure and also inconsistent with the application in WTO law.

In the *Indonesia – Iron or Steel Products* case, the situation was different. Here the party argued that they had applied a safeguard measure. The likely reason behind wanting to apply a safeguard measure is that all WTO Members exporting the goods would be affected by the measure. If it was not a safeguard measure, then the measure would not affect the FTA parties. Even though it was undisputed whether

[341] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 8.1(b).

[342] Ibid, para. 7.28.

[343] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 7.85.

[344] Ibid, para. 7.86.

the measure was a safeguard measure, the panel examined the applicability and determined that it was not a safeguard measure. The Appellate Body concluded that:

(i) A safeguard measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession.

(ii) the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.

(iii) all relevant factors should be evaluated,

a. including the manner in which the measure is characterized under the domestic law of the Member concerned,

b. the domestic procedures that led to the adoption of the measure,

c. and any relevant notifications to the WTO Committee on Safeguards. [345]

There should though be a precaution to the relevant factors mentioned above, since the way a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law as emphasised in *Indonesia – Iron or Steel Products*.

In *India – Iron and Steel products,* it was not disputed whether the measure was a safeguard measure, but the panel still examined the applicability of the Agreement on Safeguards. The panel concluded that it was entitled and required to carry out an "independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute."[346] Hence, the WTO DSB can assess applicability of a specific rule, even though this is not disputed by the parties, in accordance with Article 11 DSU.

[345] Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products*), (15 August 2018), para. 5.60.

[346] Panel Report on India – certain measures on import of iron and steel products, (*India — Iron and Steel Products),* WT/DS518/R, 6 November 2018, para. 7.30, and Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products*), (15 August 2018), para. 5.33.

From the cases above, some conclusions can be drawn that there are some requirements as to make the safeguard rules applicable. It is not a requirement that the measure was initiated and notified as a safeguard measure, nor what the country claim to have applied. The most important factor is what the measure aims to combat, *i.e.* serious injury to the domestic industry, and that the measure suspends in whole or in part, a GATT obligation or withdraw or modify a GATT concession. If the measure does not aim to protect the industries from serious injury and the measure has not suspended or withdrawn a GATT obligation or concession, then it is not a safeguard measure.

When it comes to the US tariffs and the similarities with the above cases, it constitutes an extraordinary duty which is distinct from the ordinary customs duty, it is clear that the tariffs suspend obligations under GATT Article II:1(b) since they exceed the bound levels and the aim is to suspend the obligation in whole or in part or to withdraw or modify the concession. Thus, the first criteria in the list from the *Indonesia – Iron or Steel Products* above is fulfilled.

The extraordinary situation is what distinguish the unforeseen developments. The suspension of the obligations is designed to prevent or remedy serious injury to the US's domestic industry on steel and aluminium caused by increased imports of the product at issue at a temporary manner. Thus, the second condition is fulfilled, and it therefore seems unlikely that the US measures were based on national security.

A recent study by Lester and Zhu argues that the WTO dispute settlement cannot easily resolve the national security exception disputes and instead suggest an alternative mechanism.[347] The suggestion is to include a rebalancing process, as in the Safeguard mechanism, by providing each party the possibility of a particular degree of liberalization or obligations which constitute a balance. Compensation is thus the preferred approach to rebalancing.[348]

> "An attempt to expand the existing safeguard rules for rebalancing beyond their scope undermines the rule of law, but a new rebalancing regime designed specifically for the national security context could help restore it".[349]

One of the differences between the security exception and safeguard measures is that the former means that the WTO Member can take measures "*it considers necessary* for the protection of its *essential security interests*", while safeguard measures means that a WTO Member can *suspend the obligation in whole or in part*

[347] Lester, Simon and Zhu, Huan, Closing Pandora's Box, The Growing Abuse of the National Security Rationale for Restricting Trade, *Policy Analysis Cato Institute,* (June 25, 2019), Number 874, page 1.

[348] Ibid, page 9.

[349] Ibid, page 7.

or to withdraw or modify the concession if "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 that territory of like or directly competitive products". The difference is basically thus that one measure protects security interest while the other protect the domestic producers.

Another huge difference is that security exceptions does not have to be verified in the same manner as safeguard measures. How does one prove that measures that "it considers necessary" have been applied? As indicated above, it is up to the single market to self-judge as a sovereign state that it has applied the measure in good faith.

Also, if using security exception as a base and some kind of voluntary export restraints have been imposed between the invoking Member and another Member, what would the justification look like for the other Member? If the US use security exception to impose duties on steel, how can quotas from South Korea still be allowed? And what if the quotas would be challenged under the WTO DSB?

National security exceptions are similar to safeguard measures in the way that the Member violate the rules and national security is offered as the *excuse*, while for example environmental regulations where the responding party argues that the regulation is *not* in violation.[350]

The manner in which the measure is characterized under the domestic law of the Member concerned, as well as the procedures, are similar to that of safeguard measures. As described above, it is the US President who makes the final decision to impose safeguard measures after taking into consideration the national economic interest. Even though the duties have not been notified as safeguard measures, it does not mean that the measures at issue are not safeguard measures. As stated earlier, an assessment of whether the conditions for the imposition of safeguard measures have been met is only relevant considering whether a WTO Member has applied a safeguard measure in a WTO-consistent manner.

This Chapter strengthens the opinion that there is still some uncertainty in regard to the application of the rules on safeguard measures. Sykes' concern that the continuous failing to show when safeguard measures are permissible, would lead to a revival of measures that the Agreement on Safeguards sought to eliminate,[351] does seem to be a reality. The purpose with the Agreement on Safeguards is amongst others to re-establish multilateral control over safeguards and eliminate measures that escape such control. The Agreement on Safeguards thus serves to uphold the

[350] Lester, Simon and Zhu, Huan, Closing Pandora's Box, The Growing Abuse of the National Security Rationale for Restricting Trade, *Policy Analysis Cato Institute*, (June 25, 2019), page 8.

[351] Sykes, Alan, O., The Safeguard Mess: A critique of WTO Jurisprudence, *Chicago John M. Olin Law & Economics* Working Paper No. 187, (2003), page 3.

goal of trade liberalization and the principle of non-discrimination by applying measures on all products irrespective of its source.

However, as shown in this Chapter, it is still possible to apply selective measures and conclude bilateral agreement which include voluntary restraints. Thus, neither the design nor the application of the rules does re-establish multilateral control over safeguards and eliminate measures that escape such control. This is despite the fact that any measure which suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession and that measure is designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product – is a safeguard measure. And that any such measure falls under Article XIX GATT and the Agreement on Safeguard's control.

In comparison to other measures, safeguard measures are an extraordinary measure. If the measure has suspended the concessions to prevent or remedy serious injury to the Member's domestic industry caused by or threatened by increased imports of the subject product, then the Agreement is applicable. Whether the Agreement is applicable to all irrespective of its source and without being able to opt out, will be examined further below.

This Chapter has introduced the WTO safeguard rules and the types of measures that are considered as safeguard measures under the law. The next Chapter will examine the WTO safeguard rules further with focus on discriminatory and selective measures.

3 Multilateral safeguard rules

3.1 Introduction

In this Chapter, the multilateral rules on safeguards and the requirements for applying them are described and analysed. It deals with the rules on general safeguard measures contained in GATT Article XIX and the Agreement on Safeguards, the rules on the two types of WTO special safeguards measures, *i.e.* the so called Special Safeguard (SSG) in Article 5 of the Agreement on Agriculture and the proposed Special Safeguard Mechanism (SSM). The role of the Most Favoured Nation principle in this context as well as the object and purpose of the rules on safeguards are reviewed. Some of the challenges and problems related to the aim, design and interpretation of the rules are also reviewed and commented on. Furthermore, those asymmetric safeguard rules which favour developing countries' trade are identified.

The overall purpose of this Chapter is to set the ground for the more specific issues analysed and discussed in subsequent chapters. It aims to promote an understanding of the different kinds of rules on multilateral safeguard measures, their interdependence and the challenges related to them.

3.2 The Most Favoured Nation principle

WTO law is built on the principle of non-discrimination. Its overall objective is that Members shall not discriminate against their trading partners or between foreign and domestic goods. It is further elaborated in the Most Favoured Nation (MFN) principle and the National Treatment (NT) principle.

The idea of the MFN-principle, contained in GATT Article I, is that a WTO Member shall treat all the other Members similarly as "most-favoured" partners. If one country gives advantage, favour, privilege or immunity to another trading partner, it has to give the same treatment to all the other WTO Members so that all are "most-favoured".[352] The NT-principle, contained in GATT Article III, means that imported

[352] Article I of the General Agreement on Tariffs and Trade, Article II of the General Agreement on Trade in Services, Article 4 of the Trade-Related Aspects of Intellectual Property Rights.

and locally produced goods should be treated equally when it comes to internal taxation and regulation.[353]

Article XIX of GATT requires safeguard measures to be applied on a non-discrimination basis. According to the MFN-principle they must be directed at *all imports*. Before the Agreement on Safeguards was concluded, targeted (or selective) trade restrictions were used towards certain exporting nations and left the rest alone – instead of using Article XIX. Safeguard measures, on the other hand, could lead to a restriction on all imports of the same goods which in its turn could lead to threats of retaliation from some countries and necessitate compensation to avoid it. Due to this importers began to negotiate arrangements outside of the GATT, which resulted in the earlier mentioned bilateral agreements on quantitative export limitations, the so called "grey area measures".[354] The alternative to the grey area measures would be to impose safeguard measures and since grey area measures were often in an economic sense more beneficial, many exporting nations agreed to the restrictions.[355]

The data on the use of grey area measures is not sufficient, but in 1991, 24 formal Article XIX measures were in effect and 284 known export restraint arrangements.[356] Since many grey area measures were voluntary and perhaps not so transparent, some measures were not known which is why the data is insufficient. Economists noted the potential of these grey area measures that threatened the work of liberalizing trade, and especially developing countries wanted to end the selective use of these arrangements against them.[357] The problems of grey area measures contributed to the Uruguay Round negotiations on safeguards and resulted in a prohibition.[358] One of the issues with grey area measures was that they could be discriminatory since they were a form of selective safeguard measures. Safeguard measures, as mentioned, should be applied on a non-discriminative manner.

There are two fundamentals in the regard of non-discrimination; the *intent* to discriminate and the *effect* of discriminating.[359] Intent to discriminate is when there

[353] Article III of the General Agreement on Tariffs and Trade, Article XVII of the General Agreement on Trade in Services, Article 3 of the Trade-Related Aspects of Intellectual Property Rights.

[354] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press (2006), page 21-22.

[355] Ibid, page 23.

[356] After the Agreement on Safeguards, grey area measures were prohibited, thereby preventing later statistics.

[357] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press (2006), page 24-25.

[358] Ibid, page 245 and 249.

[359] Lester, Simon, Mercurio, Bryan and Davies, Arwel, *World Trade Law, Text, Materials and Commentary*, (2nd ed), Hart Publishing, (2012), page 261.

is a purpose to discriminate and it is the conduct that needs to be prevented through regulation. Effect is when a measure has a discriminatory effect against imports.[360]

There is also a difference between *de jure* and *de facto* discrimination.[361] Safeguard measures should be applied on a non-discriminatory basis which means that they should be applied to a product being imported irrespective of its source.[362] Thus there is a restriction *de jure* of intent to discriminate. As mentioned earlier, certain developing countries proposed during the negotiations on the Agreement on Safeguards that they should be exempted from the application of safeguard measures by developed nations, meaning that there should be an exception from the non-discrimination principle in their favour.[363] The issue of whether the ability to apply safeguard measures selectively based on the source of imports should be allowed or not, was the most important and debated issue in the Tokyo Round negotiations.[364]

In 1985, Bronckers also argued that the non-discrimination principle did not adequately protect the interest of relatively weak countries.[365] Thus, developing countries wanted a more restrictive use of safeguard measures and the effect would be discriminative or selective measures. These problems were to a certain extent solved *de jure* by the conclusion of the Agreement on Safeguards since developing country[366] imports are exempted under certain criteria.[367]

Some developed countries[368] have argued that safeguard measures should be allowed to be applied selectively towards certain countries.[369] These issues were

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[360] Ibid, page 262.

[361] Ibid, page 265.

[362] Article 2.2 of the Agreement on Safeguards.

[363] GATT, Direct-General of GATT, The Tokyo Round of Multilateral Trade Negotiations, April 1979 and Supplementary Report, January 1980. These developing countries were Brazil, Nigeria and Pakistan, see Rai, Sheela, *Recognition and Regulation of Safeguard Measures Under GATT/WTO*, Routledge Research in International Economic Law, (2011), page 24.

[364] Lee, Yong-Shik, *Safeguard Measures in World Trade, The Legal Analysis*, Edward Elgar, 3dr Ed. (2014), pages 38-39.

[365] Bronckers, M.C.E.J., *Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law*, Kluwer (1985), page 11.

[366] The status of being a developing country can bring certain benefits or rights as for example in terms of safeguard measures. WTO law does not contain any precise definition of the terms "developed" and "developing countries". Instead Members of the WTO can themselves announce whether they are developed or developing countries. Other Members can however challenge the decision of a Member to utilize the provisions available to developing countries.

[367] Article 9.1 of the Agreement on Safeguards.

[368] The US, EEC, Japan, Canada, Switzerland, Australia and the Nordic countries, see Rai, Sheela, *Recognition and Regulation of Safeguard Measures Under GATT/WTO,* Routledge Research in International Economic Law, (2011), footnote 39.

[369] Bronckers, Marco, Nondiscrimination in the World Trade Organization Safeguards Agreement: A European Perspective, In *Law and Economics of Contingent Protection in International Trade*,

also to some extent solved *de jure* since Article 5.2 allows for allocative procedures in quantitative restrictions. This indicate that quotas can in themselves be regarded as discriminatory since they allow for some imports but not for others. Bronckers also believes that quantitative restrictions *de facto* make safeguard measures discriminatory.[370]

Pauwelyn suggests that the non-discrimination requirement can be interpreted in two ways. On the one hand it requires Members to impose additional trade restrictions besides the one that offsets the specific imports causing the serious injury. On the other hand, it could be seen as a disincentive since it requires the application of safeguard measures to all imports even close political or economic allies.[371] In both occasions, the non-discrimination requirement "punishes" all imports even those who do not cause the injury. Thus, the non-discrimination requirement ought to be regarded as a discouragement in the application of safeguard measures.

3.3 Article XIX and the Agreement on Safeguards

GATT Article XIX allows WTO Members to take emergency safeguard measures against imports of particular products and specifies the requirements to be fulfilled. The disciplines and rules of Article XIX have been clarified and further expanded in a separate WTO agreement, the Agreement on Safeguards (SA).[372]

Under the escape clause of GATT Article XIX, Member countries are allowed to suspend their GATT obligations if these commitments have led or threaten to lead to injury to the domestic industry.

GATT Article XIX:1(a) reads as follows:

> "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

(ed) Bagwell, Kyle W., Bermann George A., and Mavroidis, Petros C., Columbia Studies in WTO Law and Policy, Cambridge University Press, (2009), page 367.

[370] Bronckers, M.C.E.J., *Selective Safeguard Measures in Multilateral Trade Relations, issues of protectionism in GATT European Community and United States Law*, Kluwer (1985).

[371] Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law,* Oxford University Press, vol 7, no 1, (2004), pages 109-142, page 119.

[372] See Appendix 1.

> to domestic producers in 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."

Several reports from both different panels and the Appellate Body have dealt with the interpretation of GATT Article XIX.[373] In *Argentina – Footwear (EC)* the Appellate Body stated that the object and purpose of this article is to allow a Member to readjust "temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances".[374] The remedy is of an emergency character and is to be invoked in situations when, due to obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not foreseen when it undertook that obligation.[375]

One important issue that needed to be clarified at an early stage was the relationship between GATT Article XIX and the Agreement on Safeguards. In its report in *Argentina – Footwear (EC)* the Appellate Body stressed that "any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994". It also confirmed that the Uruguay Round negotiators did not intend entirely to replace GATT Article XIX by the Agreement on Safeguards. They should be applied cumulatively, except to the extent of a conflict between specific provisions.[376]

The Appellate Body pointed out that:

> "The GATT 1994 and the *Agreement on Safeguards* are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are *both* 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'. Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members. And, as

[373] See for example Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear, (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), and Appellate Body Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (14 December 1999), see also Appendix 2.

[374] Appellate Body Report on Argentina – safeguard measures on imports of footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 87.

[375] Ibid, para. 93. See also Appellate Body Report on Korea – Definitive safeguard measure on imports of certain dairy products, (*Korea — Dairy*), WT/DS98/AB/R, (14 December 2009), para. 86.

[376] Appellate Body Report on Argentina – safeguard measures on imports of footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 89.

> these provisions relate to the same thing, namely the application by Members of safeguard measures, the panel was correct in saying that 'Article XIX of GATT and the Safeguard Agreement must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction.'"[377]

In *Korea – Dairy*, the Appellate Body repeated this statement and also examined the relationship between GATT Article XIX and the Agreement on Safeguards in the light of Article II of the WTO Agreement on the one hand and, Articles 1 and 11.1(a) of the Agreement on Safeguards on the other. Here too, the Appellate Body concluded that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX and the Agreement on Safeguards.[378]

In the case of a conflict however between GATT Article XIX and the Agreement on Safeguards the Interpretative Note to Annex 1A on the relationship between the GATT 1994 and the other multilateral agreements on trade in goods gives guidance on how to solve the problem. Here it is stated that the provision of the other agreement shall prevail to the extent of the conflict.[379] This means that if such a conflict should occur regarding the multilateral rules on safeguards the Agreement on Safeguards prevails over GATT Article XIX.

Lee finds that GATT Article XIX raises a concern about the clarification achieved by the new Agreement on Safeguards.[380] The cumulative interpretation and application of Article XIX and the Agreement on Safeguards is, in his opinion, somewhat unclear. Since both are included in Annex 1A, they should both be applicable but, according to Lee, some provisions of the Agreement seem to treat it (the Agreement on Safeguards) as the sole authority on safeguards (for example Article 2 and 8.3).[381]

GATT Article XIX and the Agreement on Safeguards provide the main body of provisions regarding safeguards in WTO law. As already mentioned, there are

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[377] Ibid, para. 81.

[378] Appellate Body Report on Korea – Definitive safeguard measure on imports of certain dairy products, (*Korea — Dairy*), WT/DS98/AB/R, (14 December 2009), paras. 76–77. See also Appellate Body Report on Argentina – safeguard measures on imports of footwear, (*Argentina – Footwear (EC)*), WT/DS121/AB/R, (14 December 1999), para. 84.

[379] Uruguay Round Agreement, Multilateral Agreements on Trade in goods; General interpretative note to Annex 1A.

[380] Lee, Yong-Shik, Destabilization of the Discipline on Safeguards? Inherent problems with the continuing application of Article XIX after the settlement of the Agreement on Safeguards, *Journal of World Trade* 35(6):1235-1246, (2001), page 1239.

[381] Ibid, pages 1237 and 1240.

further provisions in WTO law regarding special multilateral safeguards and these will be described in section 3.6. [382]

3.4 Requirements for multilateral safeguards

3.4.1 Introduction

GATT Article XIX and Article 2 of the Agreement on Safeguards set out the conditions which must be satisfied before safeguard measures may be applied. The provisions regarding increased imports under the WTO safeguard regime lay down two main conditions which have to be in place if the imposition of safeguard measures is to be justified, namely, increased imports and injury. These two conditions can be further divided into four main sub-conditions.

The first sub-condition is that the increase must have occurred as a result of unforeseen developments and must be the effect of obligations incurred by a WTO Member, *i.e.* tariff concessions and other trade liberalization commitments. Second and third, imports should enter into the importing country in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. Article 2.1 of the Agreement on Safeguards describes the characteristics of those import trends which justify a safeguard measure. However, Article 2.1 must be read together with Article 4.2 of the Agreement which lays down the operational requirements for determining whether the conditions in Article 2.1 exist.[383] Finally, there also has to be a causal link between the increased imports and the injury. The four sub-conditions that have to be fulfilled will here be reviewed separately, *i.e.* "unforeseen developments", "increased quantities", "serious injury" and "causation".

3.4.2 Unforeseen developments

The clause "unforeseen developments" is not further defined in either of the WTO agreements and the broad language can cover various circumstances. Before the Agreement on Safeguards existed, there was a debate concerning the precise meaning of "unforeseen developments" and "the effect of the [GATT] obligations incurred". The first case where the phrase "unforeseen developments" was

[382] The special safeguard provisions of the Agreement on Agriculture, Article 5, are called the SSG and are supposed to operate more easily than the general safeguard measure.

[383] Article 2.1 lays out the conditions under which a WTO Member may apply safeguard measures while Article 4.2 elaborates on injury. See also Panel Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/R, (26 June 1999), para. 7.53.

interpreted was the *US-Hatter's Fur* case. The following reasoning in the GATT Working Party report that handled this 1951 dispute on hats actually gives little guidance:

> "… 'unforeseen developments' 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."[384]

In this particular dispute, the Working Party agreed with the United States and stated that the change in hat fashion had led to the increase of imports which was thus unforeseen, particularly in terms of its magnitude.[385]

Before the conclusion of the Agreement on Safeguards in 1994, GATT practice had evolved to the point where Members no longer paid attention to the wording of the phrase "unforeseen developments" nor argued against it having been fulfilled in a specific case.[386] It should be noted though that the Agreement on Safeguards does not actually mention the requirement of "unforeseen developments" but the Appellate Body confirmed in the two disputes *Korea – Dairy* and *Argentina – Footwear (EC),* that the unforeseen developments requirement of GATT Article XIX is co-applicable with the Agreement on Safeguards. It was held that the phrase should bear its ordinary meaning and be construed in the light of the object and purpose of GATT Article XIX.[387] Furthermore, it has been held that the requirement of "unforeseen developments" describes a certain set of "circumstances" instead of establishing a separate "condition" for the imposition of safeguard measures.[388]

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[384] Working Party Report, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement of Tariffs and Trade. (*US-Hatter's Fur*), (27 March 1951). GATT/CP/106 page 10, para 131.

[385] Working Party Report, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement of Tariffs and Trade. (*US-Hatter's Fur*), (27 March 1951). GATT/CP/106. Interestingly this is the only case when safeguard measures were considered consistent with the multilateral law.

[386] Sykes, Alan O., *The WTO Agreement on Safeguards*, Oxford University Press, (2006), page 102.

[387] Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear, (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 91. See also Appellate Body Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (14 December 1999), para. 84. See also Stevenson, Cliff, Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations? *Journal of World Trade* 38(2): 307-329, (2004), page 310.

[388] Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear, (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 92. See also Appellate Body Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (14 December 1999), para. 85.

The phrase “unforeseen developments” is, as mentioned, not included in the Agreement on Safeguards. In *Argentina – Footwear (EC)* and *Korea – Dairy* the panels had concluded that "safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of GATT Article XIX."[389] The Appellate Body however rejected this conclusion as inconsistent both with the principles of effective treaty interpretation (with respect to treaty interpretation in general) and with the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards.[390] The Appellate Body stated that “unforeseen developments” did not establish an independent condition but still must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with GATT Article XIX.[391]

There has been some discussion on this point among legal scholars. Sykes argues that the Appellate Body has failed to provide standards as to when safeguards are permissible.[392] Lee disagrees with Sykes and holds that the measures reviewed in these disputes all failed to comply with obvious requirements under the Agreement on Safeguards. Contrary to Sykes he is of the opinion that the requirements have been well established by the panels and the Appellate Body. However, he admits that there is still some ambiguity regarding the interpretation of the term “unforeseen developments”.[393]

Stevenson found that there were only a few cases where the requirement of unforeseen developments had been explicitly discussed but that safeguard determinations tended to fail to establish that the increased imports were indeed due to unforeseen developments. In most cases no efforts were made to establish the point.[394] However, his study showed that all safeguard measures reviewed by WTO panels and the Appellate Body had in fact been found inconsistent with WTO law on this point.[395]

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[389] Panel Report on Argentina – Safeguard Measures on Imports of Footwear, (Argentina – Footwear (EC)), WT/DS121/R, (25 June 1999), para. 8.69. Panel Report on Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/R, (26 June 1999), para. 7.48.

[390] Appellate Body Report on Argentina – Safeguard Measures on Imports of Footwear, (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 83.

[391] Ibid, para. 85.

[392] Sykes, Alan, O., The Safeguard Mess: A critique of WTO Jurisprudence, Chicago John M. Olin Law & Economics Working Paper No. 187, page 1 and 31.

[393] Lee, Yong-Shik, Not without a clue: Commentary on “the Persistent Puzzles of Safeguards”, *Journal of World Trade* 40(2):385-404 (2006), page 386.

[394] Stevenson, Cliff, Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations? *Journal of World Trade* 38(2): 307-329, (2004), page 326.

[395] Ibid, page 307.

According to Pauwelyn, the term "as a result of unforeseen developments" suggests two interpretations. The first one, also supported by the Appellate Body, arises where a prior GATT tariff prevents the affected WTO Member from raising its import duties. The tariff does not need to cause the import surge but prevents the Member from reacting with higher tariffs. The other suggests that the reduction of tariffs is an *ex ante* cause which actually triggers the import surge and thereby itself gives rise to the unforeseen developments of the effect of the GATT tariff binding.[396] According to this view, countries will be willing to reduce tariffs as long as they have the option to temporarily raise them again. This is even more the case when it comes to the regional rules on safeguard measures as will be illustrated in Chapter 5.

3.4.3 Increased quantities

There is no explicit definition of the term "increased imports" but the following working definition can be found in Article 2 of the WTO Agreement on Safeguards:

> "… product is 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."

However, the question of whether imports have in fact increased or not, has been debated over the years. This has been the case in disputes dealt with by different panels and by the Appellate Body within the framework of the WTO dispute settlement procedure. Some of these disputes are now briefly reviewed.

In its report on the dispute between Argentina and the EC, *Argentina – Footwear (EC),* the panel discussed whether the "increase" should be determined in relation to quantities or value.[397] The panel emphasised that the rate as well as the amount of the increased imports need to be established both in absolute terms and as a percentage of domestic production.[398] The increase in imports must be assessed as to whether it is "recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively," to cause or threaten to cause serious

[396] Pauwelyn, Joost, The Puzzle of WTO Safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press (2004), vol. 7, no 1, pages 109-142, page 112.

[397] Panel Report on Argentina- Safeguard Measures on imports of footwear (EC), *(Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), para 8.152.

[398] Ibid, para. 8.141. See Appellate Body Report on Argentina - Safeguard measures on imports of footwear (EC), *(Argentina – Footwear EC),* WT/DS121/AB/R, (14 December 1999), para. 144, confirming the Panel's finding.

injury to the domestic industry. [399] Furthermore, it also concluded that the changes in import levels over the entire period of investigation must be considered when making a determination of whether there has been an increase in imports "in such quantities" in the sense of Article 2.1 of the Agreement on Safeguards. However, in the same dispute the Appellate Body stated that it did not agree with the panel that it is reasonable to examine the trend in imports over a five-year historical period. Instead, according to the Appellate Body, the phrase "is being imported" implies that the increase in imports must have been sudden and recent.[400]

In the dispute *US – Steel Safeguards*, the panel held that imports need not be increasing at the time of the determination but that it was necessary that imports had increased and that the use of the present continuous "are being" implies that imports remain at higher levels.[401] In the same case, the Appellate Body reiterated that a determination of whether increased imports had occurred or not cannot be made merely by comparing the end points of the period, since such investigations can easily be manipulated.[402] The investigating authority has an obligation to examine the trends in imports over the entire period under investigation.[403]

In the case *Korea – Dairy* the panel held that the phrase "under such conditions" qualifies and relates to the situation in which the products are being imported and the situation of the market into which the products are being imported.[404] This phrase was also considered by the panel in *Argentina – Footwear (EC)* which confirmed that it refers to the competition between the imported product and the domestic like or directly competitive products and that the phrase is also linked to the causation analysis that must be performed under Article 4.2(a) and (b) of the Agreement on Safeguards.[405] When considering whether increased imports justify the use of safeguard measures the Appellate Body stated that:

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[399] Appellate Body Report on Argentina - Safeguard measures on imports of footwear (EC), *(Argentina – Footwear EC),* WT/DS121/AB/R, (14 December 1999), para. 131.

[400] Ibid, para. 130.

[401] Panel Report on United States – Definitive Safeguard Measures on imports of certain Steel Products*, (US – Steel Safeguards),* WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R and WT/DS259/R, (11 July 2003), paras. 10.162-166.

[402] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, *(US – Steel Safeguards),* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), paras. 354-355.

[403] Ibid, para. 367.

[404] Panel Report on Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, *(Korea – Dairy),* WT/DS98/AB/R, (21 June 1999), para. 7.52.

[405] Panel Report on Argentina- Safeguard Measures on imports of footwear (EC), *(Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), para. 8.250.

> "We further note that Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards require that the relevant product 'is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury'. The question whether 'such increased quantities' of imports will suffice as 'increased imports' to justify the application of a safeguard measure is a question that can be answered only in the light of 'such conditions' under which those imports occur. The relevant importance of these elements varies from case to case."[406]

When estimating the imported products' shares of the domestic market, what needs to be taken into consideration is related to "changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment".[407]

These findings of the different panels and the Appellate Body demonstrate that establishing import surges as defined in Article XIX and Article 2.1 of the Agreement on Safeguards is a complex matter. It has also been pointed out earlier that all safeguard measures reviewed by WTO panels and the Appellate Body have been found inconsistent with WTO law.[408] This may indicate that it is their complexity that makes countries avoid using them and indeed that they should not be used lightly.

3.4.4 Serious injury

When determining injury, it must be assessed whether the increased imports have caused or threatened to cause serious injury to the domestic industry producing the like or directly competitive product. In Article 4 of the Agreement on Safeguards "serious injury" is defined as an injury that shall "be understood to mean a significant overall impairment in the position of a domestic industry".[409] "Threat of serious injury" shall be understood to mean serious injury that is "clearly imminent".[410] It is further stressed that the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

Certain disputes brought before the WTO panels concerned the interpretation of the requirement of serious injury and threat of serious injury and all have been found

[406] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, *(US – Steel Safeguards)*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), para. 350.

[407] Agreement on Safeguards, Article 4.2(a).

[408] Stevenson, Cliff, Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations? *Journal of World Trade* 38(2):307-329 (2004), page 307.

[409] Article 4 Agreement on Safeguards.

[410] Ibid.

inconsistent with the WTO rules.[411] It is not yet clear what a panel must do if it is to correctly take into account the definition of serious injury. In *Korea – Dairy* and *Argentina – Footwear (EC)*, the panels held that the data shown was not sufficiently representative of the industry as a whole. National authorities have to identify and comprehensibly respond to arguments questioning the existence of serious injury or else a panel will most likely find a lack of such injury.[412]

It has proved difficult for national authorities to show the existence of serious injury and the requirement of "serious injury" seems to be hard to meet.[413] In *US – Lamb*, the Appellate Body remarked that the standard is set very high. It acknowledge that the word "injury" is qualified by the adjective "serious" and compared to the phrase "material injury" applied in anti-dumping and countervailing contexts, the standard for imposing safeguard measures is much higher.[414] However, it should be emphasised that the trend analyses made in anti-dumping cases are sensitive to the manner in which they are interpreted.[415]

There might be other parties than the domestic industry which are affected by both import surges and the application of safeguard measures. The rules are however designed to protect the domestic industry only and do not take into account other parties that might suffer indirectly. From an economic point of view, it is of course interesting and crucial to discuss all types of injury and why and how they occur. However, such a broader examination of the interests that might be indirectly affected by an import surge does not fall within the scope of this study.

3.4.5 Causation

The description of the causation requirement in the Agreement on Safeguards is found in Article 4.2(b).

Article 4.2(b) of the Agreement on Safeguards provides:

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[411] See for example Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, *(US — Lamb),* WT/DS177/AB/R and WT/DS178/AB/R, (1 May 2001), paras. 124 and 126 and Panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, *(US – Wheat Gluten),* WT/DS166/R, (31 July 2000), paras. 8.80 and 8.85. See also Sykes, Alan O., *The WTO Agreement on Safeguards*. Oxford University Press (2006), page 152 and Stevenson, Cliff, Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determinations? *Journal of World Trade* 38(2):307-329 (2004), page 307.

[412] Sykes, Alan O., *The WTO Agreement on Safeguards*, Oxford University Press (2006), page 151.

[413] Ibid, page 149.

[414] Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, *(US-Lamb),* WT/DS177/AB/R, WT/DS178/AB/R, (1 May 2001), para 124.

[415] Messerlin, Patrick A., *Rules on Contingent Protection*. (June 12 2007), page 15.

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports."

The existence of a causal link between increased imports and serious injury is required first. In the second step, the injury caused by factors besides increased imports must be taken into account and not accredited to increased imports.[416] Furthermore, it has been established that the competent authorities shall publish a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined in order to prove that the serious injury is caused by the increased imports.[417]

In *Korea – Dairy*, the panel stated that the national authority needs to analyse and determine whether developments in the industry have been caused by the increased imports. In its causation assessment, "the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports."[418]

In *Argentina — Footwear (EC),*[419] the panel set forth the following approach to the analysis of causation:

> "whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation;
>
> whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and

[416] Appellate Body report on United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea, (*US – Line Pipe*), WT/DS202/AB/R, (15 February 2002), para. 208.

[417] Article 4.2(c) of the Agreement on Safeguards.

[418] Panel Report on Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, (*Korea – Dairy*), WT/DS98/AB/R, (21 June 1999), paras. 7.89–7.90.

[419] Panel Report on Argentina- Safeguard Measures on imports of footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), para. 8.229.

> whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports."

This means that a three-step test must be demonstrated to determine whether the injury was caused by increase in imports or not. Although the Appellate Body in *Argentina — Footwear (EC)* considered that the panel should have exercised judicial economy as regards the causation related claims, it saw no error in the panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the Agreement on Safeguards:

> "We are somewhat surprised that the Panel, having determined that there were no 'increased imports', and having determined that there was no 'serious injury', for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist. Nevertheless, we see no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the Agreement on Safeguards."[420]

The panel in *US — Wheat Gluten* also confirmed and repeated this general causation standard,[421] while the Appellate Body in *US — Wheat Gluten* concluded that the contribution by increased imports must be sufficiently clear so as to establish the existence of "the causal link" required, but rejected the panel's conclusion that the serious injury must be caused by the increased imports alone and that the increased imports had to be sufficient to cause "serious injury". In *US — Lamb*, the Appellate Body concluded that Article 4.2(b) requires a "demonstration" of the "existence" of a causal link, and it requires that this demonstration must be based on "objective data".[422]

In *US — Steel Safeguards*, the Appellate Body reiterated the conclusions from *US – Lamb*:

> "Moreover, in *US — Lamb*, when examining the requirement of Article 4.2(b) that the determination as to increased imports must be 'on the basis of objective evidence', we explained that 'objective evidence' means 'objective data'. Thus, Article 4.2(b) requires a 'demonstration' of the 'existence' of a causal link, and it requires that this demonstration must be based on 'objective data'. Further, this 'demonstration' must

[420] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 145.

[421] Panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, (*US – Wheat Gluten*), WT/DS166/R, (31 July 2000), para. 8.91.

[422] Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, (*US — Lamb*), WT/DS177/AB/R and WT/DS178/AB/R, (1 May 2001), para. 130.

be included in the report of the investigation, which should 'set[ ] forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c)' of the Agreement on Safeguards".[423]

When it comes to the non-attribution requirement the Appellate Body stated in *US — Line Pipe*, that competent authorities: (i) 'must 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards'; and (ii) must provide a 'reasoned and adequate explanation of how the facts support their determination'. This was also repeated in the Appellate Body Report in *US – Steel Safeguards*.[424]

The Appellate Body further stated in *US – Steel Safeguards* that:

> "In US — Wheat Gluten, we found that 'the term 'causal link' denotes … a relationship of cause and effect' between 'increased imports' and 'serious injury'. The former — the purported cause — contributes to 'bringing about', 'producing' or 'inducing' the latter — the purported effect. The 'link' must connect, in a 'genuine and substantial' causal relationship, 'increased imports', and 'serious injury'.
>
> In sum, the Agreement on Safeguards — in Article 2.1, as elaborated by Article 4.2, and in combination with Article 3.1 — requires that competent authorities demonstrate the existence of a 'causal link' between 'increased imports' and 'serious injury' (or the threat thereof) on the basis of 'objective evidence'. In addition, the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned 'objective evidence') support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise."[425]

Article 3.1 of the Agreement on Safeguards concerns the investigation and basically states that a Member may apply a safeguard measure only following an investigation by the competent authorities of that Member.

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[423] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, (*US – Steel Safeguards*), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), para. 485.

[424] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, (*US – Steel Safeguards*), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), para. 486.

[425] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, (*US – Steel Safeguards*), WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, (10 December 2003), paras. 488-489.

In *Argentina – Footwear (EC)* the panel highlighted the importance of a sustained reflection on "other factors", such as the development in the domestic industry itself, in order to assure that the requirements are met when performing the causal link assessment.[426] In *Korea – Dairy*, the panel stated that "in its causation assessment, the national authority is obliged to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry".[427]

In *US – Wheat Gluten*, the Appellate Body concluded that in order to establish the existence of the causal link, the effect due to increased imports must be clear. However, it rejected the panel's conclusion that the increase in imports alone must be enough to cause serious injury and that the injury has to be caused solely by increased imports. Consequently, it did not agree with the view that other factors causing injury must be totally excluded from the determination of serious injury. On the contrary it was emphasised that the language of the provision at issue taken as a whole, suggests that the causal link between increased imports and serious injury may exist, even though other factors are also simultaneously contributing to the situation of the domestic industry.[428]

Factors other than increased imports (non-attribution requirement)

The panel in *US — Wheat Gluten* went on to further interpret the relationship between increased imports and "other factors" within the context of the causation analysis pursuant to Article 4.2(b). The panel held that the increased imports must be "sufficient in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement while the increased imports does not have to be the only factor.[429]

The panel then further clarified its approach by stating that "where a number of factors, one of which is increased imports, are sufficient collectively to cause a 'significant overall impairment of the position of the domestic industry', but increased imports alone are not causing injury that achieves the threshold of

[426] Panel Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina - Footwear (EC)),* (25 June 1999), WT/DS121/R, para. 8.267.

[427] Panel Report on Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, *(Korea – Dairy),* WT/DS98/R, (21 June 1999), paras. 7.89-7.90.

[428] Appellate Body report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities*, (US - Wheat Gluten),* WT/DS166/AB/R, (22 December 2000), paras. 67.

[429] Panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, (*US – Wheat Gluten*), WT/DS166/R, (31 July 2000), para. 8.138.

"serious" within the meaning of Article 4.1(a) of the Agreement,[430] the conditions for imposing a safeguard measure are not satisfied."[431]

This was however reversed by the Appellate Body which stated that increased imports "alone", "in and of themselves", or "per se" must be capable of causing injury that is "serious".[432] This reverse statement show how difficult it is to apply safeguard measures, since the panel interpreted it differently and also indicate the legal uncertainty of the rules.

The Appellate Body in *US – Wheat Gluten* stated:

> "[T]he Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be distinguished from the effects caused by other factors; third, the effects caused by other factors must, therefore, be excluded totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports alone, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury."[433]

The Appellate Body went on and considered that the requirement of a "causal link" Article 4.2(b) suggests a "clear contribution" and that, furthermore, increased imports need not be the sole cause of serious injury".

> "The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element. The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury. Although that contribution must be sufficiently clear as to establish the existence of 'the causal link' required, the language in the first sentence of Article 4.2(b) does not suggest that increased imports be the sole cause of the serious injury,

[430] Article 4.1(a) … states: "'serious injury' shall be understood to mean a significant overall impairment in the position of a domestic industry."

[431] Panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, (*US – Wheat Gluten*), WT/DS166/R, (31 July 2000), para. 8.139.

[432] Appellate Body report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities*, (US - Wheat Gluten),* WT/DS166/AB/R, (22 December 2000), para. 79.

[433] Ibid, para. 66

> or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that 'the causal link' between increased imports and serious injury may exist, even though other factors are also contributing, 'at the same time', to the situation of the domestic industry."[434]

The Appellate Body in *US — Wheat Gluten* referred, as support, to the "non-attribution" requirement in the last sentence of Article 4.2(b). Since there may be several factors, besides increased imports, contributing simultaneously to the situation of the domestic industry competent authorities 'shall not … attribute' to increased imports injury caused by other factors. Thus, this sentence provides rules that apply when 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time'.

> "The last clause of the sentence stipulates that, in that situation, the injury caused by other factors 'shall not be attributed to increased imports'… . Synonyms for the word 'attribute' include 'assign' or 'ascribe'. Under the last sentence of Article 4.2(b), we are concerned with the proper 'attribution', in this sense, of 'injury' caused to the domestic industry by 'factors other than increased imports'. Clearly, the process of attributing 'injury', envisaged by this sentence, can only be made following a separation of the 'injury' that must then be properly 'attributed'. What is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the 'injury'."[435]

Thus, a determination must be made whether the injury was caused or attributed to the increased imports.

> "The need to ensure a proper attribution of 'injury' Articles 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports as distinguished from the effects of other factors. However, the need to distinguish between the effects caused by increased imports and the effects caused by other factors does not necessarily imply, as the Panel said, that increased imports on their own must be capable of causing serious injury, nor that injury caused by other factors must be excluded from the determination of serious injury."[436]

As mentioned above, this was when the Appellate Body in *US — Wheat Gluten* subsequently set out a three-stage process for Article 4.2(b), which later was

[434] Ibid, para. 67.

[435] Ibid, para. 68.

[436] Ibid, paras. 69–70.

repeated in *US – Lamb*.[437] This process concerns firstly whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; and secondly whether the conditions of competition between imported and domestic products as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and lastly whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.

3.5 Asymmetry and selective multilateral safeguard measures

3.5.1 Introduction

As has already been mentioned several times, safeguards are to be applied to all imports of a specific product irrespective of its origin. However, there are some exceptions to this principle of non-discrimination. Here, asymmetric multilateral safeguard rules for developing countries will be briefly described. First, some exceptions such as the *de minimis* rules will be presented, thereafter the term "industry" and its meaning regarding developing countries will be touched upon. In section 3.6 the special multilateral safeguard rules will be described, *i.e.* the Special Safeguards of the Agreement on Agriculture and the proposed Special Safeguard Mechanism.

3.5.2 Safeguard measures and developing countries

Safeguard measures have come to play an important part in the trade activities of developing countries, both as applicants and as targets. As described further below, the countries that (report they) apply safeguard measures most frequently are EU, India, Indonesia, Turkey, Jordan, the Philippines, and Chile. Out of 62 disputes in the WTO Dispute Settlement Body, developing countries have been the complainant in roughly 25 cases and the respondent in 23 cases.[438] However, it is difficult to get a clear picture of the countries most affected by the measures since all countries producing the protected good are supposed to be targeted. Nonetheless, those developing countries that undertook large tariff reductions during the Uruguay

[437] Appellate Body Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, *(US — Lamb*), WT/DS177/AB/R and WT/DS178/AB/R, (1 May 2001), para. 170.

[438] See Appendix 2 as well as the disputes on WTO's webpage www.wto.org, visited 30 May 2020.

Round tended to use safeguard measures more frequently after the establishment of the WTO.[439] This indicates that developing countries are active both in applying safeguard measures and in dispute settlements.

In accordance with Article 2.2 of the Agreement on Safeguards and the MFN principle in GATT Article I, safeguard measures need to be applied irrespective of the source of imports. As mentioned in Chapter 1, quantitative restrictions can also be applied. According to Article 5.2(a) in "cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned." This does indicate that some selective treatment is allowed. According to the Agreement on Safeguards, however, developing country Members are to receive special treatment both when subject to safeguard measures and when applying them. This illustrates the compromise between developed countries requirement of selective measures and developing countries requirement of exception from the non-discrimination principle in their favour.

With respect to safeguard measures, there is a *de minimis* import exemption from developing countries to be found in Article 9.1 of the Agreement on Safeguards:

> "Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."

As a rule, safeguards may not be applied for more than eight years. However, when developing countries apply safeguard measures, they can extend the application for an extra two years. The rules for the re-application of safeguards are also relaxed for developing country Members.[440]

In *US – Line Pipe* the issue was amongst others that the US had not excluded Korea's exports from the application of safeguard measures and thus acted

[439] Crowley, Meredith A., Why are safeguards needed in a trade agreement?, In *Law and Economics of Contingent Protection in International Trade*, (ed) Bagwell, Kyle W., Bermann George A., and Mavroidis, Petros C., Columbia Studies in WTO Law and Policy, Cambridge University Press, (2009), page 380.

[440] Articles 7.5 and 9.1-2 Agreement on Safeguards.

inconsistently with its obligations under Article 9.1 of the Agreement on Safeguards.[441]

3.5.3 Developing countries and the term "industry"

A WTO Member may apply a safeguard measure to a product only if that Member has determined 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.

According to Article 4 of the Agreement on Safeguards "serious injury" shall be understood to mean a significant overall impairment in the position of a "domestic industry". Thus, the definition of "industry" is relevant in the determination of injury. Many developing countries have large agricultural production. What is the meaning of "industry" in that sector?

In Article 4 of the Agreement on Safeguards, domestic industry is defined as "the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".[442] This definition of domestic industry in safeguard proceedings allows for a broader consideration of effects when compared to anti-dumping and countervailing duties.[443] In a finding subsequently upheld by the Appellate Body, the panel on *US – Lamb* rejected the argument of the United States that the term "domestic industry" under Article 4.1(c) should be defined on the basis of a "continuous line of production" and a "coincidence of economic interests". Leaving the definition of relevant domestic industry to the discretion of competent national authorities could easily defeat the purpose of reinforcing discipline in the field of safeguards and enhancing rather than limiting competition.[444]

In *Dominican Republic – Bags*, the panel examined whether the competent authority (i) failed to establish adequately and reasonably that the imported and domestic

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[441] Appellate Body Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US - Line Pipe*), WT/DS202/AB/R, (15 February 2002).

[442] Agreement on Safeguards, Article 4.1(c).

[443] See Article 4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement on Anti-dumping) and Article 16 of the Agreement on Subsidies and Countervailing Measures.

[444] Panel Report on United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia, (*US — Lamb*), WT/DS177/R, WT/DS178/R, (21 December 2000), paras. 7.76 and 7.77 and Appellate Body Report on (*US — Lamb)*, WT/DS177/AB/R, WT/DS178/AB/R, (1 May 2001), para. 124.

products were "like or directly competitive" and (ii) improperly excluded producers of domestic products directly competitive with the product under investigation. This means that the first step is to define the product under investigation and secondly to define like or directly competitive products. Questions such as whether the raw material is a like, or directly competitive product might also arise. The Appellate Body has also emphasized that the term producers could mean those who manufacture an article or those who bring a thing into existence.[445]

The discrepancy in the definition of the term "industry" may cause problems in regard to especially developing countries' production. It is not clear what an "industry" would be in that context.[446] Moreover many local farmers in these countries run businesses which are not even registered. Such uncertainty when it comes to the interpretation of a key element of the law could be a factor in explaining why many countries do not use safeguard measures.

3.5.4 Developing countries and compensation/retaliation

A further area to be considered when it comes to countries' use of safeguard measures is compensation and retaliation. Since the application of safeguard measures is not dependent on unfair trade, safeguards will without doubt upset the balance of concessions between importing and exporting countries.

Consultations with a view to coming to a mutually agreed settlement are required by the Agreement on Safeguards. This might lead to compensation in the form of reduced tariff rates on other products. If the parties concerned cannot reach an agreement, countermeasures can be used against the trade of the importing country after the first three years.[447]

Safeguard measures can adversely affect the development interests of developing countries subject to a measure, since they might rely on a certain level of exports. Lee suggests a retaliatory measure should be taken on behalf of the developing countries in order to balance the gap between compensation and injury. He also suggests that compensation should always be offered as a *prior* condition for the application of safeguard measures.[448]

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[445] Panel Report on Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric, *(Dominican Republic – Bags),* WT/DS415/R, WT/DS/416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 7.161.

[446] Denner, Willemien, *Protectionism, trade remedies and safeguards: A quick guide for African countries,* Tralac Working Paper No 6/2009, August 2009, page 8.

[447] Agreement on Safeguards, Article 8.1-3.

[448] Lee, Yong-Shik, *Reclaiming Development in the World Trading System*, Cambridge University Press, (2006), pages 102-103.

The basic structure of GATT Article XIX leans towards the negotiation of compensation for the imposition of safeguard measures on exporting countries. The importing nation can choose between alternative trade concessions such as compensation or retaliation. Article 8.3 of the Agreement on Safeguards, which "prevails over conflicting provisions of Article XIX"[449], states that the right of suspension of concessions in Article 8.2 cannot be exercised during the first three years provided that the safeguard measure follows an absolute increase in imports and that it is in conformity with the provisions of the Agreement. This leaves a situation, which is quite accurately described by Sykes in the following words:

> "[t]he importing member applying a safeguard measure can make less generous offer of compensation, secure in the knowledge that if the offer is rejected, the affected trading partners will nevertheless be unable to retaliate for three years. Indeed, one might argue that there is little incentive for the importing nation to make any serious offer of compensation under these circumstances, at least for the period covered by the first three years."[450]

The question whether Article 8.1 of the Agreement on Safeguards establishes an obligation to bargain in good faith was debated in *US – Wheat Gluten* and *US – Line Pipe*, where the panels and the Appellate Body concluded that the failure to offer adequate opportunity for prior consultations as required in Article 12.3 was a violation of Article 8.1.[451]

When determining whether to apply safeguard measures to protect domestic industry, it is likely that the importing Member will balance the potential implications and reactions it might have on exporting countries. Despite the above limitations, the possibility of retaliation and compensation is a factor that might prevent Members from using safeguard measures. Thus, it could be seen as a disincentive in order to apply safeguard measures.

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[449] Uruguay Round Agreement, Multilateral Agreements on Trade in goods; General interpretative note to Annex 1A and Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press (2006), page 246.

[450] Sykes, Alan O., *The WTO Agreement on safeguards*, Oxford University press (2006), pages 246-247.

[451] Panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, (*US – Wheat Gluten*), WT/DS166/R, (31 July 2000), para. 8.213, *Appellate Body on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/AB/R, (22 December 2000), paras. 144-146, and Appellate Body on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, *(US– Line Pipe*), WT/DS202/AB/R, (15 February 2002), paras. 114-119.

3.6 Special safeguard measures

3.6.1 Introduction

One would think that safeguards ought to be significant for developing countries, especially in the agricultural sector. Safeguard measures, in the form of raised tariffs, are often the only border measure developing countries can use to safeguard their farmers' interests when prices fall or import surges occur. Developing countries that are attempting to improve their food security and alleviate poverty by developing their agricultural potential and expanding production are vulnerable to external shocks and often lack instruments to deal with risk situations. When reducing trade barriers or tariffs in accordance with WTO law or regional trade arrangements, these countries become exposed to the general instabilities of the external agricultural market and to import surges.[452]

Besides the "general" safeguard measures in WTO law, there are also "special" safeguard measures only applicable to agricultural products. The object and purpose of the Agreement on Agriculture is to establish a fair and market-oriented agricultural trading system where developed country Members take into account the particular needs and conditions of developing country Members. To provide this, a special safeguard measure is applicable under Article 5 of the Agreement on Agriculture, the so-called Special Safeguard (SSG). Another measure, the Special Safeguard Mechanism (SSM), is also currently under discussion. The SSG is however not intended for developing countries only as is the case with the SSM. The SSG is special in the sense that it is only applicable on agricultural products and therefore interesting for many developing countries. This is the reason for placing the SSG under this section.

In this study, special safeguard measures, when used as a more general term, refer to both the Special Safeguard (SSG) and the Special Safeguard Mechanism (SSM). When referring to one of them only, its precise title is used. These two varieties of "special" safeguard measures are similar to the "general" measures but, as will be shown, there are also many differences.

3.6.2 Special Safeguard Measure (SSG)

Due to the sensitive nature of the realm of agricultural products, special rules were introduced by Article 5 of the Agreement on Agriculture (AoA) which allowed

[452] Ruffer, Tim and Vergano, Paolo, *An agricultural safeguard mechanism for developing countries*, Oxford Policy Management and O'Connor and Company, (August 2002), page 8.

import restrictions on agricultural products. They are known as "Special Agricultural Safeguards" or simply "Special Safeguards" (SSG).[453]

As opposed to the Special Safeguard Mechanism (SSM) described in section 3.6.3 below, the SSG may be applied by both developed and developing countries. It differs from the general rules on safeguard measures in GATT Article XIX and the Agreement on Safeguards in that higher duties can be used *automatically* when import volumes rise above a certain level and serious injury does *not* have to be demonstrated. The Appellate Body also confirmed in the *EC – Poultry* case that the SSG does not require a demonstration that a serious injury is caused to domestic industry as is the case with other safeguard provisions.[454] This is quite an important difference since the injury test is rather complicated to use and as a result the SSG is much easier to apply than general safeguard measures.

Members of the WTO have the right to invoke the SSG provisions for tariffied products provided that a reservation to this effect is placed next to the products concerned in the relevant Member's tariff schedule. In the dispute *Chile – Price Band System*, Chile had used a special safeguard measure on wheat and wheat flour without having reserved the right to use such a safeguard. It was held that Chile was not allowed to use special safeguard measures for those products. Only a few developing countries have made such reservations which means that only a limited number of countries have access to this instrument. 38 Members have reserved the right to use the special safeguards on agricultural products, but they have not been used very often.[455] Out of the 38 Member reservations, 22 were by developing countries and 16 by developed countries. The developing countries (with the number of products concerned in parentheses) are: Barbados (37), Botswana (161), Colombia (56), Costa Rica (87), El Salvador (84), Ecuador (7), Guatemala (107), Indonesia (13), Korea (111), Malaysia (72), Mexico (293), Morocco (374), Namibia (166), Nicaragua (21), Panama (6), Philippines (118), Romania (175), Swaziland (166), Thailand (52), Tunisia (32), Uruguay (2) and Venezuela (76). More recently, developed countries seem to be the most frequent users of special safeguards.[456]

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[453] ICTSD, *Special Products and the Special Safeguard Mechanism. Strategic options for developing countries.* (Geneva, 2005), page 50.

[454] Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, *(EC – Poultry),* WT/DS69/AB/R, (13 July 1998), para. 167.

[455] These countries are; Australia, Barbados, Botswana, Bulgaria, Canada, Colombia, Costa Rica, Czech Republic, Ecuador, El Salvador, European Union-15, Guatemala, Hungary, Iceland, Indonesia, Japan, Malaysia, Mexico, Morocco, Namibia, New Zealand, Nicaragua, Norway, Panama, Philippines, Poland, Romania, Slovakia, South Africa, South Korea, Swaziland, Switzerland-Liechtenstein, Taiwan, Thailand, Tunisia, United States, Uruguay and Venezuela.

[456] See the WTO, Committee on Agriculture for example G/AG/N/EU/9 (31 October 2012), G/AG/N/TPKM/101 (17 January 2013), G/AG/N/JPN/186 (26 April 2013), G/AG/N/EU/13 (12 June 2013) and G/AG/N/AUS/95 (10 February 2015).

When using the WTO volume-based methodology for SSGs the following figures in the table below for the number of import surges per country can be observed.

Table 7: Number of cases where import surges have occurred when using the WTO volume-based methodology for SSGs

Number of cases	Countries where import surges have occurred
140-170	Albania, Angola, Benin, *Botswana*, Cameroon, Cape Verde, Congo Rep., Gabon, Gambia, Ghana, Haiti, Honduras, Jamaica, Jordan, Kenya, Liberia, Mauritius, *Morocco*, *Nicaragua*, Papua New Guinea, *Philippines*, Sri Lanka, Togo, Trinidad and Tobago, *Venezuela,* Zimbabwe
130-139	*Barbados*, Belarus, Bosnia Herzegovina, Cuba, *Ecuador*, *Indonesia*, Malawi, Mauretania, Rwanda, Senegal, Syria, *Tunisia*
120-129	Comoros, Côte d'Ivoire, Egypt, Iraq, Madagascar, Mongolia, Peru, Saint Lucia, Sierra Leone, *Swaziland*, Tuvalu

Source: *FAO Briefs on Import Surges – Issues*, No. 2 Import Surges: What is their frequency, and which are the countries and commodities affected? (October 2006) page 3.

Countries typed in italics in the above table are countries with access to the SSGs and the countries also typed in bold are countries that actually used the SSG. This could indicate that some other tool is necessary for protecting vulnerable products and farmers.

A more recent review of the use of safeguard measures where special safeguard measures are shown in percentage can be seen below.

Table 8: Special safeguard measures in %[457]

Country	Special safeguard measures in %
Norway	48,20%
Iceland	41,50%
Botswana	37,50%
Eswatini (Swaziland)	37,50%
Namibia	37,50%
South Africa	37,50%
Switzerland	36,40%
Mexico	34%
Venezuela	30,70%
Colombia	28,50%
EU	23%
Barbados	17,40%
Morocco	16,20%
Guatemala	14,90%
Philippines	14,30%
El Salvador	10,80%
Costa Rica	9,70%
Thailand	7,80%
Korea	6,50%
Nicaragua	6,40%
Malaysia	5,50%
Canada	5,40%
Japan	5,40%
Israel	5%
Chinese Taipei	5%
Tunisia	4,70%
USA	3%
Australia	0,90%
Indonesia	0,70%
Ecuador	0,50%
New Zealand	0,50%
Panama	0,20%
Uruguay	0,20%

As can be seen from the list, it is a mix of developed and developing countries that has the highest percentage.

[457] World Tariff Profiles 2020, WTO, ITC and UNCTAD publication, (2020).

3.6.3 Special Safeguard Mechanism (SSM)

In 2002 the issue of the developing countries' need for a new mechanism was discussed in the WTO Agriculture Committee, but it dealt more with technicalities than with the principle or the purpose of such a tool.[458]

In the WTO negotiations on agriculture, one of the main issues has been this Special Safeguard Mechanism which is to be reserved for developing countries. There are two different views of the purpose of the SSM: (i) it should be used to protect poor and vulnerable farmers and thus made easier to use or (ii) it should be seen as a time-limited means of encouraging liberalization whose use should be more restricted and not increased above the pre-Doha Round levels.[459] For the Member Countries of the G-33,[460] the SSM is seen as an instrument which allows developing countries to address their concerns regarding food and livelihood security and rural development while still permitting them to undertake liberalization commitments.[461] They argue that it must be a differential instrument for developing countries only.[462] This view is supported by paragraph 13 of the Doha Ministerial Declaration which requires that special and differential provisions in the agriculture negotiations must be "operationally effective to enable developing countries to effectively take account of their development needs, including food security, livelihood security and rural development".[463]

The Doha round negotiations collapsed in 2008 precisely because of the discussions on the SSM. The intention during the discussions was to get all nations to agree to all parts of the final agreement, but when talks on defending the right to protect fragile farming sectors started, this proved to be unachievable. The United States and India, among other countries, failed to agree on measures that would allow developing countries to place tariffs on imported agricultural commodities in case

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[458] Wolfe, Robert, The special safeguard fiasco in the WTO: the perils of inadequate analysis and negotiation, *World Trade Review*, (2009), 8:4, 517-544, page 522. See also the WTO Committee on Agriculture - Summary Report on the Thirteenth Meeting of the Committee on Agriculture Special Session Held on 6 September 2002, TN/AG/R/3, Fourteenth Meeting on 27 September 2002, TN/AG/R/4 and Fifteenth Meeting on 22 November 2002, TN/AG/R/5.

[459] See for example Ruffer, Tim and Vergano, Paolo, *An agricultural safeguard mechanism for developing countries*, Oxford Policy Management and O'Connor and Company, (August 2002), and the website of the WTO www.wto.org, visited on 27 January 2010.

[460] The G 33 is a group of developing countries that coordinates trade and economic issues. In the WTO negotiations they have proposed special rules for developing countries.

[461] WTO TN/AG/GEN/30, (28 January 2010), (10-0443) Committee on Agriculture, Special Session, Refocusing discussion on the Special safeguard Mechanism (SSM): Outstanding issues and concerns on its design and structure, submission by the G-33, para. 7.

[462] Ibid, para. 1.

[463] See more in WTO TN/AG/GEN/30, (28 January 2010), (10-0443) Committee on Agriculture, Special Session, Refocusing discussion on the Special safeguard Mechanism (SSM): Outstanding issues and concerns on its design and structure, submission by the G-33.

of a surge of such goods into the country.[464] It could be argued that the conflict only related to one aspect of import surge response, namely that whereby the SSM raises tariffs above the commitments, countries made during the Uruguay Round, *i.e.* the second view presented above. Since then, Members of the WTO have tried to push the Doha round further, but progress has been slow.

The SSM was supposed to provide a more effective and useful instrument for developing countries in need of special and differential treatment. Thus, the SSM had to be easier to invoke and more effective in its remedies.[465] It was however argued that the SSM was watered down to such an extent that its effectiveness and utility for developing countries was questionable. According to South Centre, an intergovernmental policy think tank for developing countries, the SSG would actually be more favorable than the SSM in many ways.[466]

The proposed SSM is supposed to provide protection for poor and vulnerable farmers but it can also be viewed as a way to assist liberalization, as is argued by the G-33. It would according to this view be easier to use than the safeguard in GATT Article XIX and the Agreement on Safeguards and applicable to a larger number of developing countries than the SSG. The SSM could prevent short term disturbances to agricultural sectors which may otherwise be vulnerable to risks. However, differences of opinion still exist. It has already been agreed that developing countries will have access to the SSM and more or less agreed how large an import surge would be needed to trigger both the temporary tariff rise and the level of the rise as well. The question that is still unresolved is whether to apply the tariff at or above the pre-Doha rate. Those countries that view the SSM as a time-bound way to assist liberalization think that no tariff increases should be above the pre-Doha Round rates. The argument for this view is that poor farmers need to export in order to escape poverty. The argument for the other view, where the triggers are smaller and the tariff increase bigger, is that prices are in fact depressed because of large subsidies by rich countries.[467] The instrument would then provide for a necessary and required special and differential treatment. However, as noted above the SSM could also negatively affect the exports of other developing countries, which shows the need for careful consideration before application. Perhaps, after all, an injury test would be a good way of preventing this negative effect.

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[464] Third World Network, *The July failure of the WTO talks: Cause of collapse and prospects of revival*, www.twnside.org.sg/title2/resurgence/.

[465] South Centre, Analytical note SC/TDP/AN/AG/11, *Comparing the Special Safeguard Provision (SSG) and the Special Safeguard Mechanism (SSM): Special and Differential Treatment for whom?,* (November 2009), page 1.

[466] Ibid, page 2.

[467] WTO, *An unofficial guide to agricultural safeguards*, (5 August 2008), page 1, http://www.wto.org, visited on 20 January 2011.

There is a risk that the application of the SSM will harm weaker developing countries if it is misused by stronger ones. This is due to the tariff levels issue and the lack of an injury test. If the need for the SSM is just that countries do not have and cannot afford policies for supporting their farmers, this just means it is easier to introduce than domestic provisions, which is not necessarily a good argument.

3.6.4 Comparing general and special safeguards

GATT Article XIX and the Agreement on Safeguards both allow and set the limits of the temporary imposition of a safeguard measure to restrict imports of a product, if domestic industry is injured or is threatened with injury due to a surge in imports. The measure can be either quantitative restrictions or an increase in tariffs above the bound rate and injury needs to be proven. The Special Safeguard (SSG) raises tariffs and can be triggered by import surges or price falls without the need to show injury or provide any compensation. However, it can only be used with regard to products that were tariffied during the Uruguay Round which limits its use to a certain number of countries. Many developing countries chose not to tariffy and instead use binding ceilings. The proposed Special Safeguard Mechanism (SSM) cannot be used on imports within tariff quotas. It is meant for developing countries only and can be triggered if import surges or price fall occurs without any need to show injury. If one of the other types of safeguards is used on a product the SSM cannot be used as well.[468]

The table below found in *WTO An unofficial guide to agricultural safeguards*, presents some similarities and differences between the various types of multilateral safeguards.[469]

[468] WTO, *An unofficial guide to agricultural safeguards*, (5 August 2008), page 3, http://www.wto.org, visited on 20 January 2011.

[469] Ibid.

Table 9: Similarities and differences between GATT Safeguards, SSG and SSM

	GATT Safeguards	Special Agricultural Safeguards (SSG)	Special Safeguard Mechanism (SSM)
Which products?	All, including agricultural	Agricultural, if tariffied	Agricultural
Which countries?	All	Developed and developing only if tariffied	Only developing
Trigger	Import surge *with* price fall	Import surge *or* price fall	Import surge *or* price fall
Remedy	*Quantity restriction,* tariff increase	Tariff increase	Tariff increase
Constraint/ condition	Show *injury* or threat of injury, negotiate *compensation*	No injury test. Only products tariffied in Uruguay Round	No injury test. For import surge: · limit on % of products in a year · ceiling on tariff at or above pre-Doha rate · minimum surge for tariff exceeding pre-Doha rate?
Expiry of mechanism	Permanent	Expires or reduced post-Doha	Different views

3.7 Conclusion

In this Chapter safeguard rules available under WTO law have been described. The ground has thus been prepared for the more specific questions framed in the introductory Chapter of this study. This Chapter has also introduced when selective measures are allowed under the WTO rules on safeguard measures. There is a possibility to exclude countries based on asymmetric multilateral safeguard rules for developing countries and also due to special safeguards.

To satisfy the needs of protection, the rules on special safeguards - the SSG and the proposed SSM - have been introduced. The SSG differs from general safeguard measures in WTO law as higher duties can be automatically imposed on agricultural products when import volumes rise above a certain level and serious injury does not have to be demonstrated. This measure has not been used very frequently and only 38 WTO Members have reserved the right to use it. All developing countries can use the SSM while it is mainly developed nations that have applied the SSG. The SSM should be seen as a special and differential treatment for developing countries only. However, there is no specific exclusion of developing country exports in the application of the SSM. This means that the SSM provides for special and

differential treatment in the application of the measure and this does not depend on who is targeted.

When summarizing the results of the investigation carried out this far, certain observations are of particular relevance for the more in-depth analyses and discussions in the subsequent chapters. The following points regarding the aim, design, interpretation and application of the multilateral rules on safeguards deserve to be highlighted.

Before the Agreement on Safeguards existed, grey area measures were used relatively often, and the aim of the new agreement was to limit them. The Agreement on Safeguards was intended to clarify and reinforce GATT Article XIX and to restore multilateral control over safeguards. This was done by the requirement that the application of the rules on all imports of certain products must be non-selective. All measures that are not included in the Agreement on Safeguards are to be eliminated while the agreement still provides a way to support industries negatively affected by increased imports. The term "emergency" safeguard measure indicates that they are only supposed to be used in extraordinary situations. They are not to become ordinary events in routine commerce.

Hence, the conclusion must be that the object of the Agreement on Safeguards is rather to restrict the use of safeguard measures and limit their application to exceptional circumstances than to provide the possibility of easily invoking them. The fact that no actions to date have been found to be consistent with WTO law would confirm such a strict interpretation of the rules and their aim. If that proves to be the case, it would have important consequences for the application of multilateral safeguard measures.

What further conclusions could then be drawn from this observation? Is the fact that none of the safeguard measures tried within the WTO Dispute Settlement System has been approved related to the design, the strict interpretation of the rules or their application? As discussed above, the views in legal scholarship differ.

Lee believes that the measures are not applied correctly by the WTO Members while Sykes argues that the root of the problem lies in the design of the rules. Further, since safeguard measures can be viewed differently depending on one's ideology, they can be seen as a tool to protect poor and vulnerable farmers (protectionism) or as a means of encouraging liberalization (liberalism). If they are supposed to protect the poor, then it is easy to argue that there are shortcomings in the design of the rules since they do not fulfil this purpose. But, seen from the opposite angle, the problem would rather be linked to the application of the rules since they are clearly supposed to be used in extraordinary circumstances only. One could also argue that the rules should be interpreted differently, *i.e.* that interpretation is too strict. The challenge is to strike a balance between these different views and to limit the use of the multilateral safeguards in conformity with the liberal view but not so as entirely to eliminate them. However, since these general multilateral safeguard measures are

clearly inadequate for developing countries, this supports the view that some other tool is necessary to protect poor and vulnerable farmers.

Before general multilateral safeguard measures can be applied four criteria have to be fulfilled. These are unforeseen developments, increased quantities, injury and a causal link between increased quantities and injury. There is still some doubt as to when safeguard measures are permitted which relates to when unforeseen developments have occurred, when increased imports have reached such a level that safeguard measures are justified and when industry is seriously injured. The definition of industry can have an adverse effect on developing countries because local farmers in these countries may be excluded from the definition. The compensation requirement, too, can prevent developing countries from applying the measures. As seen from above, and Appendix 2, the inconsistencies in the application of safeguard measures, shows that the most difficult criteria to comply with seem to be "serious injury" and "unforeseen developments". The fact that imports have increased does not seem to be too difficult to prove.

Since the progress in the Doha Round agricultural negotiations have been slow and the number of RTAs is increasing it is now necessary to focus attention on the structure of RTAs. If the multilateral safeguard measures cannot provide an efficient tool for developing countries, it is even more important that the safeguard measures in RTAs be adequate.

4 Safeguard measures and RTAs

4.1 Introduction

An essential part of this study is devoted to safeguards in RTAs, not only multilateral safeguards. It has however been questioned whether such regional safeguards are at all allowed according to WTO law. The starting point when it comes to regional safeguards must therefore be to examine whether they are allowed under WTO law and if that is the case, which requirements must be fulfilled. This Chapter will also examine whether regional safeguards notified under Article XXIV and/or the Enabling Clause are compatible with the WTO safeguard rules.

Most RTAs include clauses allowing for the use of safeguard measures, either regional safeguards or multilateral ones, or both. It is important to distinguish between these two types of safeguard measures. Internal regional safeguard measures are only applicable to the parties to the regional trade agreement whereas multilateral safeguards are applicable also to trade with countries that are not parties to the regional agreement, *i.e.* third countries. Basically, clauses on multilateral safeguard measures in RTAs simply allow for the use of safeguard measures in accordance with WTO law.

Regional trade arrangements are either customs unions or free trade agreements.[470] There are some differences between the two that could be essential in regard to safeguards and they will be discussed in this Chapter. To further add to the complexity of the situation, notification of a regional trade agreement can occur under either GATT Article XXIV or the Enabling Clause. The overall aim of the Enabling Clause is to facilitate for developing countries to integrate in international trade. This Chapter will therefore also address the issue of notification being possible under the two different legal acts and what legal and practical consequences that can have when it comes to safeguards.

The practical importance cannot be missed if one considers how agreements have been notified thus far. For example, customs unions as well as free trade agreements

[470] There are also non-reciprocal trade agreements such as the Generalized System of Preferences (GSP).

have been notified under either GATT Article XXIV or the Enabling Clause or both. The most commonly applied ground for notification is by far Article XXIV. There are though some customs unions – as well as some free trade agreements – notified under the Enabling Clause, namely the Andean Community, the East African Community (EAC), the Economic and Monetary Community of Central Africa (CEMAC), the Common Market for Eastern and Southern Africa (COMESA), Southern Common Market (MERCOSUR), the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS).[471]

In some cases, both GATT Article XXIV and the Enabling Clause have come to play an important role. One example is the Gulf Cooperation Council (GCC) – which is a customs union – and which was initially notified under GATT Article XXIV. The GCC thought however that it would be more appropriate to notify it under the Enabling Clause since it is designed to facilitate trade among developing countries.[472] Thus, it notified the agreement under the Enabling Clause as well. Another example is the ASEAN – Korea FTA which was notified under both GATT Article XXIV and the Enabling Clause (and also under GATS Article V). Korea notified the agreement under Article XXIV while the other parties notified the agreement under the Enabling Clause.[473]

This incoherent practice raises several questions concerning notifications such as whether it is possible to notify an agreement under both GATT Article XXIV and the Enabling Clause. Does it make any difference in regard to safeguard clauses in the RTAs if the agreement is notified under Article XXIV or the Enabling Clause? The complexity of the situation will be illustrated by looking more closely at some RTAs, namely the SACU, the EPAs, the GCC, the ASEAN and MERCOSUR. These RTAs have been chosen since they are examples of the variety of situations that can occur. The EPAs, the ASEAN and the MERCOSUR agreements allow safeguard measures while the SACU agreement does not. The SACU agreement is a customs union notified under GATT Article XXIV, the EPAs are free trade agreements notified under Article XXIV,[474] the ASEAN is a free trade agreement

[471] www.wto.org, RTA database, visited 30 May 2020.

[472] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66, (18 July, 2008), 1. Some other agreements are notified under both Article XXIV and the Enabling Clause, (dual notification or dually notified) namely: ASEAN – Korea and India – Korea. These three agreements (GCC as well) do not have a date for notification in the RTA database nor a reference to notification (www.wto.org RTA database).

[473] WTO Document, Notification of Regional Trade Agreement, WT/REG287/N/1, 8 July 2010. WTO Document, Committee on Trade and Development, Notification, WT/COMTD/N/33 8 July 2010.

[474] Some of the EPAs are interim agreements and only the EU-CARIFORUM is a full free trade agreement notified under GATT Article XXIV.

notified under the Enabling Clause and the MERCOSUR is a customs union notified under the Enabling Clause.[475]

As mentioned, the described diverse situations raise a number of questions concerning whether it makes any difference if the RTA is a free trade agreement or a customs union and if the choice of legal act under which the notification of the RTA is made constitutes any problems. Despite its emerging practical importance little guidance is offered to clarify the situation and the scholarly contributions are few.[476] There are therefore several outstanding questions to be answered, such as: Can a customs union be notified only under the Enabling Clause or must it be notified solely under GATT Article XXIV or both? Does it make any difference if the agreement is notified under GATT Article XXIV or the Enabling Clause when it comes to regional safeguard measures? And most importantly for this part of the thesis: Are regional safeguard measures allowed or not according to WTO law? These questions will be addressed in this Chapter. First by introducing the substantive law in GATT Article XXIV and the Enabling Clause and then continuing to the issue of notifying RTAs and the implications for safeguard clauses included in the notified agreements.

4.2 Customs unions and free trade agreements

GATT Article XXIV provides for the possibility of departing from the MFN principle in GATT Article I by creating customs unions and free trade agreements amongst a limited number of Member countries and under which reciprocal preferences are accorded to the participating countries. Developing country Members can also, apart from the possibility stated in Article XXIV, depart from the MFN clause when entering into trade agreements among themselves in accordance with the Enabling Clause Article 2(c).

There are several similarities between customs unions and free trade agreements. In GATT Article XXIV most of the wording dealing with the two forms of agreements

[475] Even though the MERCOSUR was notified under GATT Article XXIV, it was decided later that MERCOSUR would be subject to an examination in the light of the Enabling Clause as well as Article XXIV.

[476] Three examples cited in this thesis are: Islam, Md. Rizwanul and Alam, Shawkat, Preferential Trade Agreements and the scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An appraisal of G ATT/WTO jurisprudence, *Netherlands International Law Review,* LVI: 1-34, (2009), Lockhart, Nicholas J.S., and Mitchell, Andrew D., Regional Trade Agreements under GATT 1994: An Exception and Its Limits, in *Challenges and Prospects for the WTO*, e.d. Mitchell, Andrew D., Cameron, (May 2005), pages 235-236 and Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846.

is similar and the Enabling Clause does not even distinguish between them. But there are also some differences that need to be observed.

In GATT Article XXIV the requirements to be fulfilled relate to on the one hand trade between the contracting parties (internal trade) and on the other hand trade with third countries (external trade).

Regarding customs unions, Article XXIV states in relevant parts:

> "…
>
> 2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.
>
> …
>
> 5 (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement 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 or the adoption of such interim agreement, as the case may be;
>
> …
>
> 8 (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
>
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
>
> …"

GATT Article XXIV subparagraph 8(a)(i) defines a customs union. It is basically defined as the substitution of a single customs territory for two or more customs territories so that duties and other restrictive regulations of commerce are eliminated with respect to substantially all the trade between the members and that substantially the same duties and other regulations of commerce are applied by each member to the trade of territories not included in the union.

Regarding free trade agreements Article XXIV states in relevant parts:

> "5 (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be;
>
> 8 (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."

The formation of a common external policy includes the elimination of internal duties and other measures which are necessary in order to give effect to a functioning customs territory.[477] It is however uncertain whether it is the same for a free trade area; but as the phrase in GATT Article XXIV is exactly the same whether it concerns a customs union or a free trade area, using a literal interpretation it ought to be. Nevertheless, it is not clear what flexibility is covered by the distinction between "all trade" and "substantially all the trade". This question will be addressed in the following sections since it is an important feature of GATT Article XXIV and a distinction from requirements set out in the Enabling Clause.

The main difference between a customs union and a free trade agreement is that a customs union has a common external tariff while the parties to a free trade agreement keep their own individual external tariffs for trade with third countries. A customs union can apply multilateral safeguard measures either as a union or as individual members according to the footnote to Article 2.1 in the Agreement on Safeguards. However, a common external tariff ought to mean that safeguard

[477] Mathis, James H., Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 86.

measures should be applied by the customs union as a whole and thus keep the same external tariff.

Both the internal and external aims of a customs union or of a free trade area are clearly expressed in GATT Article XXIV paragraph 4. It should be to facilitate trade between the constituent territories (internal) and not to raise barriers to the trade of other contracting parties with such territories (external).[478] Over the years there has been a discussion whether a customs union or a free trade area that fulfils the more specific requirements of the provisions of paragraphs 5 to 9 of Article XXIV automatically satisfies also the overall purpose requirement of paragraph 4.[479] It does seem obvious that all the requirements of the Article should be fulfilled. However, in some disputes only parts of the Article have been used as to defence of a violation, such as in the case *Turkey – Textiles.*

The Appellate Body in *Turkey – Textiles* stated however that

> "the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defense under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4."[480]

Also, according to the Understanding on the interpretation of Article XXIV of the general Agreements on Tariffs and Trade 1994, customs unions, free trade areas and interim agreements leading to the formation of a customs union or free trade area must satisfy, *inter alia*, the provisions of paragraphs 5, 6, 7 and 8 to be consistent with Article XXIV.

There are internal and external requirements for a customs union and a regional trade agreement as mentioned. The internal requirement is that the purpose of a customs union or a free trade area should be to facilitate trade between the constituent territories.[481] The external is that no barriers should be erected against the trade of other contracting parties with such territories, as stated in GATT Article XXIV:4, 5 and 8. Accordingly, paragraph 5 of Article XXIV states that the impact of an RTA should be neutral to third parties regarding both duties and other regulations of commerce. An additional requirement for a customs union is, as mentioned, that it has a common external tariff.

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[478] General Agreement on Tariffs and Trade, Article XXIV:4.

[479] Understanding on the interpretation of Article XXIV of the general Agreements on Tariffs and Trade 1994, Part II, paragraph 2(1).

[480] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),*WT/DS34/AB/R, (19 November 1999), para. 57.

[481] General Agreement on Tariffs and Trade, Article XXIV:4.

This shows that there are different rules depending on whether a trade arrangement is a customs union or a free trade agreement. It is therefore of interest to this study to investigate which implications this might have on safeguards in regional trade and to be able to answer the research questions. First by looking more closely at GATT Article XXIV in section 4.3 and then proceed to the Enabling Clause in section 4.4.

4.3 Safeguards and GATT Article XXIV

4.3.1 Introduction

The exception to the MFN principle established in GATT Article XXIV contains certain conditions which must be fulfilled by preferential trade arrangements.[482] Article XXIV:8 stipulate that duties and other restrictive regulations of commerce are eliminated with respect to "substantially all the trade" as mentioned. It is not clear what is meant by the term's "duties" and "other restrictive regulations of commerce". It is also not clear how these terms as well as the substantially all the trade requirement relate to safeguard measures. Does this mean that safeguard measures are allowed or not allowed in RTAs? This will be elaborated on in the following sections.

4.3.2 Article XXIV and customs unions

There are a couple of cases concerning safeguard measures and Article XXIV.[483] However, since these cases do not give a full picture of the problem of whether

[482] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*. Oxford University Press (2006), page 109.

[483] Panel Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, (*US – Line Pipe*), WT/DS202/R, adopted 8 March 2002; Panel Reports, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, *(US — Steel Safeguard*s), WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R / and Corr.1, adopted(10 December 2003; Panel Report, Argentina – Safeguard Measures on Imports of Footwear, (*Argentina – Footwear),* WT/DS121/R, adopted 12 January 2000; Panel Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/R, adopted 19 January 2001; Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002; Panel Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/R,

regional safeguard measures are allowed or not, guidance also has to be found in other cases although they do not specifically concern safeguard measures.

The *Turkey – Textiles* will be examined first, and is the only case since the establishment of the WTO that directly has addressed the issue of justified restrictive internal measures under Article XXIV and thus the only authoritative interpretation.[484] The dispute concerned the issue of which restrictive trade measures that are allowed in a customs union.[485] It also concerned whether Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions and thus be posed as a defence for such a violation. Since safeguards are one of several types of measures restricting trade the conclusions that can be drawn from this particular case is of course of interest to this study.

The case was introduced by India because of Turkish quantitative restrictions[486] on imports of Indian textile and clothing products.[487] Article 12(2) of the Turkey – EC Association Council adopted Decision 1/95 stated that Turkey would apply "substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing." Turkey stated that if it did not impose quantitative restrictions on the textile and clothing from India, the EU would exclude 40 per cent of Turkey's exports from the customs union between Turkey and the EU and it would therefore not cover "substantially all the trade".[488] Thus, Turkey introduced the quantitative restrictions mentioned above. The panel concluded that the restrictions were inconsistent with the

WT/DS178/R, adopted 16 May 2001; Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, adopted 12 January 2000; Panel Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R, adopted 23 July 1998; Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, adopted 19 January 2001; Appellate Body Report, European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998; Panel Report, Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, adopted 23 February 2012 and Panel Report, United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/R, adopted 5 November 2001.

The cases above are sorted in the number of hits that Article XXIV is mentioned in the case. The list is based on information from the tradelawguide.com.

[484] Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846. Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999).

[485] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999).

[486] Safeguard measures can also consist of quantitative restrictions.

[487] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999), para. 1.

[488] Ibid, para 17.

provisions of Articles XI and XIII of GATT 1994 and Article 2.4 of the Agreement on Textiles and Clothing and therefore not permitted under Article XXIV of the GATT 1994.[489]

Turkey appealed the panel's findings on the basis that these quantitative restrictions were justified by GATT Article XXIV.[490] The Appellate Body examined the text of the chapeau to Article XXIV to establish its ordinary meaning and held that Article XXIV may under certain conditions "justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible defence to a finding of such inconsistency."[491] Furthermore, the Appellate Body found that the text of the chapeau indicates that Article XXIV can justify measures inconsistent with certain other GATT provisions if they are introduced on the *formation* of a *customs union*.[492]

The Appellate Body noted that the terms provided that members of a customs union may maintain certain regulations restrictive of commerce that is otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. This statement makes it permissible to maintain *certain* restrictions *within* a customs union.[493] This means there is a possibility of liberalizing less than all trade and thus some flexibility when liberalizing the internal trade in customs unions.[494] The Appellate Body cautioned that the degree of flexibility allowed by the Article is limited by the requirement that duties and other restrictive regulations of commerce be eliminated with respect to substantially all internal trade.[495]

Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to apply "substantially the same" duties to *external* trade with third countries, *i.e.* to apply a common external trade regime. The paragraph does not however require that they apply *the same* duties and other regulations of commerce as other members towards third parties. This does offer some flexibility but still requires something close to

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[489] Ibid, para. 3.

[490] Ibid, para. 41.

[491] Ibid, para. 45.

[492] Ibid, para. 46.

[493] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 113 and note 15.

[494] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 113.

[495] Ibid, page 113 and note 17.

"sameness".[496] This ought to mean that customs unions should apply safeguard measures as a whole, rather than by the individual members, to be sure to apply substantially the same duties.

When it comes to "duties" paragraph 2 of the Understanding on Article XXIV states that it is the applied rate of duty that must be used. The wording "other regulations of commerce" is also elaborated on in paragraph 2 but it is more difficult to determine what is intended here. It is stated that "the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies." This also means that a customs union can be economically tested to see if it is compatible with Article XXIV. [497]

Other cases such as the *US – Line Pipe* and *Brazil – Tyres* have also dealt with whether the customs union or the free trade agreement has met the requirements set forth in Article XXIV. What is relevant here is to examine whether the defence of violation or inconsistency can rely on Article XXIV, in order to see if Article XXIV can be used as a defence or not. The panel in *Brazil – Tyres* found that the MERCOSUR exemption[498] was not inconsistent with Article XX under the Article XXIV exception.[499] In *US – Line Pipe* the panel found that NAFTA was consistent with Article XXIV:5 and 8, (*i.e.* it met all the requirements for the formation of a free trade area under Article XXIV) and that Article XXIV thus offers a defence for violations of GATT and the Agreement on Safeguards.[500]

US – Line Pipe concerns an application of safeguard measures on line pipe from the Republic of Korea and the issue was whether the imports caused serious injury, if the requirements of parallelism were fulfilled etc. On the appeal, the Appellate Body upheld most of the panel's findings. However, the Appellate Body stated that "we need not address the question whether an Article XXIV defence is available to the United States. Nor are we required to make a determination on the question of the relationship between Article 2.2 of the Agreement on Safeguards and Article XXIV of the GATT 1994".[501] The reason for this statement was that the safeguard measure

[496] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999), paras. 49-50.

[497] Ibid, para. 55.

[498] Exemption from the Import Ban afforded by Brazil to imports of retreaded tyres originating in MERCOSUR countries.

[499] Panel Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Tyres*), WT/DS332/R, (12 June 2007), para. 7.289.

[500] Panel Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US - Line Pipe*), WT/DS202/R, (29 October 2001), paras. 7.150 and 7.158.

[501] Appellate Body Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea *(US - Line Pipe),* WT/DS202/AB/R, (15 February 2002), para. 199.

at issue violated the Agreement on Safeguards as well as GATT Article XIX and thus there were no reasons for the Appellate Body to continue its investigation on Article XXIV. Likely, Article XXIV is sensitive to rule upon and the Appellate Body, as well as the panels, is very careful in its respective interpretations.

To conclude, a party must first demonstrate that the measure, *e.g.* a safeguard measure, is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 5(a) and 8(a) of Article XXIV and secondly that the formation of that customs union would have been prevented if it were not allowed to introduce the measure at issue.[502] In the *Turkey – Textiles* case, the question whether the agreement between the EC and Turkey was in fact a customs union was not appealed, so the Appellate Body only referred to the second condition. The Appellate Body concluded that Turkey did not demonstrate that the formation of a customs union would be prevented if it were not allowed to adopt these quantitative restrictions and subsequently, Article XXIV did not justify the adoption of restrictions by Turkey.[503] For a customs union, the interpretation above is not improbable, since the formation of a common external policy includes the elimination of internal duties and other measures which are necessary in order to give effect to a functioning customs territory.[504] Mathis argues that if a formation fails to eliminate the designated barriers on the appropriate amount of trade then it shall not be understood to mean a customs union or a free trade area.[505]

The Negotiating Group on Rules within the WTO has pointed out the need to analyse the intent and application of Article XXIV such as the "other restrictive regulations of commerce" in operation in RTAs,[506] but with no results as yet. In the dispute *US – Wheat Gluten*, the panel upheld the Appellate Body's findings in *Turkey – Textiles* where it was stated that GATT Article XXIV may provide a defence to a claim of violation of and inconsistency with a provision of the GATT 1994, but it never examined whether GATT Article XXIV provides a defence to a violation of the Agreement on Safeguards.[507] However, as stated by the Appellate Body in *Turkey – Textiles*, GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. As mentioned, a

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[502] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999). para. 59.

[503] Ibid, para. 63.

[504] Mathis, James H., Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 86.

[505] Mathis, James H., *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement,* The Hague: T.M.C. Asser Press, (2002), page 49.

[506] WTO, Negotiating Group on Rules, *Compendium of issues related to regional trade agreements*, Background Note by the Secretariat, TN/RL/W/8/Rev.1, 1 August 2002, para. 54.

[507] Panel Report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, (*US–Wheat Gluten)*, (WT/DS166/R), (31 July 2000), para. 8.180.

customs union or a free trade area is a territory where "the duties and other restrictive regulations of commerce are eliminated" but there is no definition of what constitutes "other restrictive regulations of commerce" (ORRC).[508] Opinions on this matter differ among legal scholars.

Mathis suggests that the listing of Articles in the paragraph (portrayed in table 10 below) specifies the restrictions that do not need to be eliminated, thus making the ones that are not listed the ORRC.[509] This would mean that GATT Article XIX and, in consequence, safeguard measures ought to be eliminated if a regional trade agreement is to be constituted. This is supported by Estrella and Horlick who suggest that abolition of the *possibility* of applying anti-dumping measures, countervailing duties and safeguard measures is mandatory in order to qualify as a customs union or a free trade area. Consequently, customs unions or free trade areas notified to the WTO that usually allow the *internal* application of trade defence measures, such as anti-dumping measures, countervailing measures and safeguards would be unlawful derogations of the MFN principle.[510] During the negotiations on rules in the WTO, this has also been discussed by for example the Republic of Korea.[511] However, since the negotiations on Article XXIV have not been a success, the matter is still unresolved.

Estrella and Horlick argue that trade remedies are not within the meaning of "duties" but rather within the meaning of "other restrictive regulations of commerce" in Article XXIV:8. One of the problems of a literal interpretation here is that the English, French and Spanish versions differ from each other; the English version does allow for inclusion of trade defence measures in "duties" while the latter versions do not. In Article XXIV:5(a), (b) and 8(a)(ii) "other regulations of commerce" (ORC) is used to refer to the RTAs' internal trade liberalization requirements, without the term "restrictive".[512]

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[508] Mathis, James H., Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 80.

[509] Ibid, page 81.

[510] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in the light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 147.

[511] WTO, Negotiating Group on Rules, Submission on Regional Trade Agreements, Communication from the Republic of Korea, TN/RL/W/116, 11 June 2003, paras 18-20.

[512] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 117-118.

This indicates that Article XXIV:8(a)(i) and (b) are distinguished in their "restrictive" nature but are otherwise similar. Therefore, the panel's ruling in the case *Turkey – Textiles*, which was not rebutted by the Appellate Body, is relevant when interpreting the meaning of ORRC. The panel stated that "the ordinary meaning of the terms 'other restrictive regulations of commerce' could be understood to include *any regulation having an impact on trade*" (such as measures in the fields covered by the WTO rules, *e.g*., sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, *e.g*., environmental standards, export credit schemes).[513] Estrella and Horlick argue that the definition in *Turkey – Textiles* suggests that ORRC means "any regulation of commerce having a *restrictive* impact on trade".[514] It is however not clear whether this means cross-border trade (external) or trade between the constituent parties (internal).[515]

Estrella and Horlick believe that Article XXIV:8(a) (1) and (b) covers all "other restrictive regulations of commerce" (ORRC) and that it is thus exhaustive. This means that Estrella and Horlick are firm believers that safeguard measures are not allowed to be included in either customs unions or free trade agreements. Pauwelyn on the other hand does not believe that the list in Article XXIV:8(a)(1) and (b) is exhaustive and thus safeguard measures can be included. The arguments supporting the different views are presented below.

A brief introduction to the exceptions with an explanatory text is to be found in Estrella and Horlick's article:

[513] Panel Report on Turkey-Restrictions on imports of textile and textile and clothing products*, (Turkey – Textiles),* WT/DS34/R, (31 May 1999), as modified by the Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, (*Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999), para. 9.120.

[514] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 119.

[515] Ibid, page 120.

Table 10: Exceptions list[516]

Article XI	Prohibits quotas and other restrictions on imports and exports other than duties and charges, except for certain import and export restrictions in the agricultural sector, such as those to support domestic supply management regimes.
Article XII	Permits import restrictions in the event of balance payments emergencies.
Article XIII	Requires that in those areas where quotas are allowed (agriculture, for instance) quotas can be applied on a non discriminatory basis.
Article XIV	Allows deviations from the non-discriminatory application of quotas under Article XIII if necessary for balance of payments reasons.
Article XV	Allows deviations from GATT rules to comply with commitments to the International Monetary Fund.
Article XX	Allows qualified deviations from GATT rules for measures to protect health, safety, the environment, (and other public policy purposes).

All the Articles except Article XX regulate quantitative restrictions applicable at the external border. Trade defence measures are also within the meaning of ORRC, since they are by definition border measures whose purpose is to restrict imports of certain products.[517] The list of exceptions must according to Estrella and Horlick be understood as exhaustive and not illustrative since the latter interpretation effectively includes words that are not there.[518] This means that the abolition of the possibility of applying trade defence measures is mandatory if an agreement is to qualify as a customs union (or a free trade agreement) under WTO law in general and Article XXIV in particular. [519] Customs unions (or free trade agreements) that allow for the internal application of trade defence measures are violating the MFN principle according to Estrella and Horlick.

Pauwelyn, however, does not believe that the list is exhaustive and suggests that the flexibility offered in Article XXIV should be wide enough to include regional rules on safeguard measures. The requirement is *substantially all the trade* and not *all the trade*.[520] As Pauwelyn puts it, the question of whether Article XXIV prevents intra-regional safeguard measures is not likely to arise in a WTO dispute *on safeguards*

[516] Ibid, and Hudec, Robert E. and Southwick, James D., Regionalism and WTO Rules: Problems in the fine art of discriminating fairly, in Mendoza, Miguel Rodriguez, Low, Patrick and Kotschwar, Barbara (eds), *Trade Rules in the Making: Challenges in Regional and Multilateral Negotiations* (Washington, DC; OAS: Brookings, 1999), page 63.

[517] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 121.

[518] Ibid, page 141.

[519] Ibid, page 148.

[520] Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press, vol 7, no 1, (2004), pages 109-142, page 126-127.

since there is no discrimination. Then the only parties that would complain about the imposition of safeguard measures to all imports would be the regional parties and thus complain at the regional level. This would also be the case if safeguard measures were to be applied only to regional parties.[521]

Further, Pauwelyn believes that it is unconvincing that the list is exhaustive since it does not include trade restrictions imposed for reasons of national security or restrictions for balance of payments for certain developing countries. Also, the requirement is elimination on substantially all the trade – not all trade restrictions except those necessary under the list. The question could only arise of whether the remaining trade that continues to circulate freely still qualifies as 'substantially all the trade' if safeguards were to be imposed on a substantial percentage of the trade. Finally, safeguard measures are of a temporary nature which plays in favour of such an interpretation according to Pauwelyn.[522]

The following can be concluded. First, as Pauwelyn puts it, the requirement is *substantially* all the trade. This gives room for applying safeguard measures as discussed above. Thus, Article XXIV is wide enough to include safeguard measures. Second, no safeguard measures in RTAs have been contested and ruled that they are in their entirety inconsistent with WTO law. The only cases when safeguard measures have been contested in this sense is when third parties are targeted by safeguard measures and regional parties are not. This however concerns multilateral safeguard measures. The question of regional safeguard measures is not likely to find its way to the WTO DSB, apart from if it is discriminatory. Regional safeguard measures only affect the regional parties and the agreements most often refer to regional dispute settlement. This will be elaborated on in Chapter 5.[523] If a party to a trade agreement applies a safeguard measure to third parties but excludes the regional parties, then it is likely to find its way to the WTO DSB. But that is a different question and will be dealt with in Chapter 6.

Lastly, as seen from Appendix 3 at the end of this study, there exist numerous trade agreements which do allow for regional safeguard measures. Some customs unions allow for regional safeguard measures and some do not. The Southern African Customs Union (SACU) for example does not allow for regional safeguard measures. Taking that into account, this suggests that so long as the matter has not been authoritatively ruled on, regional safeguard measures could be seen as allowed by subsequent practice.

This conclusion is supported by the fact that WTO Agreements should be interpreted using customary rules of public international law such as the Vienna Convention on

[521] Ibid, page 125.

[522] Ibid, page 125-127.

[523] See for example the ASEAN, the EU, the MERCOSUR, the EPAs etc.

the Law of Treaties (VCLT) Articles 31-33.[524] In addition to context, any subsequent practice in the application of the treaty shall also be taken into account which means that the practice of including regional safeguard measures shall be taken into account. Subsequent practice means consistent, treaty-related arrangements and oversights of the parties to or organs established by the treaty on international level, which reflect the mutual ideas of all the parties about the interpretation of the treaty and are found in the VCLT Article 31(3) (b).[525] Consequently, regional safeguard measures ought to be allowed. Perhaps since so many RTAs include regional safeguard measures, no country actually wants to find out whether they are allowed or not. Also, since the inclusion of regional safeguard measures is seen as a requirement for signing RTAs, no RTAs would perhaps be agreed upon without them.

Most customs unions notified under Article XXIV do not allow for regional safeguard measures as seen from Appendix 3.[526] However, the CARICOM does allow for safeguard measures.[527] The first original treaty did not include safeguard measures but then when the treaty was revised in 2001, safeguard measures were included. Since most other customs unions do not include safeguard measures, this could also be seen as an indicator of subsequent practice. Consequently, safeguard measures are not prohibited in customs unions but rarely included.

Before examining free trade agreements, one particular customs union will be used as an illustrative example, namely the SACU.

As mentioned, the Southern African Customs Union (SACU) is a customs union which does not allow for internal regional safeguard measures and it is notified under GATT Article XXIV. SACU does however allow for the use of multilateral safeguard measures. An interesting fact is however, that other RTAs which the parties to SACU have signed do allow for regional safeguard measures.

Against this background the following questions will be reviewed. How does the SACU deal with injurious imports? Is it acceptable not to allow for internal safeguard measures? Are other measures allowed which could restrict imports? Who decides if a multilateral safeguard measure should be imposed and what does

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[524] Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (*US – Gasoline*), WT/DS2/AB/R, 20 May 1996, para. 17; Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (*US-Shrimp*), WT/DS58/AB/R, (12 October 1998); Appellate Body Report Japan – Taxes on Alcoholic Beverages, (*Japan – Alcoholic Beverages),* WT/DS8-11/AB/R, (1 November 1996), paras. 10-12.

[525] Linderfalk, Ulf, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 165-171.

[526] For example, the EU, the SACU, the Central American Common Market (CACM). See www.wto.org RTA database for information.

[527] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, Article 150.

the procedure look like? Also, even though SACU is a customs union, safeguard measures are introduced by the single countries instead of the customs union as a whole. Why is it so and is this practice supported by the regulations? These questions will be dealt with in the following.

The SACU consists of South Africa, Lesotho, Namibia, Swaziland and Botswana. Due to their membership of SACU, Botswana, Lesotho, Namibia and Swaziland (BLNS countries) apply anti-dumping, countervailing and safeguard measures imposed by South Africa as will be explained below. Chapter 6 of the South African Customs and Excise Act (main act), and Section 4 of the country's Board on Tariffs and Trade (BTT) Act, provide the legal basis for anti-dumping, countervailing and safeguard measures imposed by South Africa in regard to trade with third countries.[528] Since the domestic industries of the BLNS countries do not produce most of the items concerned, the measures are mainly relevant to items produced in South Africa.[529] As a consequence, Botswana, Lesotho and Swaziland can be retaliated by third countries if South Africa suffers injury and thus as a customs union applies a safeguard measure. This means that all countries within the customs union will be retaliated against if one of the countries decides to apply a multilateral safeguard measure, as a customs union, towards a third country. If a single country applies a safeguard measure, then it is the single country that will be retaliated against. Thus, only one country's production is injured by the imports but all countries within a customs union can potentially suffer by retaliation if safeguard measures are imposed. If that is the case, then it is perhaps a better choice to apply the safeguard measure as a single country.

At the request of a SACU industry, anti-dumping, countervailing or safeguard action are initiated by the South African Board on Tariffs and Trade. After an investigation, the Board makes recommendations to the South African Minister of Trade and Industry (MTI). The Minister of Finance may, in accordance with a request of the MTI and by notice in the official Gazette, "impose, withdraw, or reduce anti-dumping, countervailing or safeguard duties, with or without retrospective effect."[530]

In South Africa, and in SACU, safeguard actions are taken in the case of "disruptive competition". Under the BTT Act disruptive competition is defined as:

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[528] WT/TPR/S/114, Trade Policy Review Body - Trade Policy Review - Southern African Customs Union (SACU) - Southern African Customs Union (SACU) - [South Africa, Botswana, Le[...]d] - Report by the Secretariat, page 33.

[529] SACU, Merchandise Trade Statistics 2010, www.sacu.int.

[530] WT/TPR/S/114, Trade Policy Review Body - Trade Policy Review - Southern African Customs Union (SACU) - Southern African Customs Union (SACU) - [South Africa, Botswana, Le[...]d] - Report by the Secretariat, para. 32.

> "… the export of goods to South Africa or the common customs area of the SACU in such increased quantities, absolute or relative to domestic production in South Africa or the common customs area of the SACU which produces like or directly competitive products."[531]

Article 18 of the SACU Agreement states that goods grown, produced or manufactured in the Common Customs Area shall be free of customs duties and quantitative restrictions. Exceptions are only allowed for the protection of health of humans, animals or plants, the environment, public morals, intellectual property rights etc.[532] Article 22 states that Member States shall apply similar legislation with regard to customs and excise duties except where it is provided otherwise in the Agreement. This makes it effectively necessary for the other Member States to pass legislation that is similar to that of South Africa, as it is the country that is the most developed of the Member countries.

Each Member State has the right to prohibit or restrict the importation into or exportation from its area of any goods from any country for economic, social, cultural or other reasons as may be agreed upon by the Council under Article 25.1. The provisions of the Agreement shall not be considered to suspend or succeed the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods except where Members agree otherwise.[533] By Article 25.3, the above "shall not be construed as to permit the prohibition or restriction of the importation by any Member State into its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods".[534] This means that internal regional safeguard measures are not allowed within the SACU.

Infant industry is a form of a protectionist measure and it is temporary. A clause on infant industry is a way to protect newly established industries until they can compete on the same terms as well as established industries. The Governments of BLNS are however permitted to impose temporary protection for infant industries in the form of provisionally levied additional duties.[535] Such duties must be levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area. Infant industry means an industry which has been established in the area of a Member State for not more than eight years.[536]

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[531] Ibid, para. 38.

[532] 2002 SACU Agreement Article 18.2 (a)-(g).

[533] Ibid, Article 25.2.

[534] Ibid, Article 25.3.

[535] Ibid, Article 26.1.

[536] Ibid, Article 26.2.

There are also provisions in Article XVIII GATT 1994 which provide for special measures to protect the development of an infant industry in poor developing countries and special measures by developing countries with balance-of-payment difficulties. This means that a developing country Member can modify or withdraw a tariff concession in order to promote the establishment of a particular industry but must enter into negotiations with Members primarily affected by it.

Within SACU infant industry protection is allowed and some concerns have also been raised in order for other members to protect themselves from South African companies.[537] In cases where unfair trade practices harm competitors as well as consumers, Article 41 of the SACU can be invoked. It is not further established in the Article what this means. Unfair trade practices shall be addressed by the Council on the advice of the Commission in accordance with an annex to the agreement which has not yet been implemented.[538]

Meanwhile Article 25.3 prohibits the SACU members from applying trade defence measures towards goods grown, produced or manufactured in other Member states with a view to protecting their own production, this provides some uncertainty as to what measures the Members are allowed to use and against whom. But the SACU Members are Members of the WTO and are thus entitled to apply multilateral safeguards under GATT 1994 and the Agreement on Safeguards. As mentioned, the most important imports come from within the SACU area which indicates that if one Member faces import surges it is most likely that such surges are of relatively local origin.

Since SACU is a customs union, it establishes that safeguard measures may only be imposed in response to a rapid and significant increase in imports of a product as a result of an unforeseen development, where such increased imports cause or threaten to cause serious injury to the customs union as such, *i.e.* the Southern African Customs Union industry producing the like or directly competitive product. It is also indicated in the preamble, as well as in Article 1 of the Agreement, that it is the SACU which imposes such measures, not the individual countries.[539]

This illustrates that internal regional safeguard measures are not included in this customs union and when applying multilateral safeguard measures, they should be applied by the customs union, not the individual countries. However, as mentioned, the Member States of the SACU nevertheless do apply safeguard measures individually even though it is not supported by the SACU regulations. As mentioned above, customs unions ought to apply the same duties on third party imports and

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[537] Payne, Stewart, Tralac Hot Seat Comment: SACU's uncertain future, (22 January 2014), see www.tralac.org.

[538] According to 2002 SACU Agreement Article 41 and as amended 2013.

[539] Safeguard Regulations, The International Trade Administration Commission, Government Gazette, Republic of South Africa, Vol. 470, (Pretoria 27 August 2004), No. 26715, preamble and Article 1.

thus ought to apply multilateral safeguard measures as a customs union. Nonetheless, if SACU applies multilateral safeguard measures as a customs union and only one country produces the goods that are injured, then all parties might suffer from retaliation from third countries affected by the measure. Since, in the case of SACU, South Africa is most likely the country that imports goods from third countries it is most likely that South Africa is applying the measure. The issue of whether South Africa is applying the measure correctly will be discussed further in Chapter 5.

4.3.3 Article XXIV and FTAs

In *Turkey – Textiles*, it was stated by the Appellate Body that GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. Furthermore, the Appellate Body found that the text of the chapeau indicates that Article XXIV can justify measures inconsistent with certain other GATT provisions if they are introduced on the formation of a customs union. However, the chapeau of Article XXIV:5 states that

> "…the provisions of this Agreement shall not prevent … the formation of a customs union *or of a free-trade area* or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area …" (Emphasis added).

This indicates that the same requirements apply for free trade areas as for customs unions and that the findings in *Turkey – Textiles* ought to apply also to free trade areas. Thus, the chapeau makes it clear that Article XXIV under certain conditions may justify the adoption of a measure which is inconsistent with certain other GATT provisions and may be invoked as a possible defence to a finding of inconsistency. This is however only the case if the measure is introduced upon the formation of a free trade area and only to the extent that the formation of the free trade area would be prevented if the introduction of the measure were not allowed.

Free trade areas are distinguished from customs unions since they do not have a common external tariff and thus the parties to the agreement may apply different quotas and customs duties in trade with third countries. The internal requirements are however the same. Duties and other restrictive regulations of commerce should be eliminated with respect to substantially all the trade, *i.e.* remove barriers on trade between the member countries. Since the wording in Article XXIV is basically the same for customs unions and free trade agreements it indicates that the answer to the question of whether safeguard measures are allowed ought to be the same for free trade agreements and customs unions.

One difference though is that the footnote of Article 2.1 in the Agreement on Safeguards clearly states that a customs union may apply a safeguard measure as a

single unit or on behalf of a Member state. However, the panel in *US – Line Pipe* found that the footnote also applies to free trade areas.[540] The Appellate Body did not address the issue in that case but in *Argentina – Footwear (EC)* it concluded that the footnote only applies to customs unions, *i.e*. contrary to the conclusion that the panel in *US – Line Pipe* had come to.[541] Thus, a free trade area cannot apply a safeguard measure on behalf of the entire free trade area as such. This conduct is limited to customs unions.

When it comes to the interpretation of the requirement of "substantially all the trade", the same conclusion can be drawn as for customs unions, namely that there is room for applying safeguard measures in FTAs. Thus, Article XXIV is wide enough to include safeguard measures. Regarding whether or not free trade agreements are allowed to include regional safeguard measures nothing indicates that there should be any difference in comparisons to customs unions. Thus, regional safeguard measures ought to be allowed due to that the requirement "substantially all the trade" gives room for safeguard measures.

As Mathis puts it, there is no context in the Article that suggests that the elimination of ORRC's in customs unions should be different or less than that in free trade areas.[542] The existence of the clause does however suggest the possibility of eliminating a noteworthy amount of regional trade.[543]

Also, as discussed earlier, the question of regional safeguard measures is not likely to find its way to the WTO DSB. Lastly, due to subsequent practice, regional safeguard measures ought to be allowed to be included in free trade agreements since most free trade agreements allow for both multilateral and regional safeguard measures.

Thus, the difference from customs unions is that customs unions have a common external tariff and thus ought to apply external or multilateral safeguard measures as a customs union. Internally there is no difference by regulation, but as mentioned, it is common that customs unions do not allow for internal safeguard measures.

Two free trade arrangements that do allow for safeguard measures are the Economic Partnership Agreements (EPAs) and the Southern African Development

[540] Panel Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US - Line Pipe*), WT/DS202/R, (29 October 2001), para. 7.153.

[541] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 106.

[542] Mathis, James H., Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 87.

[543] Ibid, page 89.

Community (SADC). They will therefore be examined somewhat more closely in the following.

The EPAs are fairly recent agreements between the EU and groups of developing countries in Africa, the Caribbean and the Pacific. Since they are agreements concluded between developed and developing countries, they ought to have an asymmetric indication as discussed in Chapter 3. What this means in terms of safeguard measures has already been discussed so here only the implications of Article XXIV and the EPAs are highlighted.

The EU-CARIFORUM and the EU-Eastern and Southern Africa States Interim EPA are free trade agreements which were notified under Article XXIV.[544] This is the reason for including them as examples in this section dealing with FTAs and GATT Article XXIV.

The African Caribbean Pacific (ACP) countries have long been given special trade preferences by the EU. This started with the first cooperation conventions; the 1964 Yaoundé Convention and the Lomé Convention which came into force in April 1976. The Lomé Convention was designed to provide a framework for trade between the European Community (EC) and developing ACP countries.[545]

The Lomé Convention was renegotiated and renewed three times during the years 1981-1989. It finally covered both trade provisions and increased economic and technical aid. The treaty which replaced Lomé IV in June 2000 became known as the Cotonou Agreement, having been signed in Cotonou, Benin.[546]

Due to its lack of reciprocity and the non-fulfilment of the "substantially all the trade" requirement, the Cotonou Agreement has been regarded as contradicting both the fundamental WTO principles of non-discrimination contained in GATT Articles I and II and the provisions of GATT Article XXIV.[547] Article XXIV allows such regional trading arrangements provided certain criteria are met as mentioned above. The EU was granted a temporary waiver by the WTO for this special kind of preference agreement with developing countries but the waiver expired on 31 December 2007.[548] Since the waiver expired, new agreements which comply with GATT Article XXIV have been signed between the EU and the ACP countries and

[544] See, the RTA database under www.wto.org, visited on 10 February 2013.

[545] Partnership Agreement between the members of the African, Caribbean and Pacific groups of states of the one part, and the European Community and its Member States of the other part, signed in Cotonou, Benin on 23 June 2000.

[546] Ibid.

[547] WTO, The results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (1999), and Article 1 of the General Agreement on Tariffs and Trade (GATT 1947).

[548] Doha Declaration. Ministerial Conference Fourth Session. Doha, 9-14 November 2001. Decision on Waiver for European Communities – ACP-EC Partnership Agreement. Adopted on 14 November 2001.

these are called the Economic Partnership Agreements (EPAs). The EPAs consist of seven regional negotiation groups with one full agreement, the others being interim agreements. [549] Interim agreements must lead to either a free trade area or a customs union and contain a plan to achieve this. The maximum transition period is 10 years.[550]

The group of Caribbean countries (except Haiti) has signed a full regional EPA called the EU-CARIFORUM. In the Pacific area, Papua New Guinea and Fiji have initialled an interim agreement. In East and Southern Africa (ESA), the East African Community has initialled an interim agreement. In West Africa Côte d'Ivoire and Ghana have initialled individual interim agreements. In the SADC area, all parties but South Africa have signed an interim agreement called the EU-SADC Agreement.[551] The negotiations have however continued, and a full agreement was signed on 15 July 2014 which included South Africa. Central Africa has also signed

[549] Stepping stone Economic Partnership Agreement between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, L 59/10 Official Journal of the European Union 3.3.2009.

Council Decision on the signature and provisional application of the stepping stone Economic Partnership Agreement between Ghana, of the one part, and the European Community and its Member States, of the other part, Brussels, 10 November 2008.

Council Decision on the signature and provisional application of the interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part, Brussels, 2 February 2009. On 15 July 2014, the EPA negotiations were successfully concluded in South Africa. The agreement was signed by the EU and the SADC EPA group on 10 June 2016 and the European Parliament gave its consent on 14 September 2016. Pending ratification by all EU Member States, the agreement came provisionally into force as of 10 October 2016.

Council Decision on the signing and provisional application of the Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part and the European Community and its Member States, on the other part, Brussels, 30 April 2009.

Council Decision on the signature and provisional application of the Agreement establishing a framework for an Economic Partnership Agreement between the European Community and its Member States, on one part and the East African Community Partner States, on the other part, Brussels, 3 April 2009. The negotiations for the regional EPA were successfully concluded on 16 October 2014.

Council Decision on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, Brussels, 26 June 2009.

[550] Understanding on the Interpretation of Article XXIV of the General Agreements on Tariffs and Trade 1994, Article 1 and 3.

[551] All information about the EPA negotiations is presented on https://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/, visited on 19 January 2021.

an interim agreement.[552] Burundi, Rwanda, Tanzania, Kenya and Uganda (Eastern African Community, EAC) initialled a framework EPA on 28 November 2007.

Here, the agreement between the EU and CARIFORUM is of special interest since it is one of the completed agreements, and the EU-SADC is also interesting since all the parties to the SACU are parties to the EU-SADC.

Regional safeguard measures can be applied after alternative solutions have been examined and they shall not exceed what is necessary to remedy or prevent the serious injuries or disturbances that have been found.[553] The clauses on safeguard measures are quite lengthy and informative and have also been changed during the negotiations. The agreements include both multilateral and regional safeguard clauses and the multilateral shall be observed by the WTO DSB while the regional safeguard measure shall be observed by the regional dispute settlement as stated in Article 33 in the EU-SADC agreement.

The European Commission announced that those countries that have concluded an EPA without ratifying and implementing it, will lose the benefit of the Market Access Regulation as of 1 January 2014. This meant that developing country Members could lose their free access to the EU market if they did not ratify.[554] However, the deadline was extended to 2016[555] and later replaced by a new Regulation.[556] GATT Article XXIV also includes interim agreements but they must include a plan and schedule for the formation of a customs union or a free trade area within a reasonable length of time in accordance with Article XXIV:5(c).

All SACU Members are also members of the Southern African Development Community (SADC) which has 15 members.[557] SADC established a Free Trade Area in August 2008 and the plan was to establish a Customs Union in 2010 but this has been postponed to an unspecified date. It remains unclear how this will affect SACU since South Africa did not sign the EU-SADC interim agreement. The

[552] Cameroon signed an interim agreement on 15 January 2009.

[553] See for example Article 24 and 25 of the Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, L 289/I/4 Official Journal of the European Union 30.10.2008.

[554] European Commission, Proposal for a regulation of the European Parliament and of the Council amending the Annex I to the Council Regulation (EC) No 1528/2007 as regards the exclusion of a number of countries from the list of regions or states which have concluded negotiations, (Brussels 30.9.2011), COM(2011) 598 final.

[555] Plenary session European Parliament on 7 September 2007, REF20120907IPR50828.

[556] Regulation (EU) 2016/1076 of the European Parliament and of the Council of 8 June 2016 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, economic partnership agreements, OJ L 185, 8.7.2016, p. 1–191.

[557] Including the five member countries in SACU, SADC also consists of Angola, the Democratic Republic of the Congo, Malawi, Madagascar, Mauritius, Mozambique, Seychelles, Tanzania, Zambia and Zimbabwe.

negotiations for a comprehensive agreement did, however, include South Africa[558] and on 15 July 2014 the EPA negotiations were successfully concluded in South Africa.[559] One reason for South Africa not signing the interim agreement is said to be the MFN clause. The clause has been a subject of debate since the EU pushed for a clause which states that it would apply to preferences that the ACP parties grant to any "major trading partner", see section 4.6.[560] This ought to mean that the area where a lower duty applies would increase and thus potentially increase the interest in safeguard clauses to protect against sudden injurious imports. Such an MFN clause would according to EU demands be applied to all future trade agreements, both under GATT Article XXIV and the Enabling Clause. The African, Caribbean and Pacific (ACP) countries would also not be allowed to give greater benefits to other trading partners even if they are developing countries. If a party excludes a product as sensitive under the EPAs and then allows open trade with the same product with a third country, the EU argues that it should be granted the same benefits.[561] Another argument is that the potential MFN clause goes against the non-discrimination principle since it does not favour the "weaker party". The EU claims that it is trying to ensure that it will not be discriminated against.[562]

Within SACU, parties may maintain preferential trade arrangements existing at the time of entry into force of the 2002 SACU agreement, but must negotiate on common grounds before joining new agreements. New agreements or amendments to existing agreements need the consent of the other Members.[563]

To further complicate the matter, SADC is also part of the African Union which has formed the African Economic Community (AEC). The objectives of the AEC are to promote economic, social and cultural development by strengthening existing regional economic communities and establish other communities where there are none.[564] The Member States of each regional economic community have agreed to progressively establish a Customs Union without customs duties, quota restrictions, other restrictions or prohibitions or administrative barriers or other non-tariff

[558] European Commission, Overview of EPA, Updated 30 May 2013, see http:///doclib/docs/2009/september/tradoc_144912.pdf.

[559] See http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/ and Overview of EPAs – state of play.

[560] Diouf, El Hadji A., Why the MFN clause should not be included in EPAs, *Trade Negotiations Insights*, Issue 8, Volume 9, (October 2010), page 8.

[561] Diouf, El Hadji A., Why the MFN clause should not be included in EPAs, *Trade Negotiations Insights*, Issue 8, Volume 9, (October 2010), page 9.

[562] Ibid.

[563] 2002 SACU Agreement, Article 31.1-3.

[564] Treaty establishing the African Economic Community, (the Abuja Treaty), signed in 1991 and entered into force in 1994, articles 1 and 2.

barriers and eventually to adopt a common external customs tariff.[565] There is however a safeguard clause in the treaty establishing the AEC.[566]

According to the SADC Agreement Article 20.1 safeguard measures may be applied to a product only if the Member state determines that the product is being imported to its territory in such increased quantities, and under such conditions as to cause or threaten to cause serious injury. Serious injury shall be determined in accordance with Article 4 of the WTO Agreement on Safeguards. By Article 20.3 in the SADC Agreement, the internal measure shall be applied irrespective of its source within the region.

However, as mentioned, the SACU does not allow for regional safeguard measures while the SADC, the EU-SADC and the AEC do. This shows that there is a complexity in the use of regional safeguard measures in terms of who can apply them and on what type of imports – internal or/and external. If a SACU member applies a regional safeguard measure according to the SADC, does it apply also to trade with the members of the SACU? And if a SACU member applies a multilateral safeguard measure, can it exclude the members of the SACU? These questions will be elaborated on in the following chapters. As shown in the previous chapters the reality is however, that regional safeguard measures are seldom used since they are far too problematic. Instead countries tend to apply WTO multilateral safeguards also in regional trade.

4.4 Safeguards and the Enabling Clause

4.4.1 Introduction

The Enabling Clause is quite different from GATT Article XXIV and it is less detailed. It allows restrictions to the MFN treatment in favour of developing countries. Thus, developing country Members can, apart from the possibility stated in Article XXIV, depart from the MFN clause when entering into trade agreements among themselves in accordance with the Enabling Clause paragraph 2(c).

According to article 2(c), less-developed contracting parties can sign regional arrangements and the criteria or conditions for the mutual reduction or elimination of non-tariff measures may be prescribed by themselves. This means that developing country Members can enter trade agreements based on the Enabling Clause. A likely explanation why developing countries choose to notify their agreements under the Enabling Clause is that the Enabling Clause does not require

[565] Ibid, article 29.

[566] Ibid, article 35.5.

that duties and other restrictive regulations of commerce must be eliminated with respect to substantially all the trade. This means that the Enabling Clause allows trade agreements without eliminating all duties and thus provides for an opportunity to lower some duties and tariffs but not close to all.

This section highlights agreements that are notified under the Enabling Clause and which include safeguard measures. Differential and more favourable treatment to developing countries applies to unilateral preferential tariff treatment in accordance with the Generalized System of Preferences as laid down in paragraph 2(a). Developing countries can also form regional or inter-regional preferential arrangements amongst themselves in accordance with paragraph 2(c). Therefore, when it comes to the Enabling Clause it is important to notice that the focus is here on trade agreements between developing countries according to paragraph 2(c), and not such trade preferences that may be offered unilaterally by developed countries to developing countries based on paragraph 2(a*)*.[567]

The Enabling Clause states in relevant parts:

> 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[568], without according such treatment to other contracting parties.
>
> …
>
> 2 (c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
>
> …
>
> 3. Any differential and more favourable treatment provided under this clause:

[567] This means reciprocal regional or global arrangements between developing countries and not preferential tariff treatment between developed and developing countries in accordance with the Generalized System of Preferences (GSP).

[568] Paragraph 1 in the original legal text: The words "developing countries" as used in this text are to be understood to refer also to developing territories.

a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

…

Paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment" to developing countries despite the MFN obligation of Article I:1 of the GATT 1994. As a result of that, the Enabling Clause operates as an "exception" to Article I:1.[569] This means that tariff reductions that are granted as a result of agreements under the Enabling Clause do not have to be granted to all other Members. Paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule (*lex specialis*), prevails over Article I:1.[570]

When invoked, the relevant provisions of the Enabling Clause could be viewed as *lex specialis* within WTO law, with respect to RTAs on goods between developing countries. Thus, it is possible that the Enabling Clause would serve to authorize RTAs among developing countries even if the requirements of Article XXIV are not fully satisfied.[571]

In relation to the number of trade agreements that have been notified under Article XXIV, only a few RTAs have been notified under the Enabling Clause in pursuant to Article 2(c) namely the Andean Community, some ASEAN agreements, AFTA, Asia Pacific Trade Agreement (APTA), Chile – India, Common market for Eastern and Southern Africa (COMESA), East African Community (EAC), Southern Common market (MERCOSUR) etc.[572] Some of the countries that have concluded the agreements mentioned are now also involved in RTAs with the EU due to the EPAs. In this thesis the ASEAN agreements and MERCOSUR have been examined more closely. Agreements between developing countries that are notified under the Enabling Clause are for example AFTA as mentioned, COMESA, EAC and MERCOSUR. Those agreements are all interesting for this thesis. The

[569] Appellate Body report on European Communities – conditions for the granting of tariff preferences to developing countries, para. 90.

[570] WTO, Committee on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), para. 5.

[571] Ibid.

[572] See Appendix 3 for further information.

MERCOSUR is a customs union while the other agreements are free trade agreements.

The portrayal of the legal bases for the existing Asian agreements is complex. The original trade arrangements in ASEAN were established pursuant to a waiver of GATT obligations as they were not considered as an RTA/FTA or a customs union under GATT Article XXIV but rather dealt with preferential trade between the Members of ASEAN. The authority for the preferential arrangements in ASEAN was the Enabling Clause and this was also the case for AFTA.[573] This may however be revised when and if the (or some) Members of ASEAN reach developed country status.[574]

Interestingly, the Enabling Clause only covers trade in goods, so there is no equivalence if developing countries want to notify an agreement with trade in services. However, Article V of the GATS does take note of the needs of developing countries while Article XXIV of the GATT does not.

As was the case in the previous sections dealing with safeguards and GATT Article XXIV, a closer look at customs unions notified under Article 2(c) Enabling Clause will be made and then proceed to free trade agreements.

4.4.2 The Enabling Clause and customs unions

In order to discuss whether safeguard measures are allowed or not in customs unions under the Enabling Clause, we must begin by examining how customs unions as such are to be regarded in relation to the Enabling Clause. It is obvious that a customs union can be notified under GATT Article XXIV, but can it also or alternatively be notified under the Enabling Clause? This issue will be elaborated on further below.

Paragraph 2(c) states in relevant parts that it provides for the establishment of regional and global agreements among developing countries (i) for the mutual reduction or elimination of tariffs; and (ii) in accordance with criteria or conditions which may be prescribed by the contracting parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.[575]

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[573] See www.wto.org, RTA database.

[574] Davidson, Paul, author of, for example, *Asean*: *The evolving legal framework for economic cooperation* and *Investment in South East Asia: Laws and policy,* e-mail correspondence on 5 May 2009.

[575] Differential and more favourable treatment reciprocity and fuller participation of developing countries (The Enabling Clause), Decision of 28 November 1979, paragraph 2 (c). See also WTO, Committee on Trade and Development, Gulf Cooperation Council Customs Union – Saudi-Arabia's notification, WT/CMTD/66*, 18 July 2008.

There is a discussion on whether customs unions are permissible under the Enabling Clause. The EU has for example restated "that paragraph 2(c) of the Enabling Clause does not provide the appropriate legal basis for justifying the formation of a customs union, which includes the elimination of non-tariff barriers."[576] The EU has argued that the elimination of restrictions on importation or exportation that fall under GATT Article XI:1, which hold a general elimination of quantitative restrictions, would depart from most favoured nation treatment not only in the sense of GATT Article I:1, but also GATT Article XIII:1. The members of the Gulf Cooperation Council (GCC) on the other hand have argued that the Enabling Clause does not require members to prescribe criteria or conditions for the reduction or elimination of non-tariff barriers, but merely provides for the possibility to do so.[577]

According to the Legal Note by the WTO Secretariat,[578] RTAs under the Enabling Clause provide merely for the reduction of tariffs between the parties and does not have to lead to the elimination of trade restrictions as is required under GATT Article XXIV:8.[579] It was considered an open question in 2003 whether such RTAs might introduce discrimination on non-tariff measures which are inconsistent with GATT Article XI which generally requires the elimination of quantitative restrictions. This is contrary to GATT Article XXIV.[580] Since then the issue has also arisen whether a customs union under the Enabling Clause could have a common external tariff exceeding its WTO binding without justifying it under Article XXIV:6.[581] The reason to have a customs union ought to be to have a common external tariff otherwise it ought to be a free trade area even though it does not comply with GATT Article XXIV. In the Agreement on Safeguards it is stated in a footnote to Article 2.1 that a customs union may apply safeguard measures as a single unit. It is not stated that the customs union must fulfil the requirements of GATT Article XXIV. It does however state that the agreement does not prejudge the interpretation of the relationship between Article XIX and XXIV:8.

At this point some conclusions can be drawn. First, the possibility of establishing a customs union under the legal basis of the Enabling clause is not expressly ruled out. Thus, it is possible to notify customs unions under the Enabling Clause. Second, customs unions under the Enabling Clause do not have to eliminate trade restrictions, thus, safeguard measures ought to be allowed in customs unions that

[576] WTO, Committee on Trade and development, Gulf cooperation council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November 2008), para. 4.

[577] Ibid, para. 4.

[578] WTO, Committee on Trade and development, *Legal note on regional trade arrangements under the Enabling Clause*, WT/COMTD/W/114, (13 May 2003).

[579] Ibid, para. 53 (a).

[580] Ibid, para. 53.

[581] WTO, Note on the meeting of 31 March 2011, WT/CMTD/M/81, (16 June 2011), para. 62.

are based on the Enabling Clause. However, customs unions that violates other provisions than GATT Article I are not justified under the Enabling Clause. This means that customs unions under the Enabling Clause that violate other WTO provisions are not allowed and that for example quantitative restrictions ought not to be allowed since they are in breach of GATT Article XIII. According to GATT Article XIII quantitative restrictions can only be applied if the importation of the like product of all third countries is similarly prohibited or restricted. In *Argentina – Footwear (EC)*, the safeguard measure was imposed against non-MERCOSUR imports (although the MERCOSUR imports were included in the investigation).[582] Nevertheless, if safeguard measures are to be used in RTAs notified under the Enabling Clause they cannot violate other WTO law rules besides the MFN obligation in GATT Article I. This indicates that quantitative restrictions which do not fulfil the requirements of Article XIII should be prohibited according to the Enabling Clause. This leads to the conclusion that also, safeguard measures that do not fulfil the requirements of GATT Article XIX ought to be prohibited.

There are currently nine customs unions that have been notified under the Enabling Clause.[583] We will now take a closer look at one of them, namely the MERCOSUR.

The Southern Common Market (Mercado Comùn del Sur - MERCOSUR) is a customs union between Argentina, Brazil, Paraguay, Uruguay, Bolivia and Venezuela. MERCOSUR is notified under the Enabling Clause and thus interesting to observe closer when it comes to safeguard measures. MERCOSUR originated before the establishment of the WTO and was notified in 1992 to the GATT 1947 "under the Enabling Clause and remains under that legal cover in the WTO."[584]

The MERCOSUR includes regional safeguard measures in Annex IV.[585] Internal safeguard measures were allowed during a transitional period until 31 December 1994. External or multilateral safeguard measures are governed by the WTO agreements. The Council of the Common Market Decision 17/96 covers the regulation for safeguard measures to imports from non-Mercosur countries, *i.e.* third countries. The decision was incorporated in the 49th Additional Protocol to the

[582] Panel Report on Argentina – Safeguard Measures on Imports of Footwear, *(Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), para. 8.70, 8.72 ff.

[583] Andean Community (CAN), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), East African Community – Accession of Burundi and Rwanda Economic and Monetary Community of Central Africa (CEMAC), Economic Community of West African States (ECOWAS), Gulf Cooperation Council (GCC), Southern Common Market (MERCOSUR) and West African Economic and Monetary Union (WAEMU). www.wto.org, RTA database visited 12 June 2014.

[584] GATT, Latin American Integration Association, L/6985, 5 March 1992, GATT, Southern Common Market (MERCOSUR), L/7044, 9 July 1992, and WTO, Committee on Trade and development, *Legal note on regional trade arrangements under the Enabling Clause*, WT/COMTD/W/114, (13 May 2003), para. 47.

[585] Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Annex IV.

Mercosur and Brazil has also incorporated the decision into its domestic legislation.[586]

Interestingly, there is also a SACU-MERCOSUR agreement. According to that agreement, SACU can apply preferential safeguard measures as a customs union or as single members. MERCOSUR can also apply safeguard measures as a customs union or as a single country. If the measure is applied as a single country, then the measure is limited to imports into that country only.[587]

Although the MERCOSUR is a customs union notified under the Enabling Clause the contracting parties to the WTO reached a compromise after informal consultations that MERCOSUR would be subject to an examination in the light of, not only the Enabling Clause, but also of GATT Article XXIV.[588] This was however decided after the dispute *Argentina – Footwear (EC)* where Argentina used Article XXIV as a defence on MERCOSUR actions.[589] Thus, the conclusion is that it is possible to notify customs unions under the Enabling Clause. The questions that remain are whether it is possible to defend safeguard measures in customs unions under the Enabling Clause and if it is possible to change the status of notification from the Enabling Clause to GATT Article XXIV and vice versa.

In *Argentina – Footwear (EC)*, Argentina applied safeguard measures in the form of quantitative restrictions on imports of footwear cleared through customs under MERCOSUR Common Nomenclature tariff headings.[590] The reason for Argentina to use Article XXIV as a defence in this case was that Argentina claimed to have the right to exclude its partners in MERCOSUR from the application of safeguard measures.[591] However, it was Argentina that applied the safeguard measure and not the MERCOSUR.[592] Thus, the Appellate Body found that footnote 1 to Article 2.1 in the Agreement of safeguards was not applicable and the analysis of Article XXIV was not relevant. Also, Argentina did not argue before the panel that Article XXIV provided it with a defence to a finding of violation of a provision of GATT 1994,

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[586] Denner, Willemien, Trade remedies and safeguards in SACU, Mercosur and the SACU-Mercosur Preferential Trade Agreement, in *South Africa's Way Ahead: Shall we Samba?,* tralac, (2010), page 230.

[587] Denner, Willemien, Trade remedies and safeguards in SACU, Mercosur and the SACU-Mercosur Preferential Trade Agreement, in *South Africa's Way Ahead: Shall we Samba?,* tralac, (2010), page 232.

[588] WTO, Committee on Trade and development, *Legal note on regional trade arrangements under the Enabling Clause*, WT/COMTD/W/114, (13 May 2003), para. 47.

[589] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), para. 27.

[590] Panel Report on Argentina – Safeguard Measures on Imports of Footwear, *(Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), and Resolution 1506/98 of 16 November 1998.

[591] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), para. 12.

[592] Ibid, para. 106-107.

neither did the panel consider whether the safeguard measure was introduced upon the formation of a customs union that fully meets the requirements of Article XXIV. Therefore, the Appellate Body reversed the panel's legal findings and conclusions relating to Article XXIV.[593] The result was that the Appellate Body did not have to consider whether MERCOSUR fulfilled the requirements of Article XXIV and whether it had liberated "substantially all the trade". The MERCOSUR has however claimed to have liberated substantially all the trade.[594]

4.4.3 The Enabling Clause and FTAs

As seen in the previous sections, it is possible to notify a customs union under the Enabling Clause as long as it doesn't violate other WTO provisions besides GATT Article I. Thus, safeguard measures ought to be allowed under the Enabling Clause as long as they only violate Article I. Customs unions under the Enabling Clause have been questioned as seen above. Free trade agreements under the Enabling Clause are not so controversial and have not been questioned in the same manner.[595]We will now look at an example that serves to illustrate the relationship between the Enabling Clause and an FTA including safeguards, namely the ASEAN.

ASEAN and the AFTA are free trade arrangements notified under the Enabling Clause and some of the trade agreements concluded by ASEAN will be presented here in order to make further reflections on safeguard measures and the Enabling Clause.

Five original Member Countries established the ASEAN in 1967. These were Indonesia, Malaysia, the Philippines, Singapore and Thailand. Since then Brunei Darussalam, Vietnam, Laos PDR, Cambodia and Myanmar have joined.[596] Its objectives are to accelerate economic growth, social progress and cultural development and to promote regional peace and stability.[597] This indicates that the object and purpose behind the ASEAN is both economic and political: economic growth is promoted as well as peace and stability. It is believed that the ASEAN

[593] Ibid, para. 110.

[594] Nsour, Mohammad F.A., *Rethinking the World Trade Order – Towards a better legal understanding of the role of regionalism in the multilateral trade regime*, Sidestone Press, (2010), page 209.

[595] Agreements under paragraph 2(a) of the Enabling Clause have though been questioned in for example *EC – Tariff Preferences* (Appellate Body report on European Communities – conditions for the granting of tariff preferences to developing countries, *(EC — Tariff Preferences),* WT/DS246/AB/R, (7 April 2004)) and *EC – Bananas III* (Appellate Body Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III), WT/DS27/AB/R, (9 September 1997)).

[596] For more information about the member countries as well as the ASEAN visit www.asean.org.

[597] The ASEAN Declaration (Bangkok Declaration), Thailand, 8 August 1967.

Economic Community, which was created in 2015, would become the central focus for East Asian economic cooperation.[598]

The ASEAN Free Trade Area (AFTA) agreement was signed in 1992 and aims at strengthening national and ASEAN economic resilience, the development of the national economies and the expansion of investment and production opportunities, trade, and foreign exchange earnings.[599] The legal cover for the AFTA is the Enabling Clause.

The region is a net exporter of all agricultural products and ASEAN countries have been active members of the Cairns group, the Group of 20 and the Group of 33.[600] The ASEAN countries are large exporters of particular products. For example, Member countries of the ASEAN account for 85 per cent of the world's rubber exports and 80 per cent of the trade in palm oil.[601]

There are also other ASEAN initiatives such as the ASEAN+3 which is a forum that functions as a coordinator of cooperation between the Association of Southeast Asian Nations and the three East Asian nations of China, Japan, and South Korea.[602] ASEAN+6 consists of ASEAN+3 as well as Australia, India and New Zealand and this group focuses on education, energy, finance, natural disasters etc.

ASEAN has also been discussing a Free Trade Agreement with the EU and separate agreements between the EU and for example Thailand and Malaysia are under negotiation.[603] Bilateral agreements have been completed with Singapore in 2014 and Vietnam in 2015.

The ASEAN countries have adopted various safeguard measures such as the Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Article VII which states that any emergency measure applied to sensitive products shall be subject to the provisions of Article 6 of the Common Effective Preferential

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[598] Kawai, Masahiro and Wignaraja, Ganeshan, Multilateralizing RTAs in Asia in Baldwin, Richard and Low, Patrick (ed), *Multilateralizing Regionalism, Challenges for the Global Trading System*, WTO The Graduate Institute, (Cambridge, 2009), page 509.

[599] Preamble, Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.

[600] The Cairns Group is a coalition of 19 agricultural exporting countries from Latin America, Africa and the Asia-Pacific region. The Group of 20 consists of large economies such as India, Japan, South Africa, China and the EU. The Group of 33 is a group of developing countries that coordinate on trade and economic matters

[601] *Preferential Trade Agreements for Development: Issues and implications*, Washington DC, (May 11-15, 2009), page 166-167.

[602] Kawai, Masahiro and Wignaraja, Ganeshan, Multilateralizing RTAs in Asia in Baldwin, Richard and Low, Patrick (ed), *Multilateralizing Regionalism, Challenges for the Global Trading System*, WTO The Graduate Institute, (Cambridge, 2009), page 508.

[603] The European Commission at ec.europa.eu/trade/policy/countries-and-regions, visited on 20 August 2014.

Tariff Scheme (CEPT) Agreement and its Interpretative Notes. Highly sensitive products can be accorded further flexibility.

The AFTA does not apply a common external tariff on imported goods since it is not a customs union. Instead every Member imposes tariffs on goods entering from third countries based on its national schedules.[604] Within ASEAN, Members are allowed to apply a tariff rate up to 5 per cent and this is what is known as the above mentioned Common Effective Preferential Tariff (CEPT) Scheme. There are three occasions where ASEAN Members can exclude products from the CEPT scheme; (i) temporary exclusions; (ii) sensitive agricultural products and (iii) general exceptions. The exclusion itself is a withdrawal of preferences, *i.e.* going back to normal tariff levels. The Agreement on the CEPT for the ASEAN Free Trade Area, Article 6 states that if:

> "… as a result of the implementation of this Agreement, import of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like or directly competitive products in the importing Member States, the importing Member States may, to the extent and for such time as may be necessary to prevent or to remedy such injury, suspend preferences provisionally and without discrimination, subject to Article 6 (3) of this Agreement. Such suspension of preferences shall be consistent with the GATT."

The measure above is thus an internal regional safeguard measure since it is only applicable to other ASEAN parties and it has to be consistent with GATT Article XIX. However, the AFTA internal regional safeguard only covers products under the CEPT Scheme.

The measure should be applied without discrimination. However, in practice this has not always been the case. In 2004 the Philippines officially announced that it would retroactively apply safeguard measures on imports from *several specified countries*.[605] As stated earlier, safeguard measures under GATT Article XIX have to be applied to products, not specific countries. One of the countries that the Philippines objected to was Vietnam which announced in 2009 that it would start a safeguard investigation on imports of Float Glass from other Asian countries.[606] Either both countries really did experience import surges from each other (or other Asian countries) or this could be seen as retaliation or even a way of liberalizing trade by way of rather suspicious-looking competition rules. This could also indicate

[604] See also Lissel, Elenor, The application of safeguard measures: a South-East Asian and Southern African perspective, *tralac Working paper* No. 04/2010, (August 2010), page 12.

[605] WTO, G/SG/N/8/PHL/5/Suppl.1, G/SG/N/10/PHL/3, G/SG/N/11/PHL/5/Suppl.1, Committee on Safeguards, Notification under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury of threat thereof caused by increased imports etc. (Float Glass), 26 May 2004.

[606] The website of the Vietnam Competition Authority (VCA), http://www.vcad.gov.vn, visited on 9 September 2009.

that the safeguard measure was used instead of anti-dumping or countervailing duties as these are not to be applied in the case of fair trade but are to be used to offset unfair trade practices as seen in Chapter 2.

ASEAN has also signed free trade agreements containing safeguard clauses with other parties. Here are some examples:

In the ASEAN-Australia-New Zealand Free Trade Area, a safeguard clause appears in Chapter 7. The Agreement contains transitional measures, provisional and multilateral measures. According to Chapter 7 Article 3, the parties may suspend further reductions or increase the rate of customs duties. The Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area was notified under GATT Article XXIV.

The ASEAN-India Free Trade Area (AIFTA) has safeguard clauses which state that the contracting parties have the right to apply multilateral safeguard measures under GATT, transitional measures and general regional measures. Regional measures may either suspend further reductions or increase the tariff rate at MFN level according to Article 10.4.[607]

As mentioned, the ASEAN-China Free Trade Area (ACFTA) includes multilateral safeguard measures, transitional measures and general regional measures.[608] Multilateral measures cannot be applied at the same time as regional measures and the use of the latter must be compensated for. Article 3.8 of the ASEAN-China FTA provides for safeguard measures in the framework agreement:

> "… safeguards based on the GATT principles, including, but not limited to the following elements: transparency, coverage, objective criteria for action, including the concept of serious injury or threat thereof, and temporary nature".[609]

On the application of WTO provisions, it is stated that:

> "The WTO provisions governing modification of commitments, safeguard actions, emergency measures and other trade remedies, including anti-dumping and subsidies and countervailing measures, shall, in the interim, be applicable to the products covered under the Early Harvest Programme and shall be superseded and replaced by

[607] Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, Article 10.11.

[608] Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China.

[609] Framework Agreement on Comprehensive Economic Co-Operation Between ASEAN and the People's Republic of China signed in Phnom Penh, (5 November 2002).

the relevant disciplines negotiated and agreed to by the Parties under Article 3(8) of this Agreement once these disciplines are implemented."

ASEAN countries which are WTO Members could also apply a special safeguard rule – the Transitional Product-specific Safeguard (TPSS) – which was only applicable towards China due to the Protocol of Accession of the People's Republic of China.[610] The protocol meant that for twelve years after its accession, other Members could impose quotas and tariffs on Chinese goods while only having to show minimal injury and there were also restrictions on China's ability to retaliate. This ought to be one example of a discriminative safeguard measure. Of the 10 Member States in ASEAN, nine are also members of the WTO.[611] This means that only these nine countries can rely on the WTO regarding dispute settlements and other rights and obligations.

Safeguard measures are given much space in the ASEAN-Korea Free Trade Agreement and the agreement is notified under both the Enabling Clause and Article XXIV.[612] First there is a multilateral safeguard measure according to WTO law which is not subject to dispute settlement under the ASEAN-Korea Free Trade Agreement.[613] There is also a transitional safeguard measure as well as a general regional safeguard measure (ASEAN-Korea FTA safeguard measure) where unforeseen developments are a requirement. The different measures cannot however be applied at the same time. The permitted measure is either a suspension of further reductions or an increase in the tariff rate up to the applied MFN rate.[614]

However, AFTA is notified under the Enabling Clause and not GATT Article XXIV. The safeguard measures in the ASEAN FTAs are not very detailed and in general only refer to the safeguard measures that can be applied under WTO law. They also allow for regional safeguard measures in that they do not prohibit them. Some of the agreements, such as the ASEAN-Korea Free Trade Agreement and the

[610] WTO, Accession of the People's Republic of China, WT/L/432, 23 November 2001, 16.1-9. This means that these quotas and tariffs will exceed in 2013.

[611] Members of the ASEAN that are also WTO Members are Brunei Darussalam, Cambodia, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam. The members of ASEAN +3 besides the ones already mentioned, South Korea, Japan and, of course, China are also WTO Members. The Lao People's Democratic Republic became a WTO Member 2 February 2013.

[612] Apparently, this is not the only RTA notified (or tried to notify) under both the Enabling Clause and Article XXIV. See WT/COMTD/66 and Add.1–3; WT/COMTD/W/175; WT/COMTD/M/79, 80, 81 and 82.

[613] Article 9.1 in the ASEAN – Korea FTA, Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Government of the Member Countries of the Association of Southeast Asian Nations and The Republic of Korea, Malaysia, 24 August 2006.

[614] Ibid, Article 9.1-11.

ASEAN-Australia-New Zealand Free Trade Area have more extensive provisions on safeguard measures.[615]

These examples and Appendix 3 indicate that safeguard measures are as common in free trade agreements under the Enabling Clause as under Article XXIV. Also, there is nothing that prohibits safeguard clauses in the Enabling Clause which ought to mean that they are allowed as long as they do not violate other articles besides GATT Article I.

4.5 Comparison of results

There are many differences between on the one hand GATT Article XXIV and the Enabling Clause and on the other hand customs unions and free trade agreements. For example, there are requirements in Article XXIV that need to be fulfilled if Article XXIV should be invoked as a defence. As mentioned, customs unions and free trade agreements are exceptions to the MFN principle codified in GATT Article I.

In *Canada — Autos*, the Appellate Body stated that the object and purpose of Article I "is to prohibit discrimination among like products originating in or destined for different countries".[616] In *EC — Bananas III* the Appellate Body stated that GATT Article I applies to de facto discrimination.[617] One thing to keep in mind is that paragraph 5 of the Enabling Clause states that developed country Members shall not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, and shall not require developing countries to make concessions that are inconsistent with the latter's development, financial and trade needs. Thus, the principle of relative reciprocity applies.[618] However, in *Canada — Autos*, the Appellate Body found the prohibition of discrimination under Article I:1 to include both de jure and de facto discrimination; "Article I:1 does not cover only 'in law', or de jure, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or de facto, discrimination."[619] In *Canada — Autos*, the issue was whether a Canadian

[615] Ibid, Article 9 and Chapter 7, Article 1-9 in the ASEAN- Australia-New Zealand Free Trade Area.

[616] Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, (*Canada — Autos*), WT/DS139/AB/R, WT/DS142/AB/R, (31 May 2000), para. 84.

[617] Appellate Body Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, (*EC – Bananas III*), WT/DS27/AB/R, (9 September 1997).

[618] Van den Bossche, Peter, *The Law and Policy of the World Trade Organization. Text, cases and materials*, Cambridge University Press, (2006), page 394.

[619] Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, (*Canada — Autos*), WT/DS139/AB/R, WT/DS142/AB/R, (31 May 2000), para. 78.

duty exemption was inconsistent with Article I:1 and Canada raised Article XXIV as a defence. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to all NAFTA manufacturers and, on the other hand, manufacturers from countries besides the United States and Mexico were being provided duty-free treatment.[620]

This indicates that if the conditions of Article XXIV are not met, the defence cannot apply. This means that agreements under the Enabling Clause that do not fulfil the requirements of Article XXIV cannot rely on Article XXIV as a defence of violations of Article I. Thus, parties to an agreement under the Enabling Clause must rely on the Enabling Clause in order to provide a defence. However, the Enabling Clause is not so detailed as to provide a thorough defence. The result is that Article XXIV can only be used as a defence if the requirements in the article have been met. The question of why Article XXIV would provide a better defence than the Enabling Clause remains to be answered.

In order to be consistent with WTO law, RTAs between developing countries must comply with both paragraph 2(c) and 3(a) of the Enabling Clause.[621] Paragraph 2(c) covers "regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the contracting parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another".[622] Article 3(a) states that any differential and more favourable treatment "shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties".

Thus, there are some important differences between the Enabling Clause and Article XXIV. Article XXIV:8 calls for the *elimination* of trade restrictions (duties and other restrictive regulations of commerce) while the Enabling Clause calls for the *reduction* of tariffs. Consequently, discrimination or non-tariff measures might be allowed. Also, as mentioned, RTAs under the Enabling Clause are not required to cover "substantially all the trade". Lastly, the use of the word "shall" in paragraph 3(a) is in comparison with the word "should" in Article XXIV:4 more stringent.[623]

The term "substantially all the trade" is absent in the Enabling Clause. This implies that agreements notified under the Enabling Clause do not have to eliminate internal

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[620] Panel Report, Canada – Certain Measures Affecting the Automotive Industry, (*Canada — Autos*), WT/DS139/R, WT/DS142/R, (11 February 2000), paras. 10.55–10.56.

[621] WTO, Committee on Trade and development, *Legal note on regional trade arrangements under the Enabling Clause*, WT/COMTD/W/114, (13 May 2003), para. 52.

[622] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, (the Enabling Clause) adopted in 1979, paragraph 2 (c).

[623] WTO, Committee on Trade and development, *Legal note on regional trade arrangements under the Enabling Clause*, WT/COMTD/W/114, (13 May 2003), para. 53.

trade barriers entirely.[624] Accordingly, since the Enabling Clause does not cover non-tariff measures, safeguard measures are justifiable under the Enabling Clause.

In *Argentina – Footwear (EC)* the issue was Argentina's application of multilateral safeguard measures which are different from regional safeguard measures as described above. However, the panel made an apparent assumption that Article XXIV was applicable, and no claim was made regarding the legal status of MERCOSUR.[625] Argentina claimed that it could not impose safeguard measures against imports from other MERCOSUR countries because of GATT Article XXIV as well as secondary MERCOSUR legislation. Thus, according to Argentina, it was incompatible to impose safeguard measures within the MERCOSUR customs union due to Article XXIV:8.[626]

The reasonable conclusion is that Article XXIV provides a better defence than the Enabling Clause if the safeguard measure is applied on behalf of a customs union and if the measure excludes the parties of the union. This will however be dealt with in Chapter 5. Also, since the Enabling Clause only permits violations of Article I, Article XXIV must provide a better defence if violations are made on other articles besides Article I, such as for example Article XIX on safeguards. The relevant question then is whether it is possible to use Article XXIV as a defence when a customs union or a free trade agreement has been notified under the Enabling Clause.

In the Appellate Body Report on *Brazil – Retreaded Tyres* the EC questioned whether the MERCOSUR exemption from an import ban was justified under GATT Article XX(d) or XXIV.[627] An import ban is a restriction which can be permitted under Article XXIV:8(i) while safeguard measures are not listed in the same paragraph. Although the dispute did not concern safeguards the defence claim made by Argentina under Article XXIV is particularly interesting for this study. As mentioned, the MERCOSUR was not notified under Article XXIV. Thus, *Brazil – Retreaded Tyres* can give some guidance on whether Article XXIV can be used as a defence when a customs union is notified under the Enabling Clause.

The US had also questioned whether Brazil could rely on Article XXIV since the article could not be invoked if the Member had chosen not to subject the customs

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[624] Islam, Md. Rizwanul and Alam, Shawkat, Preferential Trade Agreements and the scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An appraisal of GATT/WTO jurisprudence, *Netherlands International Law Review,* LVI: 1-34, (2009), page 22.

[625] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), para. 27.

[626] Panel Report on Argentina - Safeguard Measures on Imports of Footwear (EC), *(Argentina - Footwear (EC*)), WT/DS121/R, (25 June 1999), para. 8.93.

[627] Appellate Body Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Retreaded Tyres*), WT/DS332/AB/R, (17 December 2007), para. 117(c).

union to the procedures under the article.[628] It is doubtful whether a customs union or a free trade area notified under the Enabling Clause can rely on Article XXIV, especially if it does not meet the requirements under Article XXIV. The US and Indonesia also raised a similar argument in *Argentina – Footwear (EC)* which concerned MERCOSUR.[629] According to Article XXIV:8(a) MERCOSUR has to show that the MERCOSUR parties have eliminated duties and other restrictive regulations of commerce with respect to substantially all trade and that they have established a common external trade regime.[630]

Brazil argued that "substantially all the trade" had been liberalized between the members of the MERCOSUR and that it complied with Article XXIV,[631] but the EC contended that WTO Members had not reached an agreement on whether MERCOSUR complied with Article XXIV even after years of examination in the WTO Committee on Trade and Development.[632] The panel never verified whether MERCOSUR was a customs union that complies with Article XXIV.[633] Surprisingly, the Appellate Body, did not examine the European Communities' conditional appeal and made no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.[634] The reason for this is most likely the highly controversial subject.

A finding that MERCOSUR did not meet the internal trade requirements laid out in Article XXIV would be extremely controversial given that there is a lack of precision in the legal text and lack of agreement in the WTO regarding the issue.[635] As Lockhart and Mitchell state "it would be difficult to find a textual basis for a

[628] The first written submission by the US, paras. 10-11 and Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846, page 821.

[629] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), paras. 53 and 64-65.

[630] Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846, page 823.

[631] Panel Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Retreaded Tyres*), WT/DS332/R, (12 June 2007), para.4.383.

[632] Ibid, para. 4.401.

[633] Appellate Body Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Retreaded Tyres*), WT/DS332/AB/R, (17 December 2007), para. 32.

[634] Ibid, para. 256.

[635] Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846, page 830.

finding that a precise threshold of 90 % is never 'substantial' but that a precise threshold of 95 % always is".[636] Brink also puts the context in the right words:

> "It is also because, perhaps more than any other current legal controversy, the systemic implications of a more general finding would be so great that dispute settlement bodies would be reluctant to go beyond their role to settle the dispute between the parties".[637]

The question whether MERCOSUR can defend measures under Article XXIV has to be answered by examining which WTO rules an RTA can lawfully breach.[638] By doing that, the *Turkey – Textiles* case will be reviewed and whether Brazil's measure in *Brazil – Retreaded Tyres* was necessary. Brazil's measure in the form of an import ban was not introduced upon the formation of MERCOSUR. However, measures according to Article XX can be permitted under Article XXIV:8(a) if necessary but as Brink suggests they can never be necessary within the meaning of Article XXIV:5.[639] Brink states that "given that quantitative restrictions cannot be applied in a discriminatory manner and that domestic health and environmental policies cannot legally discriminate between like products from Members where the same conditions prevail, it is hard to see how Article XXIV could ever excuse such discriminatory instruments".[640]

The Appellate Body in *Turkey – Textiles* stated that certain restrictive regulations of commerce may be maintained if they are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994.[641] The key words here are "otherwise permitted". If it is not justified under other WTO regulation, then perhaps it is not justified under Article XXIV. Accordingly, if a safeguard measure is inconsistent with Article XIX or any other WTO regulation such as Article I, then perhaps it is not justified under Article XXIV. And if it is otherwise permitted, then perhaps it is permitted under Article XXIV.

Safeguard measures do seem as important in agreements notified under the Enabling Clause as in those notified under Article XXIV, but they do not seem to have been given the same justification or foundation. There is no requirement of covering

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[636] Lockhart, Nicholas J.S., and Mitchell, Andrew D., Regional Trade Agreements under GATT 1994: An Exception and Its Limits, in *Challenges and Prospects for the WTO*, e.d. Mitchell, Andrew D., Cameron, (May 2005), pages 235-236.

[637] Brink, Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in *Brazil – Tyres*, *Journal of World Trade 44*, no. 4 (2010): 813-846, page 830.

[638] Ibid, page 832.

[639] Ibid, page 838.

[640] Ibid, page 840.

[641] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, (*Turkey-Textiles*), WT/DS34/AB/R, (22 October 1999), para. 48.

"substantially all the trade" which makes the defence more difficult. Also, as stated by the Appellate Body in *Turkey – Textiles*, GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met.[642]

Originally, the only exception to the MFN principle was Article XXIV. The General Agreement did not allow for preferences in favour of developing countries and Article XXIV could not be applied to preferential imports from developing countries. These trade preferences were not intended to cover the "substantially all the trade" requirement and instead an exemption from GATT was needed. This was done through waivers from GATT Article XXIV. As part of the Tokyo Round, the Enabling Clause was created in order to meet the needs for developing countries.[643]

GATT Article XXIV does not include any specific concept or mention of development but simply focuses on reciprocal trade: note that it was negotiated during the time when many developing countries were still colonised by developed countries.[644] Interestingly, the corresponding General Agreement on Trade in Services (GATS) Article V does provide for Special and Differential Treatment in RTAs on services which were negotiated more than four decades after Article XXIV.[645] GATS Article V 3(a) states that there shall be flexibility in agreements concerning substantial sectorial coverage and the elimination of substantially all discrimination when developing countries are parties. This indicates a lacuna in Article XXIV where the equivalent wording is absent. Also, the Least-Developed Countries which enjoy special conditions in the Doha Round and preferential trade do not enjoy such conditions under Article XXIV. This has been recognised in the Committee on Regional Trade Agreements and there is a proposal for some implementing action which will harmonize with the development aspects.[646] It is also recognised that there is a legal asymmetry with respect to economic and trade conditions regarding goods and services. Several WTO Members have made

[642] Ibid, para. 50.

[643] See the WTO Committee on Trade and Development. For example COM.TD/W/319, 17 October 1980, Forty-Second Session 11-12 November 1980.

[644] South Centre, Analytical note, *Article XXIV and RTAs: How much wiggle room for developing countries?,* SC/AN/TDP//RTA, (December 2008), page 5.

[645] General Agreement on Trade in Services, Article V 3(a) and (b), South Centre, Analytical note, *Article XXIV and RTAs: How much wiggle room for developing countries?,* SC/AN/TDP//RTA, (December 2008), page 6.

[646] WTO, WT/REG/W/65, Proposal for an implementation of Article XXIV of GATT 1994, in order to harmonize current WTO dispositions on development aspects of Regional Trade Agreements for inclusion at the eight ministerial conference, 28 October 2011. See also WTO, Negotiating Group on Rules, TN/RL/M/40, 18 May 2011, Summary report of the meeting held on 8 April 2011.

proposals with regards to the developmental aspects of the RTAs.[647] It has been proposed that the following paragraph be included in the Ministerial Declaration:[648]

> "Without prejudice of the final results of current negotiations on regional trade agreements, and with the objective to contribute to a greater harmonization of current rules on regional trade agreements, when at least one of the parties to an agreement of the type considered in Article XXIV of GATT 1994 is a developing country, additional flexibilities shall be foreseen with regards to all the conditions stated in that Article, taking into account similar dispositions stated in Article V of GATS and also especially the Enabling Clause."

This implies that there is a need for an Enabling Clause which provides a wider consideration for developing countries. Asymmetrical liberalization has also been called for when it comes to North-South Agreements in order to modify Article XXIV.

> "(L)ikewise, it might be necessary to amend Article XXIV of the WTO, so that it caters for asymmetrical liberalisation, involving developed and developing economies. In this regard, the essence of provisions to give an unambiguous guiding framework for implementing North-South integration is evident. Notably, the pertinent issues are not appropriately addressed by Article XXIV either separately, or in conjunction with any of the other WTO provisions."[649]

Nevertheless, as seen above, Article XXIV has been used as a defence despite the notification under the Enabling Clause. Another example is when the EEC raised Article XXIV as a defence in *EEC – Bananas II* because of the discriminatory import regime for bananas.[650] However, the agreement was not notified under Article XXIV, nor under the Enabling Clause paragraph 2(c). The panel examined whether the Lomé Convention was one of the types of agreements mentioned in Article XXIV. The panel held that "only agreements providing for an obligation to liberalize the trade in products originating in all of the constituent territories could be considered to establish a free-trade area within the meaning of Article

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[647] For more information see communications by China (TN/RL/W/155), the ACP Group (TN/RL/W/185) and the EC (TN/RL/W/179), see also the communications by Turkey (TN/RL/W/32 and TN/RL/W/167) and Australia (TN/RL/W/180).

[648] WTO, WT/REG/W/65, Proposal for an implementation of Article XXIV of GATT 1994, in order to harmonize current WTO dispositions on development aspects of Regional Trade Agreements for inclusion at the eight ministerial conference, 28 October 2011.

[649] Matambalya, Francis and Wolf, Susanna, The Cotonou Agreement and the Challenges of Making the New EU-ACP Trade Regime WTO Compatible, *Journal of World Trade*, Vol. 35, No. 1, (2001), pages 123-144, page 140.

[650] Panel Report on EEC – Import Regime for Bananas, *(EEC – Bananas II),* DS38/R, (11 February 1994), (unadopted).

XXIV:8(b)."[651] Thus, agreements that do not impose a reciprocal duty cannot fall under GATT Article XXIV. Accordingly, agreements notified under the Enabling Clause that do not fulfil Article XXIV ought not to be able to use Article XXIV as a defence.

Also, the difference between customs unions and free trade agreements when it comes to safeguard measures is basically that a customs union can apply the measure as a whole union while a free trade area is not allowed to do so under WTO law. This fact has implications on the application of safeguard measures and the issue of parallelism which is dealt with in Chapter 5.

The procedure of notifying agreements under Article XXIV and the Enabling Clause will now be examined.

4.6 Notification and Remedies

4.6.1 Introduction

A trade arrangement has to be notified under a transparency mechanism either pursuant to GATT Article XXIV or the Enabling Clause.[652] Their respective main features will be described in the following sections.

As indicated in the introduction, notification can occur under either GATT Article XXIV or the Enabling Clause – or both. This raises several questions. Can a customs union be notified under the Enabling Clause or must it be notified under Article XXIV? What if a notified agreement does not fulfil the requirements? And what about the new practice of just summarizing notifications and not evaluating them – which essentially means that if members have a problem with them, they will have to litigate on them. What if an RTA is found not to comply? What impact, if any, does this have on safeguard measures?

4.6.2 Where to Notify

Agreements under GATT Article XXIV shall be notified in accordance with GATT Article XXIV 7(*a*) which states:

> "Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly

[651] Ibid, para. 159.

[652] Also possible under the General Agreement on Trade in Services, but since this study does not focus on services, this is only mentioned in passing.

> notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate."

The Committee on Regional Trade Agreements (CRTA) ensures the transparency of RTAs and allows Members to evaluate an agreement's consistency with WTO rules. Interestingly, no examination report of an agreement in the CRTA has been finalized since 1995 because of lack of consensus. RTAs falling under Article XXIV are notified to the Council for Trade in Goods (CTG). Notifications under the Enabling Clause, including those falling under paragraph 2(c), shall be made to the Committee on Trade and Development (CTD).[653] A notification of a trade agreement under the Enabling Clause shall be made no later than its entry into force. It is not stated in the Enabling Clause where this notification shall be made, only to whom; the contracting parties.[654] However, the CTD has been the WTO body to receive such notifications.[655]

According to the Enabling Clause, any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:

> "4 *(a)* notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;"

Thus, customs unions and free trade agreements under Article XXIV shall be notified in accordance with Article XXIV:7 to the Council for Trade in Goods, while customs unions and free trade agreements under the Enabling Clause shall be notified to the Committee on Trade and Development in accordance with paragraph 4(a). What happens then if an agreement is notified under both Article XXIV and the Enabling Clause? This question will be answered below.

4.6.3 Dual Notification

Here the differences between notifications under Article XXIV and the Enabling Clause and the legality of safeguard measures under both regulations will be examined. There are however uncertainties concerning the exact relation between

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653 WTO, Transparency mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671, (18 December 2006), para. E18.

654 WTO, Committe on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), paras. 18-20.

655 WTO, Committe on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), para. 28.

Article XXIV and the Enabling Clause. For example, it is not clear whether Article XXIV would have precedence over the Enabling Clause (or vice versa) prejudices against the rights of WTO Members to notify an arrangement under the Enabling Clause. This issue has never been ruled upon or debated in literature which makes it very difficult to answer the question. This means that some issues will not be resolved here. However, first an examination of some agreements that have been dually notified.

Even though AFTA has been notified under the Enabling Clause only, the implementation of the AFTA has been resorted to Article XXIV. Thus, a relevant question is whether the AFTA covers "substantially all the trade" requirement.[656] This thesis does not however intend to investigate whether the ASEAN agreements do so or not. As stated above, it would be difficult to find a textual basis for a finding that a precise threshold of 90 % is never 'substantial' but that a precise threshold of 95 % always is.[657] The ASEAN-Australia New Zealand FTA on the other hand was notified under GATT Article XXIV as was the ASEAN-Japan FTA. The ASEAN-Korea FTA was notified under both the Enabling Clause and Article XXIV.[658] The Republic of Korea notified the agreement under Article XXIV while the other party, the ASEAN Member countries, notified it under the Enabling Clause.

Also, in *Brazil – Retreaded Tyres* Brazil argued that Article XXIV:7 did not provide a formal notification requirement, but that MERCOSUR had notified in a manner that met the requirements of Article XXIV:7.[659] Article XXIV:7 explicitly requires notification. The MERCOSUR had only an agreement with the Chair of the CTD that a Working Party would be established to examine MERCOSUR "in light of the relevant provisions of the Enabling Clause and of GATT 1994, including Article XXIV".[660] The question is whether this constitutes a notification according to Article XXIV:7. As emphasized, a notification according to Article XXIV:7 must be made to the contracting parties and should be notified to the CTG. It seems likely that the notification is not made accordingly. And also, is it possible to notify an agreement under both the Enabling Clause and Article XXIV and then rely on whatever legal ground is most beneficial?

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[656] Nsour, Mohammad F.A., *Rethinking the World Trade Order – Towards a better legal understanding of the role of regionalism in the multilateral trade regime*, Sidestone Press, (2010), page 216.

[657] Lockhart, Nicholas J.S., and Mitchell, Andrew D., Regional Trade Agreements under GATT 1994: An Exception and Its Limits, in *Challenges and Prospects for the WTO*, e.d. Mitchell, Andrew D., Cameron, (May 2005), pages 235-236.

[658] WTO, WT/COMTD/N/33, S/C/N/560, (8 July 2010), Committee on Trade and Development and Council for Trade in Services, WT/REG287/N/1, S/C/N/559, (8 July 2010), Committee on Regional Trade Agreements and Council for Trade in Service.

[659] Brazil's first oral statement, executive summary 4; Panel Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Tyres*), WT/DS332/R, (12 June 2007), para. 4.385.

[660] WTO, Committee on Trade and Development, WT/COMTD/5/Rev.1 (25 October 1995).

The Economic Agreement between the Gulf Cooperation Council (GCC) States is an agreement which does not include safeguard measures but is interesting for this study due to the issue of dual notification.[661] The GCC sent a request in 2008 to the WTO Committee on Trade and Development to change its status of notification under GATT Article XXIV to the Enabling Clause.[662] The US however, had some concerns about the change in the notification to be exclusively under the Enabling Clause.[663] The US argued that the Enabling Clause allows for action inconsistent with GATT Article I only. "In the event that a regional arrangement under paragraph 2 (c) resulted in measures inconsistent with other provisions of the GATT 1994, that inconsistency would generally not be excused unless the regional arrangement were an FTA or customs union covered by GATT Article XXIV."[664] Since paragraph 2 (c) only allows arrangements that are notwithstanding the provisions of GATT Article I, other violations are prohibited.[665]

The GCC agreement was initially notified under GATT Article XXIV, but the GCC thought it would be more appropriate to notify it under the Enabling Clause since it is designed to facilitate trade among developing countries.[666] The EC underlined however, that the possibility to notify an agreement under either Article XXIV or the Enabling Clause cannot be based on the Member's preference to do so but rather requires a sound legal justification.[667]

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[661] The Economic Agreement between the Gulf Cooperation Council States (the "Economic Agreement") signed by their Majesties and Highnesses GCC leaders (Bahrain, the United Arab Emirates, Saudi Arabia, Oman, Qatar and Kuwait), on December 31, 2001.

[662] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66, (18 July, 2008).

[663] WTO, Committee on Trade and Development, Gulf Cooperation Council Custom Union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.1, (24 November 2008), para. 1.

[664] Ibid, para. 3.

[665] WTO, Committee on Trade and Development, Gulf Cooperation Council Custom Union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.1, (24 November 2008), and WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November, 2008), paras. 6-7.

[666] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66, (18 July, 2008), 1. Some other agreements are notified under both Article XXIV and the Enabling Clause, (dual notification or dually notified) namely: ASEAN – Korea and India – Korea. These three agreements (GCC as well) do not have a date for notification in the RTA database nor a reference to notification (www.wto.org RTA database).

[667] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November, 2008), para.3.

A long discussion followed for some years about whether this particular issue was resolved, whether it should be examined in the CRTA instead etc.[668] The only conclusion from these discussions was – according to the US – that the issue "was resolved" after informal consultations.[669] However, no notification was drawn back and it is not clear what is meant by the statement that the issue "was resolved". Only the parties to the informal consultations know what it meant. The US did though not accept a standing agenda on the matter and added that the discussions should take place in the Negotiating Group on Rules (NGR) instead of the CTD.[670] Apparently, the GCC had re-notified the agreement under Article XXIV and the GCC was now being considered in the CRTA.[671] In 2011 the issue of choice of forum was considered in the NGR. A proposal was presented where the CRTA had the responsibility to consider RTAs notified under Article XXIV and Article V of the GATS as well as those notified under the Enabling Clause.[672] Due to the disagreements the adoption of the CTD and the CRTA final annual reports in 2010 were prevented.[673] After these discussions, a proposal was raised to incorporate special and differential treatment and less than full reciprocity into Article XXIV so that developing countries can participate in such trade arrangements according to their needs. It was also stated that there were no *de jure* special and differential treatment in Article XXIV.[674] The following text was proposed to be inserted in GATT Article XXIV:

> "Where developing countries are parties to an agreement with developed countries for the formation of a customs union, a free trade area, or an interim arrangement

[668] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November, 2008), WT/COMTD/M/79, (3 September 2010), WT/COMTD/W/175, (30 September 2010), WT/COMTD/M/80, (21 December 2010), WT/COMTD/M/81, (16 June 2011), WT/COMTD/M/82, 19 October 2011).

[669] WTO, Committee on Trade and Development, Seventy-Ninth Session, Note on the meeting of 28 June 2010, WT/COMTD/M/79, (3 September 2010), para. 24.

[670] Ibid, para. 24 and WTO, Committee on Trade and Development, Eightieth Session, Note on the meeting of 4 October 2010, WT/COMTD/M/80, (21 December 2010), para. 24.

[671] WTO, Committee on Trade and Development, Eightieth Session, Note on the meeting of 4 October 2010, WT/COMTD/M/80, (21 December 2010), para. 25.

[672] WTO, Negotiating Group on Rules, Summary of the meeting held on 4 February 2011, TN/RL/M/38, (31 March 2011), para. 9 and WTO, Negotiating Group on Rules, Review of the RTAs transparency mechanism under paragraph 23: proposal for the consideration of all RTAs in a single WTO committee, TN/RL/W/248, para. 7.

[673] WTO, Negotiating Group on Rules, Review of the RTAs transparency mechanism under paragraph 23: proposal for the consideration of all RTAs in a single WTO committee, TN/RL/W/248, (24 January 2011), para. 5.

[674] WTO, Negotiating Group on Rules, Submission by Plurinational state of Bolivia, Negotiations aimed at Clarifying and Improving Disciplines and Procedures under the Existing WTO Provisions applying to Regional Trade Agreements – A Proposal to Clarify Developmental Aspects of Regional Trade Agreements, TN/RL/W/250, (26 January 2011), page 2.

> leading to either a customs union or a free trade agreement, special and differential treatment, in particular less than full reciprocity, shall be provided to developing countries regarding the conditions set out above in paragraphs 5 to 9 inclusive, specially with respect to subparagraph 5(c) and subparagraph 8(a)(i) and (b)."

However, the issue of dual notification also brings another dilemma in light namely when an RTA is notified under the Enabling Clause when it comes to goods and under GATS Article V when it comes to services. This also means that two processes will be considered where one is made in the CTD and the other in the CRTA. This state of affairs has previously never been considered a major problem.

The question that follows is what happens if the RTA does not comply with the provisions required? In 1996 non-compliance was discussed in the CRTA. Two options were proposed:

> "1, The committee could consider the possibility of counter-notification, after which, an examination process could follow.
>
> 2, Members could urge parties to comply with their notification obligations."

The first option above was however not appropriate according to some Members since the Committee should refrain from adopting this approach as the WTO legal framework did not provide for counter-notification of RTAs.[675]

According to paragraph 1 of the Decision of the General Council establishing the CTD, the main instruction is to "serve as a focal point for consideration and coordination of work on development in the WTO and its relationship to development related activities in other multilateral agencies". Also, paragraph 3 establishes that the CTD shall:

> "review periodically, in consultation as appropriate with the relevant bodies of the WTO, the application of special provisions in the Multilateral Trade Agreements and related Ministerial Decisions in favour of developing country Members, and in particular least-developed country Members, and report to the General Council for appropriate action".

The CTD shall also, according to paragraph 4, consider any questions arising from the application of any WTO provision in favour of developing countries. The CRTA was given a broad mandate when established:

[675] WTO, Committee on Regional Trade Agreements, Note on procedures to facilitate and improve the examination process, WT/REG/W/9, (9 October 1996), para. 5.

> "To carry out the examination of agreements in accordance with the procedures and terms of reference adopted by the Council of Trade in Goods, the Council of Trade in Services or the Committee on Trade and Development, as the case may be, and thereafter present its report to the relevant body for appropriate action."[676]

However, not much seems to be done about non-compliance. An attempt was made in order to clarify which WTO body has, or might have, responsibility to ensure that the requirements are met by developing countries entering into RTAs.[677] According to the Enabling Clause paragraph 4, RTAs among developing countries should be notified no later than their entry into force. The Enabling Clause does not however specify where the notification has to be made. A notification can be made either in the CTD or the CRTA.[678] The Chairman of the CTD in 1995 "recalled that the CTD was responsible for the notification requirements of Article XVIII:A, C and D, Part IV and the Enabling Clause".[679] Nevertheless, the "*Technical cooperation handbook on notification requirements"* identifies the CTD as the body receiving notifications under the Enabling Clause.[680] As mentioned, the CRTA has been raised as the body to receive notifications even though it seems clear that the CTD is the correct forum.[681] Clearly, there is no consensus on where notifications should be made.

There is an enigma that no literature covers this area of practical and legal implications of dual notifications. However, the following conclusions can be drawn. Both the CTD and the CRTA have rather similar powers to RTAs notified under the Enabling Clause. Both seem to have the power to undertake examinations of such RTAs and consequently to have consultations on the applications of the RTAs.[682] There are also some differences between notifying under Article XXIV or the Enabling Clause. For example, there is a standard format for the information required when notifying an agreement under Article XXIV. This format, which

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[676] WTO, Committee on regional trade agreements decision of 6 February 1996, WT/L/127, (7 February 1996).

[677] WTO, Committee on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), para. 17.

[678] Ibid, paras. 19-20.

[679] WTO, Committee on Trade and Development, Note on the Meeting of 17 November 1995, WT/COMTD/M/4, (22 December 1995), para. 55.

[680] See WTO, Committee on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), paras. 25-26. The handbook was based on aNote by the Secretariat entitled *Notifications required from WTO Members under Agreements in Annex 1A of the WTO Agreement*, G/NOP/W/2/Rev.1.

[681] WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November, 2008), WT/COMTD/M/79, (3 September 2010), WT/COMTD/W/175, (30 September 2010), WT/COMTD/M/80, (21 December 2010), WT/COMTD/M/81, (16 June 2011), WT/COMTD/M/82, 19 October 2011).

[682] WTO, Committee on Trade and Development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), paras. 35-44.

should be regarded as a guideline, specifies that the information on safeguard measures is required.[683]

The conclusions that can be drawn are that customs unions and free trade agreements can be notified under either Article XXIV or the Enabling Clause but that there are controversies about notifying customs unions under the Enabling Clause. In the case of non-compliance – not much is done. So far, only informal discussions have been held on the issue and neither the CTD nor the CRTA has come to any conclusions.

4.7 Conclusions

This Chapter has reviewed whether regional rules on safeguard measures are allowed under WTO law and if that is the case, which requirements must be fulfilled. It has also examined whether regional safeguards notified under Article XXIV and/or the Enabling Clause are compatible with the WTO safeguard rules.

Regional safeguard clauses in RTAs notified under the Enabling Clause have the same structure as safeguard clauses in RTAs notified under GATT Article XXIV. Thus, there seems to be no difference in the intention of the application of safeguard measures. Regional safeguard clauses in agreements notified under the Enabling Clause have nevertheless never been challenged under the DSB. However, the interpretation in dispute resolutions may differ since the Appellate Body in the case *EC – Tariff preferences* stated that the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlements.[684]

One primary difference between these two provisions is that the Enabling Clause does not require the elimination of trade restrictions as is called for by GATT Article XXIV:8. The table below illustrates the differences between customs unions and free trade agreements under Article XXIV and the Enabling Clause.

[683] WTO, Committee on Regional Trade Agreements, Standard format for information on regional trade agreements, WT/REG/W/6, 15 August 1996.

[684] Appellate Body report on European Communities – conditions for the granting of tariff preferences to developing countries, (EC — Tariff Preferences), WT/DS246/AB/R, (7 April 2004), para. 110.

Table 11: Custom unions and FTAs under Article XXIV or the Enabling Clause

	Customs unions	**Free trade agreements**
Article XXIV	Internal requirements: to facilitate trade between members, duties and other restrictive regulations of commerce should be eliminated on substantially all the trade among parties. External requirements: not to raise barriers to the trade of third countries Common external tariffs Article XXVIII procedure is required for modification of schedule in the case of customs unions. Regional safeguard measures are not prohibited but is rarely included in CUs	Internal requirements: to facilitate trade between members, duties and other restrictive regulations of commerce should be eliminated on substantially all the trade among parties. External requirements: not to raise barriers to the trade of third countries Regional safeguard measures are not prohibited and is most often included in FTAs
Enabling Clause Paragraph 2(c)	The purpose is to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties of third country. Questionable whether customs unions with high level of trade are allowed under the Enabling Clause according to some WTO Members. Regional safeguard measures are allowed but cannot violate other WTO regulations than GATT Article I.	The purpose is to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties of third country. Regional safeguard measures are allowed but cannot violate other WTO regulations than GATT Article I

This indicates that safeguard measures are not prohibited to be included in trade agreements under either Article XXIV or the Enabling Clause but that there are some differences. Regional safeguard measures are rarely included in customs unions under GATT Article XXIV, but most often included in free trade agreements.

As emphasised, Article XXIV:8 stipulates that duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories. Mathis, Estrella and Horlick advocate that this means that measures that are not listed, must be eliminated. Estrella and Horlick suggest that abolition of the *possibility* of applying safeguard measures is mandatory in order to qualify as a customs union or a free trade area.

The list of exceptions must according to Estrella and Horlick be understood as exhaustive since the latter interpretation effectively includes words that are not there. Pauwelyn, however, does not believe that the list is exhaustive and suggests that the flexibility offered in Article XXIV should be wide enough to include rules on regional safeguard measures. This is because the requirement is *substantially all the trade* and not *all the trade*. Pauwelyn also argue that the question of whether

Article XXIV prevents intra-regional safeguard measures is not likely to arise in a WTO dispute *on safeguards* since there is no discrimination. Unless the regional safeguard measure is higher than the MFN.

The Enabling Clause allows for the inclusion of regional safeguard measures, but they can only violate GATT Article I. However, there has been a long discussion whether customs unions are possible under the Enabling Clause and there are no results to that discussion. Notifying a customs union under the Enabling Clause is nevertheless not prohibited. Even so, using Article XXIV as a defence when an agreement is notified under the Enabling Clause is doubtful if the agreement does not fulfil the requirements of Article XXIV. First, an assessment has to be made whether the agreement does fulfil the requirement before a defence can be made. This means that duties and other restrictive regulations of commerce must be eliminated with respect to substantially all the trade. Substantially all the trade is however not the same as all the trade, which ought to mean that Article XXIV is wide enough to include safeguard measures.

When examining the object and purpose of the WTO Agreements it is, simply put, to encourage trade by ensuring non-discrimination and lowering trade barriers. RTAs are intended to yield the same results thereby making them a modification of the WTO Agreements with some of the parties taking further steps in the same direction. Safeguard measures are an exception to be used in extraordinary circumstances in both the Agreement on Safeguards and in RTAs as well.

The object and purpose of the RTAs is not to take further steps on safeguard measures, *i.e.* making the regional safeguard measures easier to use, but to provide for greater enhancement of free trade and thereby provide for the possibility of withdrawing from their modifications. However, a regional safeguard measure has significance ex post if the liberalizations made in the RTA causes injury.

Thus, what is it exactly that the WTO Members are trying to defend by using Article XXIV when applying safeguard measures? As seen in this Chapter, it is likely the question of allowing or abolishing safeguard measures from RTAs. Thus, the question is whether internal regional safeguard measures are allowed in RTAs. The conclusion in this study is that neither Article XXIV nor the Enabling Clause requires that safeguard measures are abolished in RTAs. Also, safeguard measures applied in accordance with the Enabling Clause can only violate Article I and no other WTO provisions. Thus, Article XXIV provides a broader defence than the Enabling Clause. Another question that may be posed in relation to a defence based on Article XXIV is whether it is allowed to exclude certain parties from the application of safeguard measures. Thus, the question is whether it is possible to exclude parties from the application of multilateral safeguard measures. This will be elaborated on in the next Chapter.

5 Regional safeguard rules

5.1 Introduction

The multilateral safeguard measures are to be applied on a product irrespective of its source. There should thus be a restriction to discriminate, although as seen from previous chapters, it is still possible to apply selective safeguard measures. In this Chapter, it will be examined whether regional rules on safeguard measures have the same non-discrimination principle or whether there is a difference from multilateral rules on safeguard measures. It will be examined if selective safeguard measures are allowed to be used in RTAs and if it is allowed to exclude certain parties in the application of safeguard measures according to Article XXIV and the Enabling Clause.

This Chapter serves to examine whether the object and purpose of regional safeguards and the regulatory framework covering them differ from those for multilateral safeguard rules. The comparison will pay particular attention to the challenge of striking the balance between the principle of non-discrimination and the need for asymmetric rules favouring developing countries' needs. The possibility to discriminate and apply selective safeguard measures due to the regional rules could affect the object and purpose for the multilateral rules on safeguard measures and hence constitute a conflict.

In order to set the grounds for investigating the questions mentioned above, the following subsection will deal with the object and purpose of safeguards in regional trade arrangements. Thereafter the different types of regional safeguards used today will be described before proceeding to deal with the safeguards in some specific regional trade arrangements, namely the ASEAN (and the ASEAN FTAs), SACU, the EPAs and MERCOSUR. These trade arrangements will illustrate the complex situations of which regional safeguards are a part. As in the case of the multilateral safeguards dealt with in Chapter 3, attention will be paid to the question of the asymmetry of the rules on safeguards in the RTAs studied. In a separate subsection the requirements for imposing safeguards in multilateral and regional trade respectively will be compared. Finally, some concluding remarks based on the results of this Chapter will be made.

5.2 Object and purpose of regional safeguard measures

Before examining different agreements one important question needs to be asked, namely: Why do trade agreements need safeguard measures at all?

The issue of the purpose of including rules on safeguard measures in RTAs has already been briefly touched on in previous chapters. Naturally, the purposes of the two types of safeguards – the multilateral and the regional - to some extent converge. However, the context in which regional safeguards may be considered necessary is somewhat different from that of the multilateral safeguards. It also defines the scope for their application and design.

The purpose of the RTAs as such should be to facilitate trade between the constituent territories and not to raise barriers which lead to discriminatory treatment to third parties. However, the reality is that most RTAs are dependent on an "escape clause" in order to provide more liberalization in general. Import-competing sectors can be very vulnerable to the effects of reduced or eliminated tariffs and need some kind of assurance that they will have the means to defend themselves from the "unforeseen developments" resulting from a regional liberalization arrangement.[685]

As described in the previous chapters, multilateral safeguard measures are to be applied on a special and limited basis, while the object and purpose of regional safeguard measures is rather to respond to the additional trade liberalization provided by the RTA. This means that the purpose of a regional safeguard measure is somewhat different from that of a multilateral measure as it addresses the specific results of additional liberalization. If the injury is not the result of such liberalization, then it is not the task of the regional measure to deal with it. Thus, the regional safeguard measure and the multilateral safeguard measure can be regarded as two different institutions. [686]

An example that illustrates the importance of safeguard measures in RTAs is the effect on the Indonesian economy of the creation of the ASEAN China Free Trade Area (ACFTA). After signing the ACFTA agreement, Indonesia expressed some concerns about the risk of import surges of products from China which could lead to injury to domestic producers of similar products. It therefore tried to renegotiate the deal with all parties, but with no luck. The consequence was that import duties on more than 6,000 types of Chinese goods were removed as from 1 January 2010

[685] Teh, Robert, Prusa, Thomas J. and Budetta, Michele, Trade remedy provisions in regional trade agreements, In *Regional Rules in the Global trading System*, Estevadeordal, Antoni, Suominen, Kati and The, Robert (ed), (2009), Cambridge University Press, page 173.

[686] Kotera, Akira and Kitamura, Tomofumi, *On the comparison of safeguard mechanisms of free trade agreements*, RIETI Discussion paper series 07-E-017, page 8.

in accordance with the agreement and it was feared that the Indonesian industry would collapse in the near future.[687] Opinions of the contracting parties differ as to the magnitude of these effects. According to Indonesian sources, Indonesia has suffered from the ASEAN China FTA while Chinese sources report that the ASEAN China FTA has created more benefits than problems.[688]

Exports from Indonesia of products such as coconut, rubber and coffee seem to be increasing as a result of the agreement but the domestic industry in electronics, steel and food could decrease. The reason is that poorly competitive domestic producers that sell their products in the domestic market will have to compete with similar but cheaper goods from China.[689]

One of the tools for preventing injuries of this kind is the safeguard measure, which is applicable through a safeguard clause, Article 3.8 in the ACFTA. Since 2011 Indonesia has been one of the most frequent users of multilateral safeguard measures and the reason is said to be its recently acquired understanding of the availability of trade defence measures. Thus, Indonesia seems to have discovered that safeguard measures can be used as a tool to defend its industry from injurious imports. Several countries have since expressed their concerns about the number of actions taken by Indonesia.[690]An interesting observation, however, is that Indonesia applies the multilateral safeguard measures according to WTO law to protect its domestic industry, not the measures available in the RTA mentioned above. Some RTAs allow for the use of multilateral safeguard measures, as does the ACFTA, but the issue here is that multilateral safeguard measures seem to have been used to combat regional liberalizations. Lower duties due to a regional trade agreement do not seem to be "unforeseen developments". The issue of how the multilateral and regional safeguard rules relate to one another and how countries make use of them will be one of the topics discussed when we compare the two sets of rules. Also, as was discussed in Chapter 2.3.3, being parties to an FTA might constitute some other difficulties when (allegedly) applying safeguard measures.

One reason for allowing rules on safeguard measures could be tied to the political economy of protectionism in that they constitute a tool to deal with the effects of

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[687] *The Jakarta Globe*, Get ready for Asean-China free trade pact: Indonesian Industry Minister, 26-November 2009, the Indonesian newspaper online, the Jakarta Globe daily newspaper at: http://thejakartaglobe.com/business/get-ready-for-asean-china-free-trade-pact-indonesian-industry-minister/343855, visited on 28 November 2009.

[688] Chandra, C. Alexander and Lontoh, A. Lucky, Indonesia – China Trade Relations: The deepening of economic integration amid uncertainty? *Trade Knowledge Network* (2011) page 3 and see also www.chinadaily.com of 24 May 2011, visited on 10 October 2011.

[689] Mutakin, Firman and Salam, Aziza Rahmaniar, The impact of ASEAN-China Free Trade Agreement on Indonesian Trade, *Economic Review*, No. 218, December 2009, page 1.

[690] WTO Committee on Safeguards, Systemic Concerns with Certain Safeguard Proceedings, G/SG/W/226, (5 October 2012).

trade liberalization. The latter may lead to modification costs.[691] There is also, as mentioned, a theory that the actual use of measures might indeed result in *ex post* losses but the intensity of the liberalization that can be accomplished by the agreement *ex ante* is dependent on whether there exist "escape clauses" in the first place.[692] If there is too much flexibility in the agreements, their credibility could however be undercut, leaving agreements with few or no benefits.[693] If rules on safeguard measures are included in the agreement, there is also a risk of relative welfare loss since industry will expect their government to use safeguard measures if needed.[694]

Nonetheless, again, if safeguards are included in a regional trade agreement, they can facilitate greater tariff concessions. One of the requirements for using multilateral safeguard measures is "unforeseen developments" (which will be attended to again below) which means that safeguard measures provide a form of insurance against adverse economic developments. Safeguard measures have also been described as a way for large countries to force other countries to maintain cooperation by temporarily raising tariff levels,[695] though smaller countries rather use safeguard measures as a tool to insure themselves against international price fluctuations.[696]

5.3 Different types of internal regional safeguard measures

5.3.1 Introduction

There exists a variety of types of safeguards in regional trade. First, it should be noticed that many RTAs offer the possibility of applying multilateral and/or regional

[691] Teh, Robert, Prusa, Thomas J. and Budetta, Michele, Trade remedy provisions in regional trade agreements, In *Regional Rules in the Global trading System*, Estevadeordal Antoni, Suominen, Kati and The, Robert (ed), (2009), Cambridge University Press, page 167.

[692] Ibid, page 168.

[693] Crowley, Meredith A., Why are safeguards needed in a trade agreement?, In *Law and Economics of Contingent Protection in International Trade*, (ed) Bagwell, Kyle W., Bermann, George A. and Mavroidis, Petros C., *Columbia Studies in WTO Law and Policy,* (2010) Cambridge University Press, page 379.

[694] Ibid, page 385.

[695] Bagwell, Kyle and Staiger, Robert W., A theory of managed trade, *American Economic Review*, (1990) 80:779-795.

[696] Fischer, Ronald David and Prusa, Thomas J., WTO exceptions as insurance, *Review of International Economics* (2003) 11:745-757.

safeguards.[697] See Appendix 3 for a list of agreements which include or do not include safeguard measures.

The multilateral safeguard measure within RTAs basically only refer back to the Agreement on Safeguards and/or GATT Article XIX. The regional measure is triggered by a different mechanism, often involving price and/or quantity thresholds.[698] It discloses characteristics in accordance with the relevant political and economic backgrounds,[699] as will be shown later, where several agreements are investigated, some more thoroughly and others more superficially.

An important difference between multilateral and regional rules on safeguard measures is that the standard regional safeguard clause in the RTAs is not as restrictive as the multilateral measure. One of the reasons for this is that the application of multilateral safeguard measures, as opposed to regional measures, requires proof of a causal linkage between import surges and injury caused to the domestic industry.[700] This difference will be examined more thoroughly in section 5.4 below.

5.3.2 Most Favoured Nation

The main difference, though, is that a multilateral safeguard measure, which takes the form of the suspension of concessions or obligations, can consist of quantitative import restrictions or increases in duties to levels higher than the bound rates. According to the MFN principle, any advantage (such as a lower customs duty rate for one product) granted by any contracting party has to be extended to all other WTO Members. One of the exceptions to the MFN principle is regional (or bilateral) trade agreements. This indicates that regional safeguard measures can be applied up to the level of the MFN rate and can consist of tariff increases, reductions, suspensions or withdrawals from the applied rate. In conclusion, parties to an RTA can apply customs duties lower than the MFN rate and multilateral safeguard

[697] See also Lissel, Elenor, *The application of safeguard measures: a South-East Asian and Southern African perspective*, tralac Working paper No. 04/2010, (August 2010), page 7 and Lissel, Elenor, *Regional Safeguard Measures: An Incentive to sign Regional Trade Agreements without taking into consideration the special needs for Developing Countries*, ETSG Conferencce 2011.

[698] Teh, Robert, Prusa, Thomas J. and Budetta, Michele, Trade remedy provisions in regional trade agreements, In *Regional Rules in the Global trading System*, Estevadeordal, Antoni, Suominen, Kati and The, Robert (ed), (2009), Cambridge University Press, page 190.

[699] Kotera, Akira and Kitamura, Tomofumi, *On the comparison of safeguard mechanisms of free trade agreements*, RIETI Discussion paper series 07-E-017, page 1.

[700] Kwa, Aileen, African Countries and the EPAs: Do Agriculture safeguards Afford Adequate Protection? *South Centre. South Bulletin, Reflections and Foresights,* (16 October 2008), Issue 25, page 1.

measures can be applied at levels above the MFN rate.[701] If the regional safeguard measure is applied exceeding the rate of MFN then Article XIX and the Agreement on Safeguards is invoked.[702]

Table 12: Safeguard measures and MFN

	Lower than MFN	**Above the MFN**
Multilateral safeguards	According to Article 5 of the Agreement on Safeguards, safeguard measures can be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. This means that multilateral safeguard measures do not have to be higher than the MFN. See (*Dominican Republic – Bags*)	According to Article 5 of the Agreement on Safeguards, safeguard measures can be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Safeguard measures above the MFN are allowed.
Regional safeguards	If regional safeguard measures are applied below or at the MFN rate, these would be considered internal and only affect the regional parties and thus would be brought before a regional dispute settlement body if a dispute arises. If the RTA fulfill GATT Article XXIV or the Enabling Clause, then there is no violation of GATT Article I.	If regional safeguard measures would be applied above the MFN rate, then the regional parties would be disadvantaged compared to other trading parties and also violate GATT Article I. According to Article XXIV and the Enabling Clause the purpose is however to facilitate trade between the constituent territories and not to raise barriers to the trade of third parties. A dispute would likely be brought to the WTO DSB and it is also likely that no countries would engage in such an RTA.

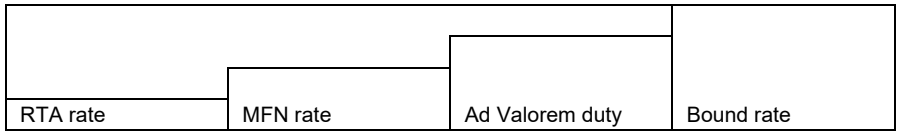
The issue in *Dominican Republic – Bags* was that the applied measure was not higher than the binding but higher than the tariffs provided in the regional free trade agreement. The measure at issue did, however, increase the MFN rate. The measure was finally regarded as a multilateral safeguard measure within the Agreement on Safeguards and GATT Article XIX, so this was a suspension of the MFN rate.

This can be illustrated by the following table.

[701] According to the Agreement on Safeguards, Article 5, safeguard measures shall be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The level of duties to be applied under the new SSM is still debated.

[702] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Bags),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), paras 7.56-7.57.

Table 13: Rate of duty



The RTA rate is lower than the MFN rate; the duty which is applied to all imports besides members of the regional trade agreement. The Ad Valorem duty is below the bound rate. This was the scenario in the *Dominican Republic – Bags* case. The Ad Valorem duty was though higher than the RTA rate and the MFN rate and was later considered to be a safeguard measure.

According to Lee, and as mentioned above, two scenarios present probable conflicts between regional safeguard measures and multilateral safeguard measures. The first scenario is when a *regional* safeguard measure is applied at a level which exceeds the rate of duty applicable to non-RTA members on an MFN basis. The measure thus suspends the obligation in whole and in part or to withdraw or modify the concessions as stated in Article XIX (a) and consequently all the procedural and substantive requirements for the application of a *multilateral* safeguard measure apply. Such regional safeguard measure violates the terms of RTAs which prohibit suspension of concessions beyond the MFN rates. RTAs with regional safeguard measures that can be higher than the MFN rate does not comply with the Agreement on Safeguards.[703]

This means that regional safeguard measures ought to be applied at a level below or at the MFN rate in order to be justified by WTO law. As seen in Chapter 2, increase in MFN rate on the one hand or applying safeguard measures on the other will have different effects on parties to RTAs.

The other scenario is when the RTA requires that the imports from RTA parties shall be excluded from the application of safeguard measures. [704]

Interestingly, due to the already low MFN rates, the increase of RTAs means that the difference between the MFN rate and the rate between the Members of the RTAs exaggerate the competitive advantage of the latter. In addition, its competitors will in time also enjoy access to that market.[705]

[703] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3rd Ed., Edward Elgar, (2014), page 260.

[704] Ibid.

[705] World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 44.

5.3.3 Categories of safeguard measures

Apart from regional (internal) safeguard measures and allowing for multilateral safeguard measures in RTAs, there are also some others. The stance in relation to whether and when safeguards should be allowed in regional trade varies among the different RTAs. From this perspective, safeguards in RTAs can be divided into three categories:

(i) disallowed,

(ii) allowed with no specific provisions or

(iii) allowed with specific provisions.[706]

This means that some RTAs[707] do not allow for safeguard measures between the contracting parties to the agreement, an example being the RTA between the members of the SACU, which is a customs union. Others allow for safeguard measures under the condition that additional special requirements are fulfilled.[708]

As with the multilateral rules on safeguard measures, regional safeguard measures vary with regard to the situations in which they may be applied. They can thus be *general* or *special* safeguards. The general regional safeguards may be used for all types of products whereas special regional safeguards may only be used for, as an example, agricultural products and under certain circumstances.

In addition, there are also *transitional* and *provisional* safeguards. Transitional safeguard measures are only applicable during a specific time-period at the start of a new trade agreement thus allowing the parties to adjust to the new tariff levels.[709] Provisional safeguard measures are only applicable during a specific time-period and before the application of a more definitive safeguard measure. As described in Article 6 of the Agreement on Safeguards, provisional safeguard measures can be applied under critical circumstances during the investigation of safeguard measures where a delay would cause damage to domestic industry. A provisional safeguard measure is normally applicable for 200 days.[710] This procedure is also the standard in RTAs which include provisional safeguard measures.

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[706] World Bank Institute Trade Program, *Preferential Trade Agreements for Development: Issues and implications*, (May 11-15, 2009), Washington DC, page 358.

[707] See Appendix 3 for more RTAs that do not allow safeguard measures.

[708] Ibid.

[709] See for example Chapter 7, Article 6 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.

[710] Article 6 of the Agreement on Safeguards and for example Chapter 7, Article 7 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area and Article 34 (9) in the Council of the European Union, Brussels, 2 February 2009, 14062/08, Legislative Acts and other instruments; Council Decision on the signature and provisional application of the interim

The following section portrays the complexity surrounding safeguard measures in RTAs by using the ASEAN, SACU and the EPAs as illustrative examples.

5.4 Requirements for using regional safeguard measures

5.4.1 Introduction

As with rules on multilateral safeguard measures, there are certain requirements that have to be met before applying regional safeguard measures. The requirements differ between the different types of regional measures. Safeguard clauses in agreements signed by the ASEAN countries and the EPAs are used to illustrate this diversity. However, safeguard clauses in other RTAs have also been considered in order to provide a further comparison when needed. Some RTAs such as the SACU Agreement do not allow for regional safeguard measures and hence are not represented here. The relevant provisions are compared to the requirements under WTO law.

5.4.2 Unforeseen developments

GATT Article XIX states that in order to impose a safeguard measure *unforeseen development* must have occurred.

None of the EPAs mention unforeseen developments and the only ASEAN agreements in which it is included are the AFTA and the ASEAN-Korea FTA.[711] Regarding the significance of this requirement the Appellate Body in *Korea – Dairy Products* determined that although it is not mentioned in the Agreement on Safeguards it is a legal requirement for the application of a safeguard measure.[712] Members who wish to apply a safeguard measure must demonstrate the existence of unforeseen developments in order to justify the use of the safeguard measure. The

Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part.

[711] ASEAN Trade in Goods Agreement, Cha-am, Thailand, 26 February 2009, Article 20.2, and the Agreement on Trade in Goods under the Framework agreement on comprehensive economic cooperation among the governments of the member countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 9.3.

[712] Appellate Body Report on *Korea – Definitive safeguard measure on the imports of certain dairy products, (Korea – Dairy Products),* WT/DS98/AB/R, (December 14, 1999), para. 90 and Argentina – Safeguard measure on the imports of footwear, (Argentina – Footwear), WT/DS121/AB/R, (December 14, 1999), para.97.

Appellate Body stated that an unforeseen development "describes certain circumstances which must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994".[713]

However, Lee has questioned this since the clause is too ambiguous to form an objective legal requirement. There is also no clear standard to determine the existence of unforeseen developments and it does not seem to serve a useful purpose since the availability of safeguards should encourage Members to increase market access.[714] In that sense, it is positive and beneficial for all parties to RTAs to exclude the requirement.

As described above, Indonesia applies multilateral safeguard measures to combat what seem to be the effects of additional regional trade liberalization. The relevant question is though whether it can be considered as an *unforeseen* development to experience import surges due to regional trade liberalization. If examined, Indonesia's safeguard measures might be found to violate WTO law. How can the existence of unforeseen developments be demonstrated when the safeguard measures are applied due to regional trade liberalization?

Lee believes it is unlikely that a Member would grant import concessions to the extent that they do, if they had foreseen any developments that would lead to serious injury or threat thereof. Thus, it is not likely that they would be prohibited from applying safeguard measures in the event that the development was actually foreseen. Lee writes:

> "The granting of import concessions in reliance of a future availability of a safeguard measure is positive for the promotion of free trade since the Member may not even have considered the import concessions without possible recourse to safeguard measures. This shows that the requirement of "unforeseen developments" serves no useful purpose and may even discourage Members from making more concessions. Therefore, the clause should be removed from the disciplines on safeguards."[715]

Even so, Members do have to demonstrate unforeseen developments according to the Appellate Body decisions. Conferring to Lee, the following needs to be demonstrated by the Member:

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[713] Ibid, para. 92.

[714] Lee, Yong-Shik, *Reclaiming Development in the World Trading System*, Cambridge University Press, (2006), pages 104-105.

[715] Lee, Yong-Shik *Safeguard Measures in World Trade, the Legal Analysis,* 2nd Ed. Kluwer Law International, (2005), page 46.

1, Identify certain developments that have led to the increase in imports causing or threatening to cause serious injury to the domestic industry,

2, Answer the questions; *why* were certain developments not foreseen and *how* did these unforeseen developments lead to the injurious increase in imports? [716]

Consequently, Indonesia would have to demonstrate and answer the above questions and it is likely that it would fail to do so since it seems clear that the applied safeguard measures are supposed to combat regional trade liberalizations. Perhaps, it could be argued that certain developments were not foreseen *i.e.* that it was not foreseen how these regional trade liberalizations would affect the domestic industries. It is not likely that an agreement would have been signed if it was foreseen that injurious imports would occur from it.

5.4.3 Increased quantities

When applying multilateral safeguard measures there must also be an assessment of whether the increase in imports is "recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively," to cause or threaten to cause serious injury to the domestic industry. [717] This distinction is not mentioned in the RTAs but all of them mention increased quantities as a requirement.

The imposition of global safeguard measures should be as a result to an "emergency" situation in the importing WTO Member. Nothing seems to be different in the RTAs since the reason for including an "escape clause" is to be capable of withdrawing from liberalization in exceptional circumstances. Examples of trends that could be taken into consideration when estimating the imported product's share of the domestic market are *e.g*. those related to changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. [718] In cases where global measures have been involved as in *Argentina - Footwear (EC)* - the question was whether the "increase" should be determined in relation to quantities or value.[719] The panel emphasised that the rate as well as the

[716] Ibid, page 47.

[717] Appellate Body Report on *Argentina - Safeguard measures on imports of footwear (EC),* (Argentina – Footwear EC), (14 December 1999), WT/DS121/AB/R, para. 131.

[718] UNCTAD, *Dispute Settlement. World Trade Organization 3.8 Safeguard Measures*. United Nations, (New York and Geneva 2003), page 9.

[719] Panel Report on Argentina- Safeguard Measures on imports of footwear (EC), *(Argentina – Footwear (EC)),* WT/DS121/R, (25 June 1999), para 8.152.

amount of the increased imports need to be established both in absolute terms and as a percentage of domestic production.[720]

5.4.4 Serious injury

According to the Agreement on Safeguards (SA), when determining injury, an assessment is made as to whether increased imports have caused or threatened to cause serious injury to the domestic industry producing the like or directly competitive products. The difference between the Agreement on Safeguards and RTAs is that the latter often have a wider application: this is especially the case with the European RTAs. The ASEAN Agreement does not include any wider definition on injury, while the EPAs elaborate on the point as do other regional agreements where the EU is a party. The Agreement on Safeguards states that an injury has to be classified as a *serious injury* or giving rise to a *threat of serious injury*. In several RTAs, such as the EPAs, the Cotonou Agreement and the EU-Chile Agreement the agreements talk only of injuries as *disturbances* and *difficulties*. This indicates that it is on this point easier to justify a safeguard measure in regional trade than in fully multilateral trade when performing the injury test. In regional trade the member countries have further opened their markets to other WTO Members. The strategy is to relax the requirements for invocation while the regulations on applying the measure remain rather strict.[721]

Some agreements talk of various *disturbances* in the market or in the mechanism that regulates the market as other kinds of injuries.[722] The Cotonou Agreement covers disturbances in any sector of the economy or difficulties that can make the economic situation worse.[723] In the EU-Chile Agreement, serious injury or disturbance in the market are criteria for introducing agricultural safeguards but this is not mentioned in the "general" clause on safeguards.[724]

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[720] Ibid, para. 8.141. See Appellate Body Report on *Argentina - Safeguard measures on imports of footwear (EC),* (Argentina – Footwear EC), (14 December 1999), WT/DS121/AB/R, para. 144, confirming the Panel's finding.

[721] Kotera, Akira and Kitamura, Tomofumi, *On the comparison of safeguard mechanism of FTAs*, (2006) RIETI, Tokyo, p 8.

[722] See for example Partnership Agreement between the Members of the African, Caribbean and pacific Group of States of the one part, and the European Community and its Member States, of the other part, (The Cotonou Agreement) ACP/CE/en55. Annex V. Article 8 and Article 25 (2) Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, (30.10.2008), *Official Journal of the European Union*, L 289/I/3.

[723] Partnership Agreement between the Members of the African, Caribbean and pacific Group of States of the one part, and the European Community and its Member States, of the other part. The Cotonou Agreement. ACP/CE/en55. Annex V. Article 8.

[724] Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its

The Cotonou Agreement and the EPAs have similar wording that leaves much space for interpretation. It is not clear what is meant by or where the limit falls with *disturbances*, *major social problems*, *difficulties* and *serious deterioration*. Also, the wording "mechanism regulating those markets" is questionable since it is not clear which countries have even implemented such regulations. The key difference between the agreements is that in the EPAs, any party has the right to invoke the measures, but in the Cotonou Agreement it is only available to the European Community. The criterion "difficulties" can nevertheless be easy for a country to invoke as an excuse to apply a safeguard measure, but it can be difficult for the targeted countries to show that they do not contribute to these difficulties. Such wordings of the "injury" requirement can however be seen as improving flexibility and together with infant industry protection providing for pro-development aspects.[725]

Article XIX and the Agreement on Safeguards provide that an injury test must be performed in order to impose safeguard measures, while the Special Safeguard in the Agreement on Agriculture (SSG) and SSM do not. In the SACU area, the injury that SACU industries suffer must be proven by an injury test and compensation might have to be considered for the affected trading partners.[726] None of the ASEAN Agreements or the AFTA suggests that an injury test has to be performed nor do the EPAs. The EU-CARIFORUM Article 25.1 states that alternative solutions have to be examined before applying safeguard measures. Also, the EU-CARIFORUM Article 25.7 states that the CARIFORUM-EC Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen.

As indicated above it is most likely easier to prove injury according to the RTAs than according to GATT Article XIX and the Agreement on Safeguards since the element of discretion is so much wider in the former. Nevertheless, member countries have opened their markets more widely in RTAs than towards other WTO Members generally. It is therefore logical that the requirements for invoking a regional safeguard measure are more relaxed than those called for in WTO law.

Member States, of the one part, and the Republic of Chile, of the other part, (30 December 2002), L 352/45, Article 73.

[725] *The CARIFORUM-EU Economic Partnership Agreement (EPA): An assessment of issues relating to market access, safeguards and implications for regional integration*, UN ECLAC, LC/CAR/L.181, (26 November 2008), page 10.

[726] Safeguard Regulations, The International Trade Administration Commission, Government Gazette, Republic of South Africa, Vol. 470, Pretoria 27 August 2004, No. 26715, preamble and Article 1.2 (c).

5.4.5 Causation requirement

The purpose of the RTAs as such should be to facilitate trade between the constituent territories and not to raise barriers which lead to discriminatory treatment to third parties. However, the reality is that most RTAs are dependent on the existence of an "escape clause" in order to provide more liberalization in general, at least to be able to sign the agreement. Import-competing sectors can be very vulnerable to the effects of reduced or eliminated tariffs and need some kind of assurance that they will have the means to defend themselves from the "unforeseen developments" resulting from a regional liberalization arrangement.[727]

There exists a variety of types of safeguards in regional trade. First of all, it should be noticed that many RTAs offer the possibility of applying multilateral and/or regional safeguards.[728]

The multilateral safeguard measure within RTAs contain the one point where the RTA refers to the Agreement on Safeguards and/or GATT Article XIX. The regional measure is triggered by a different mechanism, often involving price and/or quantity thresholds.[729]

An important difference between the rules on multilateral and regional safeguard measures is that the standard regional safeguard clause in the RTAs is not as restrictive as the multilateral measure. One of the reasons for this is supposedly that the application of multilateral safeguard measures, as opposed to regional measures, requires proof of a causal linkage between import surges and injury caused to the domestic industry.[730]

As mentioned above, in the Agreement on Safeguards Article 4.2 (b) there is a requirement for a causal linkage between the increased imports and the serious injury. In most RTAs the wording in similar, but there is no specific requirement of causal *link*. The wording is quite similar to Article XIX which amongst others state that "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

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[727] Teh, Robert, Prusa, Thomas J. and Budetta, Michele, Trade remedy provisions in regional trade agreements, In *Regional Rules in the Global trading System*, Estevadeordal, Antoni, Suominen, Kati and The, Robert (ed), (2009), Cambridge University Press, page 173.

[728] See also Lissel, Elenor, *The application of safeguard measures: a South-East Asian and Southern African perspective*, tralac Working paper No. 04/2010, (August 2010), page 7 and Lissel, Elenor, *Regional Safeguard Measures: An Incentive to sign Regional Trade Agreements without taking into consideration the special needs for Developing Countries*, ETSG Conferencce 2011.

[729] Teh, Robert, Prusa, Thomas J. and Budetta, Michele, Trade remedy provisions in regional trade agreements, In *Regional Rules in the Global trading System*, Estevadeordal, Antoni, Suominen, Kati and The, Robert (ed), (2009), Cambridge University Press, page 190.

[730] Kwa, Aileen, African Countries and the EPAs: Do Agriculture safeguards Afford Adequate Protection? *South Centre. South Bulletin, Reflections and Foresights,* (16 October 2008), Issue 25, page 1.

injury to domestic producers in that territory of like or directly competitive products…". The Agreement on Safeguards goes one step further and state "the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."

As seen from one example below the wording "cause" is fairly similar.

> EPA EU-CARIFORUM Article 25
>
> "Safeguard measures referred to in paragraph 1 may be taken where a product originating in one Party is being imported into the territory of the other Party in such increased quantities and under such conditions *as to cause or threaten to cause:*
>
> (a) serious injury to the domestic industry producing like or directly competitive products in the territory of the importing Party; or
>
> (b) disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party, or
>
> (c) disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets." (Emphasis added)

This shows however that the injury is somewhat different than from WTO law since there is no non-attribution requirement but rather the "other factors" seem to be included in the example above. An alternative to serious injury is also different kinds of disturbances. There is no mentioning of a causal "link". Does this mean that it is easier to demonstrate a causality between the injury and the increased imports when it comes to regional safeguard measures and thus easier to defend the imposition of safeguard measures?

Before taking any measure provided for in accordance with Article 25 above, the party concerned must inform the CARIFORUM-EC Trade and Development Committee with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to the parties concerned. It does not mention that an injury test or a causal link has to be proven.

However, in order to demonstrate that the injury or disturbance has been caused by the increased imports, other alternatives ought to have been ruled out. The emphasis here ought to lie on the increased imports and how it has affected the industry, economy and market. In that sense, the Panel report in *Korea – Dairy*, could be applied here as well. The authority needs to analyze and determine whether injurious developments have been caused by the increased imports. In its assessment, the

authority ought to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry. In addition, if the "authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports."[731] If something else caused serious injury to the domestic industry or the disturbances in a sector of economy or markets, then these ought not to be considered. Also, as the Appellate Body stated in *Argentina – Footwear (EC)*, "it would be difficult, indeed, to demonstrate a 'causal link' between 'increased imports' that did not occur and 'serious injury' that did not exist".[732] Thus, in order to impose safeguard measures, there must have been increased imports that causes or threatens to cause a serious injury and all these requirements must be demonstrated. This relationship also exists in the RTAs where it is mentioned that the increased imports has caused some kind of injury. Also, if the term "injury" is widened in the RTAs the linkage ought to be easier to demonstrate. However, there might not always be requirements that the link between the increased imports and the injury must actually be demonstrated.

According to the Agreement on Safeguards, it is stated that an injury has to be classified as a *serious injury* or giving rise to a *threat of serious injury*. In several RTAs, such as the Economic Partnership Agreements (EPAs), the Cotonou Agreement and the EU-Chile Agreement the agreements talk of injuries as *disturbances* and *difficulties*. This indicates that it is on this point easier to justify a safeguard measure in regional trade than in fully multilateral trade when performing some kind of injury test.

In the EU-Chile Agreement, serious injury or disturbance in the market are criteria for introducing agricultural safeguards but this is not mentioned in the "general" clause on safeguards.[733] The Cotonou Agreement and the EPAs have similar wording that leaves much space for interpretation. It is not clear what is meant by or where the limit falls with *disturbances*, *major social problems*, *difficulties* and *serious deterioration*. Also, the wording "mechanism regulating those markets" is questionable since it is not clear which countries have even implemented such regulations. The criterion "difficulties" can nevertheless be easy for a country to invoke as an excuse to apply a safeguard measure, but it can be difficult for the targeted countries to show that they do not contribute to these difficulties. Such wordings of the "injury" requirement can however be seen as improving flexibility

[731] Panel Report on Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products, *(Korea – Dairy*), WT/DS98/AB/R, (21 June 1999), paras. 7.89–7.90.

[732] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 145.

[733] Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, (30 December 2002), L 352/45, Article 73.

and together with infant industry protection providing for pro-development aspects.[734]

As stated above, the Appellate Body in *US – Wheat Gluten* specified that "[t]he word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element".[735] Consequently, the word "cause" suggest that the first element "increased quantities and under such conditions" brought about the second element "serious injury", and/ or "disturbances". Thus, even though the specific requirement of the term "causal link" is absent, it does not mean that the cause and effect is absent. And as suggested by the Appellate Body in *US – Wheat Gluten*, "[t]he word 'link' indicates that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Thus, the conclusion is that the term cause' in RTAs indicate that the increased imports must have brought about the existence of the injury or disturbance in order to be able to use the clause and impose regional safeguard measures. However, as the Appellate Body concluded in *US – Wheat Gluten*, the increase in imports and causation does not mean that it has to be the *only* cause. Since the injury itself is somewhat wider in RTAs and occasionally includes disturbances and other terms, it ought to have an impact on the determination whether the increased imports have attributed to the injury. As long as it can be determined that there is a relationship between the increased imports and the injury, whether it is a serious injury or disturbance, the requirements for applying the safeguard measure should to be fulfilled.

It is, therefore, most likely easier to prove injury in the RTAs than under WTO law. Nevertheless, Member countries have opened their markets more widely in RTAs than towards other WTO Members generally which suggests that they do see the requirements for invoking a regional measure as more relaxed than those called for by the WTO.

Which factors contributed to increased imports

Increased production in and exports from one country may, for different reasons, cause decreased production and prices in another state. This is where safeguard measures enter the scene. Safeguard measures are intended to protect industries from the economic harm caused by these unexpected surges in imports. The idea of

[734] *The CARIFORUM-EU Economic Partnership Agreement (EPA): An assessment of issues relating to market access, safeguards and implications for regional integration*, UN ECLAC, LC/CAR/L.181, (26 November 2008), page 10.

[735] Appellate Body report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, (*US - Wheat Gluten*), WT/DS166/AB/R, (22 December 2000), para. 66.

safeguard measures is to provide for a temporary protection while the industries are adjusting to the new circumstances. However, regional safeguard measures are easier to invoke than multilateral measures under the Agreement on Safeguards and GATT Article XIX since the circumstances allowing for their use occur more frequently than those in WTO law. This indicates that the object and purpose behind regional measures is actively to provide an "escape clause" rather than to restrict their use.

Even though that the phrase "causal link" is absent in most RTAs, there is a referral to a 'cause'. The word 'cause' signifies a relationship between, at least, two elements, whereby the first element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element". The 'link' however, indicates that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Consequently, the word "cause" suggests that the first element "increased quantities and under such conditions" brought about the second element "serious injury", and/ or "disturbances".

The difference here is that due to the lack of non-attribution requirement and rather the inclusion of 'other factors', this indicates that these other factors ought to be included in the estimation. Thus, it is not necessary to distinguish which factors actually contributed to the increased imports and the justification to impose these kinds of regional safeguard measures therefore ought to be wider.

Thus, when examining the causation requirement in RTAs it is likely that only two of the three-step process will be carried out. First an observation will be made whether the increased imports coincides with descending trends in the different types of injury factors, and secondly whether there is a causation between the imports and injury. Due to the lack of the non-attribution requirement and also due to the wider definition of injury, it seems as if a determination must not be made whether the injury was caused or attributed to the increased imports. Consequently, even though there must be some causation between the increased imports and the injury, other factors can contribute to the injury. In this sense, the wider definition of injury, such as disturbances and difficulties, as seen in some examples of RTAs above supports this conclusion. Other factors besides increased imports can also contribute to the injury and thus impose the right to use regional safeguard measures.

5.5 Additional requirements

5.5.1 Introduction

In addition to the basic requirements presented above, several agreements include other criteria in regard to safeguards that also need to be observed. Some of them are presented in the following subsections.

5.5.2 Transparency

As exemplified in the following some agreements mention transparency in terms of what documents should be presented to the supervising body, *e.g.* committee, while a smaller number (for example the Cotonou agreement) mention the information that has to be presented to the parties.

According to the EPAs all relevant information is to be given to the Joint Committees while the Cotonou Agreement states that the Community shall give all information asked for to the ACP countries (article 9.1).

The ASEAN-Australia New Zealand FTA mentions that the parties shall provide public versions of the report and that the targeted party shall be given evidence supporting the findings. Other agreements such as the ACFTA state that the WTO Agreement on Safeguards shall, *mutatis mutandis*, be incorporated into and form an integral part of the Agreement which could indicate that there should be some kind of transparency.[736] Within ASEAN disputes can be solved in various ways but the whole proceedings in the dispute are confidential and the reports are not enforceable in national courts.

5.5.3 Time limit for safeguard measures

According to the Agreement on Safeguards Article 7, the time limit for applying a measure is "necessary to prevent or remedy serious injury" while some agreements have a more precise limitation in years. Developing countries also have extended time limit in the Agreement on Safeguards.

The Cotonou Agreement does note state any time limit for how long it is possible to apply safeguard measures. Here the effect of using a safeguard measure could be described as going back to status quo at the time before the agreement was concluded rather than applying a temporary protection.

[736] Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, Vientiane, (29 November 2004), Article 9(6).

The EPAs have different time limits. According to the EU-CARIFORUM Article 25.6 the normal time limit is two years which can be extended by two years. If a CARIFORUM state uses a safeguard measure it can be for four years extendible by another four years. If the Community uses a safeguard measure limited to the outermost regions in the Community, the same time limits apply. There is also a limit of ten years from the establishment of the agreement if a CARIFORUM state introduces a safeguard measure towards the Community when the latter causes injury or threatens to cause injury to an infant industry that produces a like product. Some of the EPAs also allow for extensions of the period due to the world economic situation or troubles affecting the particular developing country.[737]

5.5.4 Compensation or retaliation

Many countries and especially developing countries could be prevented from using safeguard measures due to the requirement of compensation or the right to retaliation under the Agreement on Safeguards.

Likewise, an RTA could specify that the safeguard investigation must be notified to a joint committee and that consultations may follow between the parties where other solutions may be proposed. This procedure might not reduce the application of remedies *de jure*, but it is more likely to do so *de facto*. Being a member of an RTA makes a unilateral act more like a tactful trade negotiation which might restrain certain members from acting.[738] These clauses on joint committees flourished after the year 2000 and according to Teh, Prusa and Budetta are common in RTAs with the EU.[739]

The ASEAN-Australia New Zealand FTA and the ASEAN-China Free Trade Area include provisions for compensation by calling for substantially equivalent level of concessions or other obligations between the party applying the measure and the exporting country.

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[737] The EU-Ghana allows for an extension, Central Africa is given 15 years extra protection, Botswana, Namibia and Swaziland are also given 15 years as well as a possible extension. 15 years for LDCs in Eastern and Southern Africa and up to 20 years in order to promote development of productive and sustainable industries with a view to raising the general standard of living of the people for some countries in the Pacific. In the Pacific there is also a *de minimis* rule on imports from the EU of 3 per cent.

[738] Baldwin, Richard, Evenett, Simon and Low, Patrick, Multilateralizing non-tariff RTA commitments, in Richard Baldwin and Patrick Low (ed), *Multilateralizing Regionalism – Challenges for the Global Trading System*, The Graduate Institute Geneva, (Cambridge 2009), page 122.

[739] Teh, Robert, Prusa, Robert and Budetta, M., Trade Remedy Provisions in Regional Trade Agreements, paper prepared for the Inter-American Development Bank and World Trade Organization project entitled *Regional Rules in the Global Trading System*, (2007).

5.6 Differential treatment

As described in Chapter 3, WTO law offers some release for developing countries in the use of safeguard measures. In GATT Article XIX there is, *e.g.* a special and favourable rule for developing countries when calculating shares of imports. The Agreement on Safeguards provides differential treatment for developing countries both when they are applying safeguard measures and when they are subjected to them. This is not however the norm in RTAs. Nevertheless, some of these agreements do apply differential treatment.

The overall aim of the Enabling Clause is of course to support the integration of developing countries in international trade and thus agreements between developing countries based on Article 2(c) in the Enabling Clause is an example of this objective. Article XXIV, however, is supposed to provide the framework under which free trade areas and customs unions are endorsed as being in accordance with the WTO.

In the various ASEAN free trade agreements, there are rules suggesting a pro-development perspective. In each of the ASEAN Free Trade Agreements, the Members of the Australia-New Zealand Closer Economic Relations Trade Agreement (AFTA-CER), the ASEAN-India economic cooperation, ASEAN-Japan, ASEAN and the Government of the Russian Federation and ASEAN-Korea Free Trade Area it is stated in the preambles that the different stages of economic development among ASEAN Member States are recognized and considered and that new Members are especially in need of attention, these being Cambodia, Lao PDR, Myanmar and Vietnam. Examples of such wording are to be found in the Australia-New Zealand Closer Economic Relations Trade Agreement (AFTA-CER), the ASEAN-India Economic Cooperation, the ASEAN-Japan FTA, and the ASEAN-Korea FTA.

In addition the ASEAN-Australia-New Zealand FTA includes special and differential provisions for developing countries to facilitate their more effective economic integration.[740] Likewise, the ASEAN-China FTA and the ASEAN-Australian-New Zealand FTA allow special treatment for developing countries by not applying measures if the share of imports of the product concerned in the importing Member does not exceed 3 per cent which is similar to the *de minimis* provisions of the Agreement on Safeguards. The ASEAN-Korea FTA also includes a provision regarding *de minimis* exceptions of 3 per cent of total imports.[741]

[740] Agreement establishing the ASEAN-Australia New Zealand Free Trade Area, Article 1.

[741] Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 9.7.

The Cotonou Agreement states that special treatment will be given towards least developed countries, landlocked countries and ACP islands. In the EU-CARIFORUM Article 24 on multilateral safeguards provides that safeguard measures may be applied in accordance with GATT article XIX and the Agreement on Safeguards as well as the WTO Agriculture Agreement.[742] According to Article 24.2, the measure on imports will be excluded due to the level of development of the CARIFORUM countries and the size of the economies in the region. This will be limited to a time period of five years, but the transitional exclusion will be reviewed before the end of the period. Article 24.4 states in effect that the Article shall not be subject to the WTO dispute settlement system.

All EPAs have a similar approach to multilateral safeguards. In the Council Regulation applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of EPAs from December 2007, certain development aspects are also mentioned.[743]

According to the WTO Dispute Settlement Body,[744] safeguard clauses should be applied in extraordinary circumstances, which is a narrower approach than the one in the EU-CARIFORUM and most other RTAs provide. Many RTAs specify that the safeguard investigation must be notified to a joint committee and that consultations may follow between the parties where other solutions may be proposed. This procedure might not reduce the application of remedies *de jure*, but it is more likely to do so *de facto*. Being a member of an RTA makes a unilateral act more like taking a trade negotiation stance which might restrain certain members from acting.[745]

Other EPAs do not provide for special and differential treatment for its lesser developed countries in the way the EU-CARIFORUM does. The EU-CARIFORUM also has one of the longest transition periods.[746] One aspect which is of interest is that the MFN clause in the EPAs requires that if an ACP country concludes an RTA

[742] Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, L 289/I/4 Official Journal of the European Union 30.10.2008.

[743] Council Regulation (EC) No 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, OJ L 348, 31.12.2007, p. 1–154.

[744] See for example Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 94.

[745] Baldwin, Richard, Evenett, Simon and Low, Patrick, Multilateralizing non-tariff RTA commitments, in Baldwin, Richard and Low, Patrick (ed), *Multilateralizing Regionalism – Challenges for the Global Trading System*, The Graduate Institute Geneva, (Cambridge 2009), page 122.

[746] *The CARIFORUM-EU Economic Partnership Agreement (EPA): The Development Component,* Directorate-General for external policies, (2009), page 46.

with a major trading economy *other than the EU*, the EU should *automatically receive* the benefits conceded in such RTA.[747] This could have a negative effect on those parties that previously intended to conclude an RTA with ACP countries as well as vice versa and these kinds of clauses are thus controversial.[748] A part of the EU-SADC clause on MFN is cited below.

> Article 28
>
> "More favourable treatment resulting from free trade agreements
>
> With respect to the subject matter covered by this Chapter, the EC Party shall accord to SADC EPA States any more favourable treatment applicable as a result of the EC Party becoming party to a free trade agreement with third parties after the signature of this Agreement.
>
> With respect to the subject matter covered by this Chapter, the SADC EPA States shall accord to the EC Party any more favourable treatment applicable as a result of the SADC EPA States or any Signatory SADC EPA State becoming party to a free trade agreement with any major trading economy after the signature of this Agreement."

According to the Agreement on Safeguards, the time limit for applying a measure is tied to its being "necessary to prevent or remedy serious injury". Developing countries have extended time limits under the Agreement on Safeguards while some free trade agreements however have a more precise limitation specified in years.[749]

The EPAs have different time limits for the use of safeguards. According to the EU-CARIFORUM Article 25.6 the normal time limit is two years which can be extended by two years. If a CARIFORUM state uses a safeguard measure it can be for four years extendible by another four years. If the Community uses a safeguard

[747] See for example Article 28 of the Council Decision on the signature and provisional application of the interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part, (Brussels, 2 February 2009), 14062/08 (EU-SADC) and World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 182.

[748] Pauwelyn, Joost, Multilateralizing regionalism: what about an MFN clause in preferential trade agreements?, *Proceedings of the 103rd Annual Meeting,* ASIL, (March 25-28, 2009), Washington, DC.

[749] The EU-SADC, for example, provides for five years when it comes to multilateral safeguard measures under Article 33 paragraph 2 and 12-15 years for developing country members and least developed countries when it comes to regional (bilateral) safeguard measures under Article 34 paragraph 6 (b).

measure limited to the outermost regions in the Community, it has the same limits.[750] There is also a limit of ten years from the establishment of the agreement if a CARIFORUM state introduces a safeguard measure against the Community when the latter causes injury or threatens to cause injury to an infant industry that produces a like product.

Some of the EPAs also allow for extensions of the period due to the world economic situation or troubles affecting the particular developing country.[751] Ensuring that no one is disadvantaged by a change aimed at improving economic efficiency it may require compensation of one or more parties. One way of compensating is by offering special and differential treatment to disadvantaged countries, *i.e.* by asymmetry. Another could be by the actual offering of compensation. However, one thing that could prevent developing countries from using safeguard measures is the compensation which is required under the Agreement on Safeguards as well as the risk of retaliation. The ASEAN-Australia-New Zealand FTA and the ASEAN-China FTA include provisions for compensation by calling for substantially equivalent level of concessions or other obligations between the Party applying the measure and the exporting country.

Also, ASEAN countries have mostly been participating in the WTO dispute settlement system as third parties even though some parties are active as complainants or respondents. One of the lessons that may be drawn from the WTO dispute settlement system is, according to Locknei, that strong Members do not abide by the rulings and nothing is done about this. The fear is therefore that the dispute resolution in the WTO is meaningless and the poorer countries will always be defeated by developed countries.[752]

[750] Community is the phrase used in the EPAs.

[751] The EU-Ghana allows for an extension, Central Africa is given 15 years extra protection, Botswana, Namibia and Swaziland are also given 15 years as well as a possible extension. 15 years for LDCs in Eastern and Southern Africa and up to 20 years in order to promote the development of productive and sustainable industries with a view to raising the general standard of living of the people in certain countries in the Pacific. In the Pacific there is also a *de minimis* rule on imports from the EU of 3 per cent.

[752] Locknie Hsu, Application of WTO in ASEAN, paper presented at the 8th General Assembly of the ASEAN Law Association, published in 8th ALA General Assembly, (December 2003), page 377.

5.7 Special safeguard measures for agricultural products in RTAs

In developing countries, agriculture's contribution to total exports is often considerable. However, these countries' proportion of world trade tends to be very small which might partly be explained by the use of trade barriers such as sanitary and phytosanitary measures, *i.e.* those relating to the quality of products. WTO bound tariffs are being reduced on all products and lower tariffs have on occasion led to an overflow of food imports, as when subsidized tomato paste from Italy destroyed Ghana's and Senegal's tomato producers and subsidized Dutch poultry demolished small chicken farmers in the same countries.[753] RTAs go even further when reducing tariffs. One would thus assume that the possibility to use safeguards should play a considerable role for developing countries, especially in the agricultural sector. Such measures, in the form of raised tariffs, are often the only border measure developing countries can use to safeguard their farmers' interests when prices fall or import surges occur. Developing countries that are attempting to develop their agricultural potential and expand production are vulnerable to external shocks and they often lack the instruments to deal with such situations. When reducing trade barriers or tariffs, these countries become even more exposed to the general instabilities of the external agricultural market and to import surges.[754] It is these problems that the SSG in the WTO Agreement on Agriculture aims to lessen. However, only some RTAs include such special safeguards on agriculture.

The ASEAN Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products Article vii indicates that safeguard measures have to be taken in accordance with the emergency measures contained in the CEPT Scheme Agreement and its interpretive notes.[755] The permitted action is suspension of the preferences given to agricultural products with further flexibility allowed for the highly sensitive products listed in an annex to the agreement. Indonesia, Malaysia and the Philippines are allowed yet further special safeguards on vegetable products which are also considered as highly sensitive products.

During the negotiations of the EPAs, there was criticism of the lack of clauses on agricultural safeguards. It was said that such clauses would help this vulnerable and

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[753] See for example ActionAid, *Impact of Agro-Import Surges in Developing Countries*, (2008) and FAO Briefs on Import Surges – Issues, No. 2 *Import Surges: What is their frequency and which are the countries and commodities affected?,* (October 2006).

[754] Ruffer, Tim and Vergano, Paolo, *An agricultural safeguard mechanism for developing countries*, Oxford Policy Management and O'Connor and Company, (August 2002), page 8.

[755] Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products Singapore, 30 September 1999, and Kruger, Paul, Denner, Willemien and Cronje, JB, *Comparing safeguard measures in regional and bilateral agreements,* ICTSD and TRALAC, Issue paper no 22. (June 2009), page 30.

weak sector given the increasing dependency of ACP countries on imports. Also, the agricultural sector in the ACP countries is a significant contributor to employment and represents a higher share of their trade than is the average for developing countries.[756]

In the region there have been import surges previously involving poultry in West Africa; sugar, rice and maize in Kenya and Malawi; tomato paste in Ghana; dairy products in Tanzania and vegetable oils in Mozambique.[757] Developing countries that are subject to such surges and the consequent price depressions experience significant economic consequences such as displacement of domestic producers and lower incomes. The elimination of tariffs under the EPAs may increase vulnerability to import surges.[758] This sensitivity of agricultural products was mentioned in Council Regulation (EC) No 1528/2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States as provided for in the agreements establishing, or leading to the establishment of the EPAs and which were later also included in the EPAs.

In the EPAs it is stated that regional safeguard measures may be applied when a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause disturbances in the markets of like or directly competitive *agricultural* products.[759] These agricultural products are those covered by Annex 1 of the Agreement on Agriculture (referred to in this section as "AA Products").

In the EU-CARIFORUM, the Interim Agreement between the EU and Central Africa and the Interim Partnership Agreement between the EU and the Pacific States, there are also clauses on agricultural export subsidies. It is stated in Article 24 of the latter Agreement that the Pacific States shall eliminate duties on AA Products while the EU undertakes to phase out existing subsidies on exports to the Pacific.

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[756] Bernal, Luisa E. and Hampton, Heather, *Agriculture safeguard measures in the context of the Economic Partnership Agreements (EPAs),* Nordic Africa Institute, (2007), page 9.

[757] See for example ActionAid, *Impact of Agro-Import Surges in Developing Countries*, (2008) and FAO Briefs on Import Surges – Issues, No. 2 *Import Surges: What is their frequency and which are the countries and commodities affected?,* (October 2006).

[758] Rodriguez, Luisa A., Agricultural safeguard measures in the EPAs. *Trade Negotiation Insights*. Vol 6. No 7 (2007), page 6.

[759] For example 2009/152/EC: Council Decision of 20 November 2008 on the signature and provisional application of the interim agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part

Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part OJ L 57, 28.2.2009, p. 1–360 Article 31.2 (c)

In Article 24 of the Interim Agreement between the EU and Central Africa, it is stated that new export subsidies may not be introduced, nor any existing subsidies increased. However, existing subsidies may be increased due to changes in world prices. With respect to AA Products, the Central Africa Party has undertaken to eliminate its tariffs while the EU has undertaken to dismantle existing subsidies on its exports to the Central Africa Party. In EU-CARIFORUM Article 28 it is again stated that no party may introduce new subsidy programmes or increase existing subsidies on AA Products. Equally, the CARIFORUM party commits to eliminating customs duties while the EU will phase out all existing subsidies on exports to the CARIFORUM States.

However, and this is essential, the regional safeguard measures basically apply equally to both parties, which raises the risk of developing countries' exports to the EU being blocked due to "market disturbance". It has also been argued that the regional safeguard clause is weaker than the SSM. The Caribbean Regional Negotiating Machinery (CRNM) has however claimed that the EPAs contain some of the most pro-development provisions on safeguard measures ever negotiated in a trade agreement.[760]

Bernal and Hampton proposed that the safeguard mechanism in the EPAs be based on the SSM proposal. They also concluded that it is important that an EPA safeguard mechanism should be asymmetrical in the sense that only ACP countries should be able to invoke it against the EU. The asymmetrical dimension would be justified by the differences in the productive sectors of the regions as well as the likelihood of causing harm to domestic production.[761] The domestic support and export subsidies on EU goods are also a justification for asymmetric application of safeguard measures in favour of developing countries.[762]

The key features of Rodriguez' proposal for improving regional safeguard measures in the EPAs include (i) the possibility of having recourse to such a mechanism for all agricultural tariff lines, (ii) the ability to respond to price slumps and import surges by incorporating price and volume triggers and (iii) the opportunity to impose additional duties as trade remedies proportional to the problem at hand (*i.e.* the bigger the import surge and the lower the import price, the higher the additional duty).[763] By comparison with the SSG, higher duties can be used *automatically* when import volumes rise above a certain level and serious injury does *not* have to

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[760] *The CARIFORUM-EU Economic Partnership Agreement (EPA): An assessment of issues relating to market access, safeguards and implications for regional integration*, UN ECLAC, LC/CAR/L.181, (26 November 2008), page 9.

[761] Bernal, Luisa E. and Hampton, Heather, *Agriculture safeguard measures in the context of the Economic Partnership Agreements (EPAs),* Nordic Africa Institute, (2007), page 53.

[762] Ibid, page 12.

[763] Rodriguez, Luisa A., Agricultural safeguard measures in the EPAs. *Trade Negotiation Insights*. Vol 6. No 7 (2007), page 7.

be demonstrated. Another important point is that compensation should not be an option as developing countries might then be afraid of retaliation and decline to apply the measure. Demonstrating injury in agricultural products is also rather difficult since the volatility of the products is already high due to weather and other external shocks.[764] This shows again the importance of the new SSM which would be applicable to all developing countries and can be used automatically in contrast to the SSG, which only a few countries are allowed to use.

5.8 Comparing regional and multilateral safeguard rules

As with multilateral rules on safeguard measures, there are certain specific requirements that have to be met before regional safeguard measures can be applied.[765] However, the requirements of the various agreements differ. As illustrative examples, the RTAs signed between the ASEAN and other parties and the ones signed between the EU and the African, Caribbean and Pacific (ACP) States (EPAs) have been examined more closely in this study so far as concerns the requirements for using regional safeguard measures. The relevant provisions have been compared to the requirements under WTO law.

GATT Article XIX states that in order to impose a safeguard measure "unforeseen developments" must have occurred. This is not mentioned in the Agreement on Safeguards, but as stated earlier it is, according to the WTO DSB, still applicable law.[766] None of the EPAs mention unforeseen developments and the only ASEAN agreements that mention it are the AFTA and the ASEAN-Korea FTA.[767]

WTO Members who wish to apply a safeguard measure must demonstrate the existence of unforeseen developments in order to justify the use. Lee has questioned this since the clause is too ambiguous to give rise to an objective legal requirement. There is also no clear standard to determine the existence of unforeseen developments and it does not seem to serve a useful purpose since the availability

[764] Ibid.

[765] See also Lissel, Elenor, *Regional Safeguard Measures: An Incentive to sign Regional Trade Agreements without taking into consideration the special needs for Developing Countries*, ETSG Conference 2011.

[766] Appellate Body Report on Argentina – safeguard measures on imports of footwear (EC), (*Argentina – Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 89.

[767] ASEAN Trade in Goods Agreement, Cha-am, Thailand, 26 February 2009, Article 20.2, and the Agreement on Trade in Goods under the Framework agreement on comprehensive economic cooperation among the governments of the member countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 9.3.

of safeguards should encourage Members to increase market access.[768] In that sense, it could be said that it is positively beneficial for all partners to RTAs to exclude the requirement. Also, as pointed out by Pauwelyn: How can an import surge due to further liberalization under a regional trade agreement be seen as an unforeseen development? The increase in imports should be expected because of the additional concessions in the trade agreement.[769] This means that increased imports due to regional liberalizations can never be seen as unforeseen developments.

When applying multilateral safeguard measures there must also be an assessment whether the increase in imports is "recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively" to cause or threaten to cause serious injury to the domestic industry.[770] According to the Agreement on Safeguards (SA), when determining injury, an assessment is made as to whether increased imports have caused or threatened to cause "serious injury" to the domestic industry producing the like or directly competitive products. The difference between the Agreement on Safeguards and RTAs is that the latter often have a wider application. The key difference between the agreements is that in the EPAs, any party has the right to invoke the measures, but in the Cotonou Agreement it is only the European Community that has that ability. The term "difficulties" can nevertheless be easy for a country to use as a ground for invoking measures while it can be hard for the targeted countries to show that they do not contribute to these difficulties. These requirements can still be seen as improving flexibility and, along with infant industry protection, providing for pro-development aspects.[771]

GATT Article XIX and the Agreement on Safeguards provide that an injury test must be performed before imposing safeguard measures, while the SSG and SSM do not. In the SACU area, the injury that SACU industries suffer must be proven by an injury test and compensation might have to be considered for the affected trading partners.[772] None of the ASEAN Agreements suggest that an injury test has to be performed and nor do the EPAs. The EU-CARIFORUM Article 25.1 states that alternative solutions have to be examined before applying safeguard measures. The EU-CARIFORUM Article 25.7 also states that the CARIFORUM-EC Trade and

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[768] Lee, Yong-Shik, *Reclaiming Development in the World Trading System*, Cambridge University Press, (2006), pages 104-105.

[769] Pauwelyn, Joost, The Puzzle of WTO Safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press (2004), vol. 7, no 1, pages 109-142, page 114.

[770] *The CARIFORUM-EU Economic Partnership Agreement (EPA): An assessment of issues relating to market access, safeguards and implications for regional integration*, UN ECLAC, LC/CAR/L.181, (26 November 2008), page 10.

[771] Ibid.

[772] Safeguard Regulations, The International Trade Administration Commission, Government Gazette, Republic of South Africa, Vol. 470, Pretoria 27 August 2004, No. 26715, preamble and Article 1.2 (c).

Development Committee may make any recommendation needed to remedy the circumstances which have arisen.

It is, therefore, most likely easier to prove injury in the RTAs than under WTO law. Nevertheless, Member countries have opened their markets more widely in RTAs than towards other WTO Members generally which suggests that they do see the requirements for invoking a regional measure as more relaxed than those called for by the WTO.

The table below illustrates the differences and similarities between multilateral and regional rules on safeguard measures.

Table 14: Comparing multilateral safeguard measures and regional rules on safeguard measures

	GATT safeguard	**Special Agricultural Safeguards (SSG)**	**Special Safeguard Mechanism (SSM)**	**Regional safeguard measures**
Which products?	All, including agricultural	Agricultural, if tariffied	Agricultural	All, sometimes specific clauses on agriculture or sometimes listed
Which countries?	All WTO Members	Developed and developing only if tariffied	Only developing	Parties to the regional trade agreement
Trigger	Import surge *with* price fall	Import surge *or* price fall	Import surge *or* price fall	Increased quantities, difficulties, disturbances etc.
Remedy	Quantity restriction, tariff increase above the bound rate	Tariff increase, above the bound rate	Tariff increase, at or above the bound rate	Suspension of further reduction, elimination or reduction of duties, tariff increase, quantity restriction etc. Below the bound rate.
Constraint/ condition	Show injury or threat of injury, negotiate compensation	No injury test. Only products tariffied in Uruguay Round	No injury test. For import surge: · limit on % of products in a year · ceiling on tariff at or above pre-Doha rate · minimum surge for tariff exceeding pre-Doha rate?	Injury test not always Compensation only in some RTAs
Asymmetry	Special rules for developing countries when targeted and when applying	No special rules when developing countries are targeted	Only for developing countries, no special rules when developing countries are targeted	Not common to have special rules for developing countries, especially not when targeted

5.9 Asymmetry and selective safeguards in RTAs

5.9.1 Introduction

Previously, it was examined whether selective safeguard measures can be applied according to the Agreement on Safeguards, the Agreement on Agriculture and the proposed Special Safeguard Mechanism. In this section, it will be examined whether selective safeguard measures can be applied in accordance with RTAs under Article XXIV and the Enabling Clause.

Some RTAs, such as some of the EPAs state that regional parties shall be excluded from the application of multilateral safeguard measures.[773] Thus, if a party to the RTA decides to apply a multilateral safeguard measure in accordance with WTO law, these exclusion clauses in the RTAs suggests that the regional parties would not be affected by the measure. Imports from the RTA partner are thus excluded from a multilateral safeguard measure. This means that the internal trade will not be affected by restrictive measures and thus will be treated more favourably than the external trade with third countries.

It should here be recalled that some developing countries argued for an exception from the non-discrimination principle in their favour during the negotiations on the Agreement on Safeguards. They also wanted guarantees against selective application of safeguard measures. The outcome of the negotiations was that developing country exports sometimes can be exempted from the application of safeguard measures and that some discriminative behaviour in their favour is allowed according to Article 5.2 in the Agreement on Safeguards. However, according to Article 2.2 in the Agreement, safeguard measures shall be applied to a product being imported irrespective of its source. The question that arises is whether the exclusion of regional parties from safeguards is allowed and if so, under what circumstances.

Several questions raised in this context relate to the requirement of "parallelism". The meaning of "parallelism" within Article 2.2 of the Agreement on Safeguards is that the imports included in the determinations made under Articles 2.1 and 4.2 of the Agreement on Safeguards of whether the imports have increased should correspond to the imports included in the application of the measure. Consequently, calculations based on all imports cannot correspond to measures which are applied

[773] However, it is only the EU that can exclude imports from the ACP countries from multilateral safeguard measures, thus indicating an asymmetric approach.

to only third-party imports.[774] The implications of the requirement of parallelism will be discussed below.

The EPAs state that the EC (now EU) Party shall exclude imports from the other parties from any measures taken pursuant to GATT Article XIX, the Agreement on Safeguards and Article V of the Agreement on Agriculture. Are the EU and SACU thus allowed to exclude *regional* parties from the application of multilateral safeguard measures?

In three disputes, the panels and the Appellate Body have more or less declined to rule on the issue of whether the exclusion of certain members in the application of safeguard measures is allowed under Article XXIV.[775] Parallelism, however, has been examined by the panels and the Appellate Body. This issue will be dealt with in the following section and then the issue of whether the same practice is allowed under the Enabling Clause will be dealt with.

5.9.2 Selectivity under Article XXIV

All the EPAs include a multilateral safeguard measure, and which is basically the same in each agreement. As an example, in the EU-SADC agreement, the multilateral safeguard measures clause reads as follows:

> EU-SADC; Article 33, Multilateral safeguards
>
> 1. Subject to the provisions of this Article, nothing in this Agreement shall prevent the SADC EPA States and the EC Party from adopting measures in accordance with Article XIX of GATT 1994, the WTO Agreement on Safeguards, Article 5 of the Agreement on Agriculture annexed to the Marrakech Agreement Establishing the World Trade Organisation and any other relevant WTO Agreements.
>
> 2. Notwithstanding paragraph 1, the EC Party shall, in the light of the overall development objectives of this Agreement and the small size of the economies

[774] See for example Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999) and panel report on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, *(US – Wheat Gluten),* WT/DS166/R, (31 July 2000)..

[775] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), para. 113, Appellate Body Report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, (*US - Wheat Gluten*), WT/DS166/AB/R, (22 December 2000), para. 99 and Appellate Body Report on United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US - Line Pipe),* WT/DS202/AB/R, (15 February 2002), para. 198.

of the SADC EPA States, exclude imports from any SADC EPA State from any measures taken pursuant to Article XIX of GATT 1994, the WTO Agreement on Safeguards and Article 5 of the Agreement on Agriculture.

….

4. The provisions of paragraph 1 shall not be subject to the Dispute Settlement provisions of this Agreement.[776]

As seen above, imports from SADC EPA states shall be excluded from the application of measures taken pursuant to Article XIX, the Agreement on Safeguards as well as Article 5 in the Agreement on Agriculture. The exclusion is applicable only five years after the agreement entered into force and thus is of a temporary nature. Also, the exclusion is also only applicable for the ACP countries. The exclusion is though a step towards a more asymmetric behaviour in favour of developing countries and their development needs.

There are however other RTAs with similar clauses which provide the opportunity to exclude regional parties from the application of multilateral safeguard measures.[777]

Parallelism

The practice of including imports in the determination made under Articles 2.1 and 4.2 of the Agreement on Safeguards should correspond to the imports included in the application of the measure under Article 2.2. This is, as mentioned already called parallelism.[778] Thus, discrimination between the import sources may also result from failure to respect the parallelism between the imports which are subject to the investigation and those subject to the application of the safeguard measure.[779] The

[776] Council of the European Union, Brussels, 2 February 2009, 14062/08, Legislative Acts and other instruments; Council Decision on the signature and provisional application of the interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the SADC EPA States, of the other part.

[777] See for example the New Zealand-Singapore Closer Economic Partnership (ANZSCEP) 2000, Singapore-Australia Free Trade Agreement 2003, Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America, 1985, Agreement between the United States of America and the Hashemite Kingdom of Jordan on the establishment of a free trade area, 2000, etc.

[778] See for example the Appellate Body report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, (*US - Wheat Gluten*), WT/DS166/AB/R, (22 December 2000), para. 96 and Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina- Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), para. 113.

[779] United Nations Conference on Trade and Development, *Dispute Settlement. World Trade Organization 3.8 Safeguard Measures*, New York and Geneva (2003), page 36.

notion of "parallelism" is however not mentioned in the Agreement on Safeguards. It was first examined by the Panel and the Appellate Body in *Argentina – Footwear (EC)*.[780]

Owing to the requirement that a RTA covers *substantially all the trade* between the constituent territories and does not raise barriers, the purpose of a trade agreement should be to facilitate trade. Nevertheless, there is also some flexibility which is recognised by the Agreement on Safeguards. In footnote 1 to Article 2.1 of the Agreement on Safeguards it is stated that if a measure is applied by a Member then the measure and all the requirements are based on that Member's needs. It should be underlined that, according to the same footnote, if a customs union applies a measure as a single unit (as is the case with the SACU and the EU) the requirements for the determination of serious injury or threat must be based on the conditions existing in the union as a whole.

Article 2.1 of the Agreement on Safeguards defines and limits the relevant import market as well as the required effect of the increased imports. It does not however prevent a Member state from taking into account the origin of the increased imports.[781] This means that a Member can either take into account all imports or only examine imports from third parties and thereby exclude regional imports. Hence, a single country can be examined and determined to be causing serious injury, but the measure must then nevertheless be applied to all imports pursuant to Article 2.2.

South Africa can here serve as an example. In January 2013, South Africa notified the WTO Committee on Safeguards on the initiation of a safeguard investigation on the imports of frozen potato chips after November 2012.[782] In March 2013 another notification was made to the Committee on Safeguards on the same product but stating that the investigation started that same month.[783] Then on the very same day, South Africa notified the Committee on Safeguards that the investigation was to be

[780] Panel Report on Argentina - Safeguard Measures on Imports of Footwear (EC), *(Argentina - Footwear (EC)*), WT/DS121/R, (25 June 1999), para. 8.91 and Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina- Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999),para. 113.

[781] Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law,* Oxford University Press (2004), vol 7, no 1, pages 109-142, page 115.

[782] WTO, Committee on Safeguards, Notification under Article 12.1(A) of the Agreement on Safeguards on initiation of an investigation and the reasons for it, G/SG/N/6/ZAF/2, 25 January 2013.

[783] WTO, Committee on Safeguards, Notification under Article 12.1(A) of the Agreement on Safeguards on initiation of an investigation and the reasons for it, G/SG/N/6/ZAF/3, 13 March 2013.

terminated without imposing measures.[784] The investigation is said to have been terminated due to the delay of notification: the investigation started in November but was not notified until the following year. Apparently, there are concerns about the way investigations have been conducted by the International Trade Administration Commission of South Africa (ITAC). However, an investigation into an increase of the applied tariff rate is believed to be more appropriate,[785] which indicates that the need for a safeguard measure in this case is not the only choice. For all that, a notification was made in June 2013 on the imposition of provisional safeguard measures on frozen potato chips from 1 July 2013.[786] Interestingly, the unforeseen developments that has led to this measure is said to be the proliferation of quick service restaurants, excess production capacity of frozen potato chips in the EU as well as the EU not keeping up with its export subsidy commitment made in 1995.[787] On 21 June, South Africa announced that it had started an anti-dumping investigation on the same product originating in Belgium and the Netherlands. This was however withdrawn on 8 August 2014.[788] This could indicate that the safeguard measure was used instead of an anti-dumping duty or a countervailing duty, but the investigation was stopped since it is questionable that both an anti-dumping measure and a safeguard measure could be applied at the same time on the very same product.

In the investigation, the entire SACU industry was examined but the measure was only imposed by South Africa. This means that the injury calculation was based on the whole SACU economy while only one country applied the measure. This could imply that, for example Botswana is the country that is most injured by the imports, but it does not apply a defence. Why does South Africa use the SACU area when calculating injury then?

Since South Africa acts as the regulator of the region, it is more or less in charge of deciding which measures should be used and against whom. In the preamble to the South African regulation on safeguard measures,[789] it is stated that the parties are to be reminded of the characteristics of safeguard measures:

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[784] WTO, Committee on Safeguards, Information to be notified to the Committee where a safeguard investigation is terminated with no safeguard measure imposed, G/SG/N/9/ZAF/1, 13 March 2013.

[785] Tralac, Hot Seat Comments: Concerns over ITAC Trade Remedies Investigations, JB Cronjé, posted on 13 March 2013, www.tralac.org.

[786] WTO, Notification under Article 12.4 of the Agreement on Safeguards before taking a provisional safeguard measure referred to in Article 6, Notification pursuant to Article 9, footnote 2 of the Agreement on Safeguards, (21 June 2013), G/SG/N/7/ZAF/2, G/SG/N/11/ZAF/2.

[787] Ibid, page 2.

[788] South Africa Government Gazette, 8 August 2014, Notice 634 of 2014, International Trade Administration Commission, Notice of conclusion of an investigation into the alleged dumping of frozen potato chips originating in or imported from Belgium and the Netherlands.

[789] Safeguard Regulations, The International Trade Administration Commission, Government Gazette, Republic of South Africa, Vol. 470, (Pretoria 27 August 2004), No. 26715.

> "A safeguard measure may only be imposed in response to a rapid and significant increase in imports of a product as a result of an unforeseen development, where such increased imports cause or threaten to cause serious injury to the *Southern African Customs Union* industry producing the like or directly competitive product." (Emphasis added)

It is also indicated in the preamble, as well as in Article 1, that it is the SACU which imposes measures, not the individual countries.[790] If for example Botswana (which does not have national laws on safeguard measures) intends to implement national legislation on safeguard measures it has to be consistent with the SACU legislation (*i.e.* the South African legislation) and if Botswana experiences the need to impose multilateral safeguard measures it would have to consult the SACU (*i.e.* South Africa). However, as seen above, South Africa is the country as for now that applies safeguard measures which is contrary to the preamble.

Clearly, South Africa cannot base the requirements for the determination of serious injury or threat thereof in the customs union as a whole when the measure is limited to South Africa. If the measure will be disputed, it is most likely that the measure and the SACU preamble are found to be inconsistent with WTO law.

So far, the only *customs union* to apply trade defence instruments - in this case safeguard measures - is the EU. This could however be explained by the fact that the only customs union which is in fact a Member of the WTO is the EU. Other parties to apply safeguard measures do so as individual countries. This was confirmed in *Argentina – Footwear (EC)* where the panel considered whether under the Agreement on Safeguards, Argentina was permitted to take MERCOSUR imports into account in the analysis of injury factors and of the causal link between increased imports and the alleged (threat of) serious injury, and also whether it was at the same time permitted to exclude MERCOSUR countries from the application of the safeguard measure imposed.[791]

The panel concluded on the basis of footnote 1 to Article 2.1 of the Agreement on Safeguards and Article XXIV:8 of the GATT 1994 that

> "… in the case of a customs union the imposition of a safeguard measure only on third country sources of supply cannot be justified on the basis of a member-state-specific investigation that finds serious injury or threat thereof caused by imports from all sources of supply from within and outside a customs union."[792]

[790] Ibid, preamble and Article 1.

[791] Panel Report on Argentina - Safeguard Measures on Imports of Footwear (EC), *(Argentina - Footwear (EC)*), WT/DS121/R, (25 June 1999), para. 8.75.

[792] Ibid, para. 8.76.

The findings of the panel were appealed and later reversed by the Appellate Body which found that footnote 1 to Article 2.1 was not applicable in this case. Argentina is a member of the WTO, but MERCOSUR did not apply these safeguard measures either to itself as a single unit or on behalf of Argentina. It was Argentina that applied the safeguard measures after conducting an investigation of products being imported into its territory and the effects of those imports on its domestic industry.[793] The Appellate Body also rejected the panel's view that Article XXIV of GATT 1994 was relevant to the matter before it.

In *Turkey – Textiles* the Appellate Body came to the conclusion that GATT Article XXIV may serve as an "affirmative defense" while in the case *Argentina – Footwear (EC),* Argentina had not argued expressly that Article XXIV provided such a defence. The Appellate Body stated further that "this defence is available only when it is demonstrated by the Member imposing the measure that 'the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV' and 'that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.'"[794]

However, since Argentina's investigation was of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry, Argentina was required under Article 2.2 of the Agreement on Safeguards to apply those measures to imports from all sources, including those from other MERCOSUR Member States. This means that the Argentina's investigation could not serve as a basis for excluding imports from other MERCOSUR Member States from the application of the safeguard measures.[795]

In *US – Wheat Gluten*, the Appellate Body upheld the finding by the panel that the United States had acted inconsistently with Article 2.1 when excluding imports from Canada from the application of a safeguard measure. The Appellate Body again discussed the matter of parallelism between Article 4 of the Agreement on Safeguards which sets forth the conditions for imposing a safeguard measure and Article 2.2 of the same agreement which provides that a safeguard measure shall be applied to a product being imported irrespective of its source.

The Appellate Body concluded in the case *US – Wheat Gluten* that:

> "To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the

[793] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R,), (14 December 1999), paras. 106–108.

[794] Ibid, paras. 109–110. For further comments on this issue see Chapter 4.

[795] Ibid, paras. 111–113.

> application of the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."[796]

In the case *US – Line Pipe,* the Appellate Body repeated what it had already stated in the case *US – Wheat Gluten*, namely, that imports covered by the determinations under Articles 2.1 and 4.2 of the Agreement on Safeguards should match the imports included in the application of the measure, under Article 2.2. A distinction between the imports covered in the investigation and imports falling within the measure can be justified "only if the competent authorities 'establish explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.'" The competent authorities also have to provide a '*reasoned and adequate explanation* of how the facts support their determination' in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, according to the Appellate Body report in *US – Lamb*.[797]

The Appellate Body further stated in *US – Line Pipe*, that the question of whether GATT Article XXIV serves as an exception to Article 2.2 of the Agreement on Safeguards becomes relevant in only two circumstances. The first arises when, in an investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The second arises when, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury and the competent authorities have also established explicitly that imports from sources outside the free trade area satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2.[798]

In *US – Steel Safeguards* the panel found that other Members who are facing the safeguard measure should be able to assess its legality on the basis of the determination and explanations provided by the competent authorities. The competent authorities must "establish explicitly that increased imports from other

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[796] Appellate Body report on United States – Definitive safeguard measures on imports of wheat gluten from the European Communities, *(US – Wheat Gluten),* WT/DS166/AB/R, (22 December 2000), para. 96.

[797] Appellate Body report on United States – Definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea, *(US – Line Pipe*), WT/DS202/AB/R, (15 February 2002), para. 181.

[798] Ibid, para. 198.

sources than free trade partners alone caused serious injury or threat of serious injury".[799] Furthermore, the Appellate Body also stated:

> "The non-attribution requirement is part of the overall requirement, incumbent upon the competent authority, to demonstrate the existence of a 'causal link' between increased imports (covered by the measure) and serious injury, as provided in Article 4.2(b). Thus, as we found in *US – Line Pipe*, 'to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports'." [800]

Those in favour of selectivity or excluding certain countries only, argue however that measures should target "guilty" nations *i.e.* those that have increased their exports. Against this argument it could however be objected that there may be other more suitable means available in these cases, namely anti-dumping and countervailing duties since they target nations that are "guilty" of such unfair trade practices as dumping and subsidies. The practice of excluding countries may have favourable *ex ante* effects on the level of trade concessions, but the practice is similar to the practice of grey area measures due to the selectivity demonstrated.[801]

It is not clear whether GATT Article XXIV justifies selective applications of safeguard measures.[802] Pauwelyn suggests that Article XXIV does justify the exclusion of regional imports if the injury determination is based on non-regional imports even though the exclusion would otherwise violate Article 2.2 of the Agreement on Safeguards (*i.e.* discriminate).[803] See table below.

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[799] Panel Report on United States – Definitive safeguard measures on imports of certain steel products *(US — Steel Safeguards),* WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, (11 July 2003), para. 10.595–10.598.

[800] Appellate Body Report on United States – Definitive safeguard measures on imports of certain steel products *(US — Steel Safeguards),* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, (10 November 2003), paras. 451.

[801] Sykes, Alan O., Protectionism as a "Safeguard": a positive analysis of the GATT "Escape Clause" with normative speculations", *The University of Chicago Law Review*, Vol. 58, No. 1 (1991), pp. 255-305, page 294.

[802] See for example Lee, Yong-Shik, Safeguard Measures: Why Are They Not Applied Consistently With the Rules?, Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards, 36 *Journal of World Trade* (2002), pages 641-673, page 649.

[803] Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press, vol 7, no 1, (2004), pages 109-142, page 142.

Table 15: Pauwelyn's summary of options[804]

INJURY DETERMINATION	SAFEGUARD MEASURE
ALL IMPORTS - If the investigated product is covered also by the RTA, there is a violation of Art. XIX and regional imports must then be excluded. - The violation of Art. XIX cannot be justified under Art. XXIV.	ALL IMPORTS - Consistent with parallelism requirement. - Consistent with Art. 2 Agr. On Safeguards (non-discrimination). - Intra-regional safeguards are not per se prohibited by Art. XXIV. REGIONAL IMPORTS EXCLUDED in application - Violation of parallelism requirement, not justified under Art. XXIV. - Violation of Art. 2.2 Agr. On Safeguards but justified under Art. XXIV (though violation of parallelism and Art. XIX remain).
REGIONAL IMPORTS EXCLUDED - If the investigated product is covered by the RTA, then regional imports must be excluded under Art. XIX. - Agr. on Safeguards (Arts. 2.1 and 4) does not prohibit exclusion of regional imports.	REGIONAL IMPORTS EXCLUDED - Consistent with parallelism requirement. - Violation of Agr. on Safeguards Art. 2.2 (non-discrimination) but justified under Art. XXIV. Applied to ALL IMPORTS - Violation of parallelism requirement but justified under Art. 2.2. - Consistent with Art. 2.2 (non-discrimination) - Intra-regional safeguards are per se not prohibited by Art. XXIV. - Potentially in violation of rules in the RTA itself (prohibiting regional safeguards, albeit under certain conditions).

Thus, Pauwelyn believes that selective applications of safeguard measures constitute a violation of the principle of non-discrimination rather than a violation of GATT Article XXIV. This could be the case for South Africa if it justified the exclusion of regional imports when the injury determination was based on non-regional imports. However, South Africa in fact excluded the regional members on account of the *de minimis* exception of the Agreement on Safeguards Article 9.1. One difference though between GATT Article XIX and the Agreement on Safeguards is that Article XIX includes the requirement of "unforeseen developments" which could be an argument for not including regional parties in the injury determination since events due to the RTA could be seen as "foreseen developments". As mentioned in Chapter 3, safeguard measures must nevertheless comply with the provisions of both Article XIX and the Agreement on Safeguards.

The footnote to Article 2.1states that:

[804] Ibid.

> "A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State."

The reason why it is written in a footnote is likely because there was a need to clarify but should not have any legal impact. Thus, only customs unions are allowed to apply safeguard measures based on the conditions existing in the customs union. If a customs union applies a measure based on the conditions in the customs union, it indicates that regional imports are excluded and thus the regional imports shall be excluded in the application of a safeguard measure in order to comply with the Agreement on Safeguards. This means that a free trade agreement cannot apply a safeguard measure on behalf of the free trade area and consequently cannot base the injury calculation on third party imports. Only the individual members of the free trade area can apply safeguard measures and accordingly should apply the measure irrespective of its source since it ought to make the injury calculation on all sources of imports.

The text of the footnote to Article 2.1 is not fully equivalent to a full parallelism which then would entail that the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2. As stated in the *US – Steel Safeguards* if:

> "… a Member has conducted an investigation considering imports from all sources (that is, including any Member of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure. As we stated in *US — Line Pipe*, if a Member were to do so, there would be a 'gap' between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure."[805]

The footnote to Article 2.1 does not examine the relationship between GATT Articles XIX and XXIV which indicates that the Agreement does not detract from the exception in GATT Article XXIV. This means that there is no rule on whether an action applied on behalf of a member of a customs union may exclude the other

[805] Appellate Body Report on United States – Definitive Safeguard Measures on imports of certain Steel Products, *(US – Steel Safeguards),* WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R and WT/DS259/AB/R, 10 December 2003, para. 441.

members of the union. Nonetheless actions taken by an individual member must be applied to all imports according to the non-discrimination principle. The importance of the footnote is indicated by GATT Article XXIV which makes the action illegal and the rule in Article 2.2 of the Agreement on Safeguards which provides that the safeguard measures must be applied to a product being imported "irrespective of its source."[806] Thus, only customs unions are allowed to exclude regional imports.

When a country takes account of third-party imports only it must (i) add up the injury caused by all factors, (ii) decide if the total of injury caused by these factors amounts to serious injury and if so, (iii) decide if the increased imports from third-parties have in some way "brought about", "produced" or "induced" the existence of this serious injury or threat of serious injury.[807] It is thereby consistent with the Agreement on Safeguards to limit the injury determination to third-party imports, but the effects of other imports must also be evaluated.

Based on the above, the conclusion is that the only clear circumstances where the practice of selectivity is allowed are under Article 9.1 of the Agreement on Safeguards (when excluding developing country imports below the *de minimis* level) or when customs unions apply safeguard measures. Also, if the exclusion is based on Article 9.1 it is not necessary to make a new analysis of the increase of imports, injury and causation. This means that under those circumstances it is accepted to withdraw from the parallelism requirement.[808] The EU and the SACU are examples of customs unions which ought to be allowed to exclude parties from the application of safeguards. Such exclusion would be allowable if they can first demonstrate that the measure, *e.g.* a safeguard measure is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV and secondly that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.[809] But as seen from above, this discussion is not yet finished. When customs unions join free trade agreements the exclusion of all trading parties within the agreement might then be seen differently.

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[806] MUTRAP, *Review of the available instruments of trade defence in light of Vietnam's WTO rights and obligations*, Final Report (March 2008), page 35.

[807] Appellate Body on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, *(US – Wheat Gluten),* WT/DS166/AB/R, (22 December 2000), above note 2, at para 67.

[808] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Bags),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 7.385.

[809] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999), para. 59.

The case where the EPAs exclude ACP regional parties can however be excused even though it is not a customs union, since the trade might be below the de minimis level and thus allowed in accordance with Article 9.1 Agreement on Safeguards.

Nevertheless, no panel or Appellate Body decisions have required the existence of a customs union as the precondition for exemptions from safeguard measures. Nevertheless, a country that is a party to an agreement that requires the exclusion of the other parties to the agreement from the application of the measure has a treaty obligation to do so.

5.9.3 Selectivity under the Enabling Clause

As mentioned, selectivity in this regard, is when an RTA states that the parties to the RTA shall be excluded from the application of multilateral safeguard measures. As seen from above, customs unions in accordance with Article XXIV can be allowed to apply selective safeguard measures. There are no cases which discuss the issue of the Enabling Clause and selective or discriminative safeguard measures. Thus, guidance has to be found elsewhere.

Parallelism

The discussion above in the previous sections on the Agreement on Safeguards is applicable also under these circumstances. The difference is that there is no support under the Enabling Clause to justify an exclusion of the parties to an agreement from being targeted by a safeguard measure. This is shown in the table below.

Since paragraph 2 (c) only allows arrangements that are notwithstanding the provisions of GATT Article I, other violations are prohibited.[810]

When using Pauwelyn's table above, but instead inserting the Enabling Clause we get the following table.

[810] WTO, Committee on Trade and Development, Gulf Cooperation Council Custom Union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.1, (24 November 2008), and WTO, Committee on Trade and Development, Gulf Cooperation Council customs union – Saudi Arabia's notification (WT/COMTD/N/25), WT/COMTD/66/Add.2, (25 November, 2008), paras. 6-7.

Table 16: Enabling Clause and selectivity

INJURY DETERMINATION	SAFEGUARD MEASURE
ALL IMPORTS - If the investigated product is covered also by the RTA, there is a violation of Art. XIX and regional imports must then be excluded. - The violation of Art. XIX cannot be justified under the Enabling Clause.	ALL IMPORTS - Consistent with parallelism requirement. - Consistent with Art. 2 Agr. On Safeguards (non-discrimination). - If no violation of Article XIX occurs, (or any other WTO provisions besides Article I) then there is no violation of the Enabling Clause REGIONAL IMPORTS EXCLUDED in application - Violation of parallelism requirement, not justified under the Enabling Clause. - Violation of Art. 2.2 Agr. on Safeguards and not justified under the Enabling Clause
REGIONAL IMPORTS EXCLUDED - If the investigated product is covered by the RTA, then regional imports must be excluded under Art. XIX. - Agr. on Safeguards (Arts. 2.1 and 4) does not prohibit exclusion of regional imports.	REGIONAL IMPORTS EXCLUDED - Consistent with parallelism requirement. - Violation of Agr. on Safeguards Art. 2.2 (non-discrimination) and thus violates the Enabling Clause Applied to ALL IMPORTS - Violation of parallelism requirement but justified under Art. 2.2. - Consistent with Art. 2.2 (non-discrimination) - Intra-regional safeguards are per se not prohibited by the Enabling Clause. - Potentially in violation of rules in the RTA itself

This ought to mean that selective safeguard measures are not justified under the Enabling Clause. Safeguard measures in agreements under the Enabling Clause therefore have to be applied to all imports and thus the injury determination should be based on all imports as well irrespective of whether it is a customs union or a free trade agreement.

However, MERCOSUR is notified under the Enabling Clause but used Article XXIV as a defence in *Argentina – Footwear (EC)*. As stated above, the question is whether GATT Article XXIV in itself justifies selective application of safeguard measures.[811] Pauwelyn suggests that Article XXIV does justify the exclusion of regional imports if the injury determination is based on non-regional imports even though the exclusion would otherwise violate Article 2.2 of the Agreement on Safeguards (*i.e.* discriminate).[812] However, the contracting parties to the WTO Agreement reached a compromise after informal consultations that MERCOSUR would be subject to an examination in the light of the Enabling Clause as well as

[811] See for example Lee, Yong-Shik, Safeguard Measures: Why Are They Not Applied Consistently With the Rules?, Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards, 36 *Journal of World Trade* (2002), pages 641-673, page 649.

[812] Pauwelyn, Joost, The Puzzle of WTO safeguards and regional trade agreements, *Journal of International Economic Law*, Oxford University Press, vol 7, no 1, (2004), pages 109-142, page 142.

GATT Article XXIV.[813] Thus, MERCOSUR ought to be able to use Article XXIV as a defence and therefore be able to exclude parties in the same manner as other customs unions notified under Article XXIV if the notification is correct. However, as emphasized in the previous chapters, a notification according to Article XXIV:7 must be made to the contracting parties and should be notified to the Council for Trade in Goods (CTG). It seems likely that the notification is not made accordingly. In that case, the MERCOSUR cannot use Article XXIV as a defence.

5.10 Conclusion

This Chapter has examined regional rules on safeguard measures and whether it is possible to apply selective measures. While selective measures are allowed due to the RTAs, it means that the Agreement on Safeguards cannot be applied to all. As seen from above, there are circumstances where the Agreement is not applicable to all WTO Members and thus not applied to all products irrespective of its source. This Chapter has also examined some differences between multilateral and regional rules on safeguard measures.

Regional safeguard measures are easier to invoke than multilateral measures since the circumstances allowing for their use occur more frequently than those in WTO law. This indicates that the object and purpose behind regional measures is actively to provide an "escape clause" rather than to restrict their use. The purpose of multilateral safeguard measures seems to be rather to restrict the possibility of using an "escape clause" and to establish a pure "emergency" measure, while regional safeguard measures allow temporary withdrawals. However, regional measures could be more politically sensitive which may be the reason why countries choose to apply multilateral rather than regional measures.

As can be seen from above, there are different purposes behind the safeguard measures in the various agreements. The regional safeguard measures are most often a safety valve provided in order to get the parties to *sign* the agreements, while the Agreement on Safeguards provides for a temporary withdrawal of treaty obligations. The SSG is supposed to establish a fair and market-oriented agricultural trading system and the purpose of the SSM is yet to be confirmed. It is either an emergency measure for poor and vulnerable farmers or a means to help liberalization.

One of the requirements for using multilateral safeguard measures is "unforeseen developments" which means that safeguard measures provide a form of insurance

[813] Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Annex IV and WTO, Committee on Trade and development, Legal note on regional trade arrangements under the Enabling Clause, WT/COMTD/W/114, (13 May 2003), para. 47.

against adverse economic circumstances. Safeguard measures have also been described as a way for large countries to force other countries to maintain cooperation by temporarily raising tariff levels.[814] In fact, smaller countries try to use safeguard measures to protect themselves against international price fluctuations,[815] or subsidized exports. However, increased imports due to regional liberalizations cannot be seen as unforeseen developments but should rather be regarded as foreseen. This means that it will be difficult to defend the application of safeguard measures based on increased imports due to RTAs.

Another difference between the rules on safeguard measures is the requirement on injury. The SSG and the SSM do not require an injury test while some of the RTAs do, as does the safeguard measure under GATT Article XIX and the Agreement on Safeguards. Compensation is also believed to be one of the reasons why safeguard measures are not used more frequently since it can be difficult to come to an agreement on this.[816] According to GATT Article XIX and the Agreement on Safeguards, compensation must be given while the SSG and the SSM do not have such a requirement. Compensation is also said to be one of the obstacles to developing countries applying safeguard measures since it can be a rather costly affair. One of the reasons behind grey area measures in the first place was to avoid such compensation or retaliation.

The grey area measures described previously were intended to provide some kind of protection since GATT Article XIX was too difficult to use. As noted above, the measures that have been under dispute have never been found by the WTO DSB to be in conformity with WTO law. Could regional safeguard measures be a substitute to the prohibited grey area measures? Grey zone measures appeared to have shared the same purpose as GATT Article XIX,[817] as do regional safeguard measures today. Grey zone measures and regional safeguard measures do share some similarities; they are in a sense both bilateral actions which do not always need a show of injury in order to be applicable. They were also seen as a way to avoid the problems of free circulation arising when safeguard measures under Article XIX were taken by only one of the members of a customs union. However, while grey area measures consisted of quantitative restrictions, price undertakings or surveillance systems concluded between importing and exporting countries, regional safeguard measures are basically applied up to the level of MFN only. In any event, regional safeguard

[814] Bagwell, Kyle and Staiger, Robert W., A theory of managed trade, *American Economic Review*, (1990) 80:779-795.

[815] Fischer, David and Prusa, Thomas J. WTO exceptions as insurance, *Review of International Economics* (2003) 11:745-757.

[816] See Bown, Chad P. *Why are safeguards Under the WTO so unpopular?,* World Trade Review, Volume 1, Issue 01, (March 2002), pages 47-62.

[817] WTO, Negotiating Group on Safeguards, *"Grey-area measures",* MTN.GNG/NG9/W/&, (16 September 1987), special distribution, page 1.

measures cannot entirely substitute for multilateral measures since regional measures are only applicable between the parties.

The conclusion would be that Article XXIV can justify selective safeguard measures. Also, as seen in *EEC – Bananas II* and *Argentina – Footwear (EC)* it does not seem impossible to defend a certain kind of behaviour according to Article XXIV. However, footnote 1 to Article 2.1 in the Agreement on Safeguards states that in the case of measures imposed by a customs union there are two options for imposing safeguard measures, *i.e.,* (i) as a single unit or (ii) on behalf of a member State.

The footnote to Article 2.1 of the Agreement on Safeguards states that if a *customs union* applies a measure as a single unit, the requirements for the determination of serious injury or threat must be based on the conditions existing in the whole union. However, the footnote does not examine the relation between GATT Articles XIX and XXIV which indicates that the Agreement does not detract from the exception in GATT Article XXIV. This means that there is no general rule clarifying whether an action applied on behalf of a member of a customs union may exclude the other members of the union. Nonetheless, pursuant to Article 2.2 of the Agreement on Safeguards, actions taken by an individual member must be applied to all imports according to the non-discrimination principle. The exclusion or inclusion of certain parties involves discriminatory treatment.

Accordingly, since free trade areas ought to apply the measure individually as a single country (towards all imports irrespective of its source), the measure has to correspond to the parallelism requirement and thus the injury calculation must also be made on all imports.

However, when a country determines only to take account of third-party imports it must (i) add up the injury caused by all factors, (ii) decide if the total injury caused by these factors amounts to serious injury and if so, (iii) decide whether the increased imports from third-parties have in some way "brought about", "produced" or "induced" the existence of this serious injury or threat of serious injury.[818] It is thereby consistent with the Agreement on Safeguards to limit the injury determination to third-party imports provided the effects of other imports have also been evaluated.

So far, the only *customs union* to apply trade defence instruments (and in this case safeguard measures) is the EU but this may be because it is the only customs union which is a Member of the WTO. When other Members apply safeguard measures, they do so as individual countries. This was confirmed in *Argentina-Footwear (EC)* where the panel considered whether Argentina was permitted to exclude

[818] Appellate Body on United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, *(US – Wheat Gluten*), WT/DS166/AB/R, (22 December 2000), above note 2, at para 67.

MERCOSUR countries from the application of the safeguard measure imposed.[819] Argentina is a Member of the WTO, and MERCOSUR did not apply the safeguard measures, neither as a single unit nor on behalf of Argentina. It was Argentina that applied the safeguard measures as a WTO Member after conducting an investigation of products being imported into its territory and the effects of those imports on its domestic industry.[820]

[819] Panel Report on United States – Definitive safeguard measures on imports of certain steel products*, (US — Steel Safeguards),* WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, (11 July 2003), para. 10.322.

[820] Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, *(Argentina-Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), paras. 106–108.

6 Safeguard measures and overlaps of jurisdiction

6.1 Introduction

This Chapter intend to review overlaps of jurisdiction between multilateral and regional rules on safeguard measures. It will continue to examine when the rules on safeguard measures are applicable and whether the Agreement on Safeguards is applicable on all Members, as well as whether the rules and practices comply with the purpose. Whether there is a norm conflict between multilateral and regional rules on safeguard measures and how that affect the applicability of the Agreement on Safeguards will also be examined. In this context, applicable on all parties can have two meanings, the first one emphasising the non-discrimination principle and thus means that safeguard measures should be applied to the trade of all contracting parties. This was elaborated on in the previous chapters. The focus of this Chapter is another, the notion that the Agreement on Safeguards is applicable to all, thus all Members are obliged to follow it and has the possibility to apply it when needed. Selectivity on the one hand and prevailing treaties on the other can seriously disrupt this notion. Therefore, this Chapter concerns jurisdictional issues and conflict between treaties.

6.2 Conflicts between RTAs and WTO law

As mentioned above, some RTAs include clauses on choice of forum as well as choice of law also in relation to the use of safeguard measures. For example, some RTAs has wordings such as “in the event of any inconsistency” between WTO rules and RTA rules, the RTA rules “shall prevail.” Combined with this there might be clauses in the RTA that might not be in coherence with WTO law. The preference in the choice of forum clauses can be linked to different factors, such as economic, political and duration of proceedings etc. One factor that could be a reason for forum shopping is safeguard measures, for example regional safeguard measures in RTAs or the possibility to use selective safeguard measures. Selective safeguard measures are as pointed out above, when a country imposes safeguard measures not to all

imports but exclude certain partners from the application of the measures and thus in a way discriminate trade partners.

The rules on safeguard measures in RTAs are not all similar and they are also very different from the rules in WTO as seen previously. Thus, this creates a potential conflict between the different RTAs, but also between the RTAs and WTO.

Already in 1973, some Member states expressed concerns regarding safeguard measures and RTAs.

> "Some members of the Working Party expressed their concern that the parties to the Agreement seemed to interpret the provisions of Article XXIV:8(b) of the General Agreement so as to allow discriminatory application of Article XIX when safeguard action was being taken. They would like it to be understood in the Working Party that the reply given by the parties to the Agreement to the question on application of safeguard provisions did in fact mean that safeguard action would be taken on a strictly most-favoured-nation basis.
>
> The representative of the European Communities called attention to the omission of Article XIX from among those mentioned in Article XXIV:8(b), which required the elimination of certain 'other restrictive regulations of commerce' as between members of the free-trade area. His authorities, accordingly, were of the view that they were free to exempt these members from possible restrictions imposed under Article XIX".[821]

When the EU had applied safeguard measures towards non-EU members in 1973, it was defended by the EU with the following position:

> "while Article XIX measures should apply erga omnes, they need not apply to countries which had an agreement with the Community in accordance with Article XXIV."[822]

Pauwelyn has posed the question whether WTO obligations are bilateral, "in that WTO obligations can be reduced to a comparison of bilateral treaty relations" or multilateral "in the sense that their binding effect is collective and the different relationships between WTO members cannot be separated into bilateral components".[823] The latter is of the *erga omnes* type and basically means "toward all". Reading the preamble, it seems as if the Agreement on Safeguards is of the

[821] General Agreement on Tariffs and Trade, Modalities of application of Article XIX, Note by the Secretariat, L/4679, 5 July 1978, para. 24.

[822] Ibid, para. 25.

[823] Pauwelyn, Joost, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003), pages 52-53.

erga omnes nature if "applicable to all" is equivalent to "toward all". EU has stated that if a product's customs duty is *erga omnes*, it is applicable to imports from all countries,[824] as in the case of safeguard measures. This should perhaps be taken with a pinch of salt. Pauwelyn also state that:

> "In sum, and generally speaking, in case WTO obligations were of the multilateral or *erga omnes partes* type, *inter se* modifications to the WTO treaty and the suspension of WTO obligations as against a wrongdoing state would *not* be acceptable, whereas standing to bring a WTO complaint would, in principle, be granted to all WTO members, irrespective of the breach. In contrast, if WTO obligations were seen as bilateral or reciprocal obligations, inter se modifications and suspensions in response to breach would, in theory, be permissible, whereas standing would normally be limited to those WTO members at the other end of the (compilation of) bilateral relationship(s) allegedly breached."[825]

Pauwelyn concludes however that both GATT and the WTO treaty establish bilateral obligations.[826] Pauwelyn write that:

> "The conclusion reached is that WTO obligations are bilateral obligations, even if some of the more recent WTO obligations, especially those of a regulatory type, may have certain collective features."[827]

As mentioned above, Pauwelyn believe that the exclusion of regional trade partners, which could be an *inter se* modification, would violate the non-discrimination principle.[828]

As presented in Chapter 5, some RTAs, such as some of the EPAs, state that regional parties shall be excluded from the application of multilateral safeguard measures.[829]

Thus, if a party to the RTA decide to apply a multilateral safeguard measure in accordance with WTO law, these exclusion clauses in the RTAs suggests that the regional parties would not be affected by the measure. Imports from the RTA partner are thus excluded from a multilateral safeguard measure. This means that the internal trade will not be affected by restrictive measures and thus will be treated

[824] https://trade.ec.europa.eu/tradehelp/tips-eu-tariffs, visited on 14 November 2019.

[825] Ibid, page 54.

[826] Ibid, page 70.

[827] Pauwelyn, Joost, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature? *European Journal of International Law*, (November 2003), page 950.

[828] *Inter se* is a Latin phrase that means "among or between themselves", It is for example used to "distinguish rights or duties between two or more parties from their rights or duties to others".

[829] However, it is only the EU that can exclude imports from the ACP countries from multilateral safeguard measures, thus indicating an asymmetric approach.

more favourably than the external trade with third countries. This was also mentioned in Chapter 2 and 5.

Selectivity or excluding certain countries only, means that measures should target "guilty" nations *i.e.* those that have increased their exports. This was also discussed before the creation of the Agreement on Safeguards. As elaborated above, the practice of excluding countries may have favourable *ex ante* effects on the level of trade concessions, but the practice is similar to the practice of grey area measures due to the selectivity demonstrated.[830]

As confirmed above, safeguard measures in RTAs are easier to invoke than multilateral measures under the Agreement on Safeguards and GATT Article XIX since the circumstances allowing for their use occur more frequently than those in WTO law. This indicates that the object and purpose behind regional measures is actively to provide an "escape clause" rather than to restrict their use. The purpose of multilateral safeguard measures seems to be rather to restrict the possibility of using an "escape clause" and to establish a pure "emergency" measure, while regional safeguard measures allow temporary withdrawals. However, regional measures could be more politically sensitive which may be a reason why countries choose to apply multilateral rather than regional measures.

Regional safeguard measures and grey area measures share some similarities; they are in a sense both bilateral actions which do not always need a show of injury in order to be applicable. Grey area measures were also seen as a way to avoid the problems of free circulation arising when safeguard measures under Article XIX were taken by only one of the members of a customs union. However as stated in Chapter 5, while grey area measures consisted of quantitative restrictions, price undertakings or surveillance systems concluded between importing and exporting countries, regional safeguard measures are basically applied up to the level of MFN only. In any event, regional safeguard measures cannot entirely substitute for multilateral measures since regional measures are only applicable between the parties.

Rules on safeguard measures in RTAs are often linked to clauses on choices of forum. Some clarity is needed to understand if these clauses are allowed and whether the WTO DSB can examine disputes where the right to WTO dispute settlement has been waived.

The question of whether RTA law can prevail over WTO law has had somewhat little consideration previously, but it is likely to rise due to the increasing protectionism in the world. Also, regional dispute systems can become more important since they might ensure the protection of private party rights, which the

[830] Sykes, Alan O., Protectionism as a "Safeguard": a positive analysis of the GATT "Escape Clause" with normative speculations", *The University of Chicago Law Review*, Vol. 58, No. 1 (1991), pp. 255-305, page 294.

WTO DSB does not. Moreover, the current blocking of Appellate Body members can also affect the need to turn to regional dispute settlements rather than a multilateral one.

Thus, the questions that will be examined here are as follows. Is it possible to waive the rights to the WTO dispute settlement system? What is the relation between the WTO Dispute Settlement Body and RTA dispute settlement systems and is there a conflict? Is it possible to have clauses which is binding to the extent where the WTO dispute settlement body cannot examine the dispute (*i.e.*, can the RTA include clauses which are inconsistent with WTO law)?

Also, as seen in Chapter 2, it seems as if grey area measures have returned. Could voluntary export restraints be permitted under RTAs and can such clauses prevail over WTO law? These questions will be elaborated on in the light of safeguard measures. The answers will provide guidance on whether the Agreement on Safeguards is applicable to all WTO Members.

To begin with, an examination of the WTO dispute settlement system.

6.3 The jurisdiction of the WTO DSU

6.3.1 Introduction

Access to the DSU is limited to WTO Members, which can take part either as parties or as third parties.[831] This also means that a Member which is a potential exporter but not actually directly affected by any measure, can bring a claim under the GATT 1994.[832] Even if private individuals and companies may often be the ones (as exporters or importers) most directly and adversely affected by the measures allegedly violating the WTO Agreement they do not have direct access to the dispute settlement system. However, they can file an *amicus curiae* submission to WTO dispute settlement bodies. According to WTO jurisprudence, panels and the Appellate Body have the discretion to accept or reject amicus curiae but are not

[831] Dispute Settlement Understanding, Understanding on Rules and Procedures Governing the Settlement of Disputes and also see Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, *(US-Shrimp),* WT/DS58/AB/R, (12 October 1998), para. 101.

[832] Appellate Body Report on European Communities — Regime for the Importation, Sale and Distribution of Bananas, *(EC-Bananas III),* WT/DS27/AB/R, DSR 1997:II, 591, (25 September 1997), para. 138.

obliged to consider them. This is a significant difference compared to regional dispute settlement systems where some courts allow for private parties.[833]

There is no specific forum of choice clauses in WTO legal texts, but reference can be made to the Dispute Settlement Understanding (DSU). The object and purpose of the WTO dispute settlement system is through multilateral procedures, settle a dispute between Members of the WTO rather than through unilateral actions.[834] Article 23.1 of the DSU states:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

As mentioned in Chapter 1, a complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system and the jurisdiction is compulsory in nature. Members of the WTO may not make a unilateral determination that a violation of WTO law has occurred and may not take retaliation measures unilaterally concerning violations of WTO law according to Article 23.2 of the DSU. This means that whether a violation has occurred can only be decided through the recourse to dispute settlement in accordance with the rules and procedures of the DSU.[835] In the case *US – Certain EC Products*, the panel stated that it is a general obligation that the Members seek the redress of a WTO violation through the DSU only.[836] Members serve to preserve the rights and obligations under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law according to Article 3.2 of the DSU. Membership of the WTO in itself comprises consent and acceptance of the compulsory jurisdiction of the WTO dispute settlement system.[837] According to the panel in *US – Section 301 Trade Act*, Members shall have remedy to the WTO dispute settlement system to the exclusion

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[833] See for example the COMESA Court of Justice, Malawi Mobile Ltd v Government of Malawi, 20th November, 2015 and Treaty Establishing the Common Market for Eastern and Southern Africa, Article 26 allows any person who is resident in a Member State to refer for determination by the Court the legality of any act, regulation, directive or decision of the Council or of a Member State on the grounds that it is unlawful or an infringement of the provisions of the Treaty. http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=218.

[834] Bossche, Peter Van den, *The Law and Policy of the World Trade Organization. Text, cases and materials*. Cambridge University Press (2005), page 183.

[835] Article 23.2 Dispute Settlement Understanding.

[836] Panel Report on United States – Import measures on certain products from the European Communities, (*US — Certain EC Products*), WT/DS165/R, (17 July 2000), paras 6.19–6.20. This was upheld by the Appellate Body WT/DS165/AB/R, at para. 111.

[837] Bossche, Peter Van den, *The Law and Policy of the World Trade Organization. Text, cases and materials*. Cambridge University Press (2005), page 189.

of any other system. Thus, Members are prohibited from determining that a violation has occurred or similar of the covered agreements, except through recourse to dispute settlement in accordance with the rules and provisions of the DSU. The panel recognized that:

> "Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to 'have recourse to' the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call 'exclusive dispute resolution clause', is an important new element of Members' rights and obligations under the DSU."[838]

The panel also concluded that Members are compelled generally to (a) have recourse to and (b) abide by DSU rules and procedures which "include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings".[839] The panel also concluded that trade legislation "which statutorily reserves the right for the Member concerned to do something which it has promised not to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1."[840] In simple words, this means that WTO Members cannot themselves make a determination to the effect that a violation has occurred, benefits have been nullified or impaired if the violation, obligation or nullification concern the covered agreements.[841] In that case, they have to bring the dispute to the WTO DSB.

In *Argentina – Poultry* case, the panel considered that there was no limitation on Brazil to "bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR."[842]

The Appellate Body in *Mexico – Soft Drinks*, also stated:

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[838] Panel Report on United States — Sections 301-310 of the Trade Act of 1974, *(US - Section 301 Trade Act),* WT/DS152/R, DSR 2000:II, 815, (27 January 2000), para. 7.43.

[839] Ibid, para. 7.59.

[840] Ibid, paras. 7.59 and 7.63.

[841] However, a WTO Member's own court can make its own reviews concerning the compatibility with actions taken by the WTO Member's own institutions. For example, in Commission v Hungary (C-66/18).

[842] Panel Report, Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R (Nov. 7 2001), para. 7.38.

> "it [wa]s difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it."[843]

In these cases, the WTO DSB upheld its jurisdictions even though the disputes had already been settled in the forums of the RTAs. Article XXIV does not give any guidance on jurisdictional conflicts, instead we need to rely on the DSU. These cases will be attended to again below.

The DSU does not allocate the burden of proof, however there are some case law referring to burden of proof.

> "[A]s a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-*consistent*, until sufficient evidence is presented to prove the contrary."[844]

Nevertheless, in cases where a party invokes an exception to a WTO obligation trying to justify a measure that the complaining party has alleged or proven to be in breach of that obligation, the responding party in effect advances an affirmative claim in its defence. The complaining party must make a prima facie case that a WTO Member has violated its obligations when it applies a safeguard measure. This would be the case where a Member use a retaliation measure as a defence towards a safeguard measure that has or has not been applied consistent with WTO law, as in the case of EU and US Ad Valorem duties.

The WTO recognizes the legitimacy of RTAs under certain conditions such as compliance with Article XXIV. As elaborated in Chapter 4, RTAs that meet the requirements of Article XXIV can thus rely on the exception provided in Article XXIV and consequently would not conflict with WTO law. Article XXIV does not though resolve conflicts between RTAs and WTO. However, Article 23 of the DSU seems to prevent other jurisdictions from adjudicating WTO law violations. The

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[843] Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, (*Mexico — Soft Drinks*), WT/DS308/13, (29 March 2006), para. 51.

[844] Appellate Body Report on Canada – Measures affecting the importation of milk and the exportation of dairy products, (*Canada – Dairy*), WT/DS103/AB/R, WT/DS113/AB/R, (13 October 1999), para. 66. See also Appellate Body Report on European Communities - Measures Concerning Meat and Meat Products, (*EC – Hormones*), WT/DS26 and WT/DS48, (13 February 1998), para. 104 and Appellate Body Report, Chile – Price Band System, Chile – Price Band System and safeguard measures relating to certain agricultural products, (*Chile – Price Band System*), WT/DS207/AB/R, (23 September 2002), para. 134.

article does not though prohibit tribunals established by other treaties from exercising jurisdiction over the claims arising from their treaty provisions that are parallel to or overlap with WTO provisions. The choice of using an exclusive forum clause (which will be explained below) can give a solution to this problem as indicated by the panel in *US – Section 301 Trade Act*. [845]

As the title indicates, Article 23 of the DSU deals with the "Strengthening of the Multilateral System". It is designed to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. According to the statements in the panel report on *US – Section 301 Trade Act* it does so by obligating Members to follow the multilateral rules and procedures of the DSU. It is solely for the WTO through the DSU process to determine that:

(i) a WTO inconsistency has occurred according to Article 23.2(a),

(ii) to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings (Article 23.2(b)) and finally

(iii) to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed as a result of a WTO inconsistency.[846]

The binding nature of the Dispute Settlement Body (DSB) decisions is also an object of debate. Adopted panel and Appellate Body reports after the reasonable period has lapsed are despite the other objections on WTO law binding.[847] If a country legislates a determination of inconsistency before awaiting a possible appeal, it would violate Article 23(a).[848] Some WTO Members have not yet ratified specific legislation which provides for procedures to enforce WTO rights while some have. Considering the Vienna Convention Rules on treaty interpretation it is important to make clear that these rules do not violate its WTO obligations when designing them.

When the panel examined the facts in the case *US – Section 301 Trade Act* they interpreted Article 23 based on the Vienna Convention and concluded that neither the GATT nor the WTO Agreement have so far been interpreted by GATT/WTO institutions – nor by regional institutes – as a legal order producing direct effect, but

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[845] Kwak, Kyung and Gabrielle, Marceau, Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements. In Lorand Bartels and Federico Ortino, (ed.) *Regional Trade Agreements and the WTO Legal System*. International Economic Law, (Oxford, 2006), page 476.

[846] Panel Report on United States – Sections 301-310 of the Trade Act of 1974, (*US- Section 301*), WT/DS152/R, (22 December 1999), para. 7.38.

[847] Zonnekeyn, Geert A., EC liability for the non-implementation of WTO Dispute Settlement Decisions- Advocate General Alber proposes a "Copernican innovation" in the case law of the ECJ. *Journal of International Economic Law* 6(3), 761-769, Oxford University Press (2003), page 766.

[848] Panel Report on United States – Sections 301-310 of the Trade Act of 1974, (*US- Section 301*), WT/DS152/R, (22 December 1999), para. 7.48.

individual operators should nevertheless somehow be protected.[849] This was emphasized by the panel in the following words:

> "Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it."[850]

The panel also concluded under the reading of Article 31 of the VCLT that the responsibility of Members under Article 23 – to abide by the rules and procedures of the DSU and to refrain from unilateral determinations of inconsistency – is to assure Members that no such purposes in respect of WTO rights and obligations will be made. [851]

Thus, so far, the relation between the WTO dispute settlement system and those of the regional nature, is that disputes concerning the WTO agreements shall be settled in the WTO DSB. In regard to the above, it is clear that questions of whether a WTO violation has occurred can only be decided through the recourse to dispute settlement in accordance with the rules and procedures of the DSU. This leaves the question whether it is possible to try disputes concerning regional or free trade agreements in the WTO DSB. Two general considerations can be made, either the treaty interpretation of the WTO treaties will propose the applicability of RTAs in the WTO context, or the choice of forum clauses in the RTAs will provide the answers on jurisdiction. Both will be examined below.

6.3.2 Good faith

Good faith is a common term in contract law, where it is a general presumption that the parties to the contract will act in good faith and thus not eradicate the right of the other party or parties. In *Peru – Agricultural Products*, it was discussed whether Guatemala brought proceedings to the WTO in a manner contrary to good faith since the FTA allowed the inconsistencies and also prevailed over WTO law.

Good faith is referred to in two provisions in the DSU, namely Article 4.3 and Article 3.10.

[849] Ibid, paras. 7.74-7.76.

[850] Ibid, para. 7.77.

[851] Ibid, 7.95.

Members of the WTO are requested under the DSU to good faith engagement in dispute settlement procedures. The Appellate Body in *US/Canada – Continued Suspension* stated:

> "The DSU makes reference to "good faith" in two provisions, namely, Article 4.3, which relates to consultations, and Article 3.10, which provides that, "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." These provisions require Members to act in good faith with respect to the initiation of a dispute and in their conduct during a dispute settlement proceedings. Neither provision specifically addresses the question of whether a Member enjoys a presumption of good faith compliance in respect of measures taken to implement."[852]

Article 3.10 of the DSU has been recognized as one of a very limited number of explicit limitations on the right of WTO Members to bring an action under the DSU.[853] As long as a Member respects the principles in Articles 3.7 and 3.10 of the DSU, that is to use their "judgement as to whether action under these procedures would be fruitful" and to engage in dispute settlement in good faith, "then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits."[854]

The panel in *Argentina – Poultry* stated that "we consider that two conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something "more than mere violation"."[855] This will be attended to again below.

In the *US – Shrimp* case it was emphasized that:

> "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of abus de droit, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be

[852] Appellate Body Report, Canada — Continued Suspension of Obligations in the EC — Hormones Dispute, (*US/Canada — Continued Suspension*), WT/DS321/AB/R, 16 October 2008, para. 313.

[853] Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, (*Mexico — Soft Drinks*), WT/DS308/13, 29 March 2006, fn. 101.

[854] Appellate Body Report, United States – sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan, (*US — Carbon Steel*), WT/DS244/AB/R, 15 December 2003, para. 89.

[855] Panel Report in Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil, (*Argentina – Poultry*), WT/DS241/6, 22 May 2003, para. 7.36.

> exercised bona fide, that is to say, reasonably". An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[856]

Thus, if a Member clearly misuse their treaty rights, this could mean that they actually are in breach of that treaty obligation. Again, this could be the case in the US Ad Valorem application. However, it is clearly stated that the principle applies equally to all parties.[857] Thus, this applies also to the parties retaliating against the US measure. The defence must also be applied in good faith:

> "… This does not mean that a responding party may put forward its defense whenever and in whatever manner it chooses. Article 3.10 of the DSU provides that "all Members will engage in these procedures in good faith in an effort to resolve the dispute", which implies the identification by each party of relevant legal and factual issues at the earliest opportunity, so as to provide other parties, including third parties, an opportunity to respond".[858]

As also elaborated in the *US – FSC* case:

> "By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[859]

This also means that if a Member finds that there was no basis for applying a safeguard measure, this measure should also be withdrawn.

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[856] Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (*US-Shrimp*), WT/DS58/AB/R, (12 October 1998), para. 158.

[857] Appellate Body Report on United States – Import prohibition of certain shrimp and shrimp products, Recourse to article 21.5 of the DSU by Malaysia, (*US — Shrimp (Article 21.5 — Malaysia)),* WT/DS58/AB/RW, (22 October 2001), Footnote 97 to para. 134.

[858] Appellate Body Report on United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, (*US — Gambling*), (WT/DS285/AB/R, WT/DS285/AB/R/Corr.1), (7 April 2005), para. 269.

[859] Appellate Body Report on United States — Tax Treatment for "Foreign Sales Corporations", (*US – FSC*), WT/DS108/AB/R, (24 February 2000), para. 166.

> "[P]rinciple of good faith that underlies all treaties, to withdraw a safeguard measure if post-determination evidence relating to pre-determination facts were to emerge revealing that a determination was based on such a critical factual error that one of the conditions required by Article 6 turns out never to have been met."[860]

Some cases have also referred to Article 26 (Pacta Sunt Servanda) in the VCLT, meaning that Members of the WTO will abide by their treaty obligations in good faith, such as *EC – Sardines* and *US – Offset Act (Byrd Amendment)*, as elaborated below.[861]

6.3.3 Treaty interpretation by the WTO DSB

Treaty interpretation has briefly been presented in Chapter 1, but here the focus will be in regard to overlaps of jurisdictions.

The WTO dispute settlement system was created based on the DSU; which is the starting point for defining WTO panels and the Appellate Body. However, other procedural rules besides the DSU can be relied upon.[862]

Claims under the WTO covered agreements are the only claims that can be brought before panels and the Appellate Body according to Article 1.1 DSU. Nevertheless, once the jurisdiction of a panel or the Appellate Body is appropriately established it is not exactly clear what law panels and the Appellate Body may apply.[863] Panels and the Appellate Body have the power to determine their own jurisdiction.[864] However, the Appellate Body has been somewhat reluctant to interpret RTA or FTA law.[865] As will be shown below, overlaps of jurisdiction can however arise. The

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[860] Appellate Body Report on United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, (*US – Cotton Yarn*), WT/DS192/AB/R, (8 October 2001), para. 81.

[861] Appellate Body Report, European Communities — Trade Description of Sardines, (*EC — Sardines*), WT/DS231/AB/R, (26 September 2002), para. 278, and Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 ("*US – Offset Act (Byrd Amendment)"),* WT/DS217/AB/R, WT/DS234/AB/R, (27 January 2003), paras. 296–298.

[862] Van Damme, Isabelle, Treaty Interpretation by the WTO Appellate Body, Oxford International Economic Law, (2009), page 163.

[863] Report of the ILC Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Finalized by Martti Koskenniemi and Draft conclusions of the work of the Study Group, Doc. A/CN.4/L.682 and Add.1 and Corr.1, para. 45.

[864] Appellate Body Report on United States – Anti-dumping act of 1916, (*US – 1916 Act*), WT/DS136/AB/R, WT/DS162/AB/R, (28 August 2000), at para. 54, footnote 30. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 9.

[865] Appellate Body Report, EC Measures Concerning Meat and Meat Products (*EC – Hormones*), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 124 and Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, (*Mexico — Soft Drinks*), WT/DS308/13, (29 March 2006), para 55.

interpretation of Article 3.2 DSU suggests that only the customary principles of interpretation of public international law also apply in WTO dispute settlement.[866] The WTO DSB cannot build upon the rules of international law as prescribed in Article 31(3)(c) VCLT, since "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[867] However, some argue that WTO provisions can "evolve into customary international law" and be a base to interpreting RTAs.[868] This is a very interesting conclusion and could especially have some impact on the clauses on WTO provisions in the RTAs, such as clauses on safeguard measures. Some examples are presented below where international law can be used as a base for interpretation.

As already highlighted, Pauwelyn proposes two ways by which non-WTO law can be applied in WTO disputes. The first is that panels and the Appellate Body can apply international law as a "fallback" or in defence of a claim of a WTO violation, except where Members have contracted out of international law. Thereby the non-WTO law serves as a justification for a disputed act that would otherwise be a violation of WTO rules.[869] This practice has been performed by the Appellate Body.[870] The other, suggests that in the event of a conflict between WTO law and international law, non-WTO law may dis-apply WTO rules in particular respects and thereby could lead the DSB to decline jurisdiction.[871] However, panels and the Appellate Body can interpret WTO law in such a way that there is no conflict with

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[866] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 14.

[867] Article 3.2 in the DSU.

[868] Hsu, Locknie, Applicability of WTO Law in Regional Trade Agreements: Identifying the Links in Bartels, Lorand and Ortino, Federico, *Regional Trade Agreements and the WTO Legal System*, International Economic Law, Oxford, (2006), pages 525 and 542.

[869] Pauwelyn, Joost, *Conflicts of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge Studies in International and Comparative Law, (2003), pages 478-86 and Pauwelyn, Joost, How to Win a World Trade Organisation Dispute Based on Non-World Trade Organisation Law? Questions of Jurisdiction and Merits, 37(6) J. World Trade 997, 998 (2003).

[870] Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, (*EC – Poultry),* WT/DS69/AB/R, (13 July 1998), Appellate Body Report on Argentina - Safeguard Measures on Imports of Footwear, (*Argentina - Footwear (EC)),* WT/DS121/AB/R, (14 December 1999), Appellate Body Reports on European Communities - Measures Concerning Meat and Meat Products, (*EC – Hormones),* WT/DS26 and WT/DS48, (13 February 1998), Panel report on Korea – measures affecting government procurement, (*Korea – Procurement*), WT/DS163/R, (1 May 2000) and Appellate Body Report on United States – Import Prohibition of certain shrimp and shrimp products, (*US-Shrimp*), WT/DS58/AB/R, (12 October 1998).

[871] Pauwelyn, Joost, *Conflicts of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge Studies in International and Comparative Law, (2003), pages 478-86 and Pauwelyn, Joost, How to Win a World Trade Organisation Dispute Based on Non-World Trade Organisation Law? Questions of Jurisdiction and Merits, 37(6) J. World Trade 997, 998 (2003).

the non-WTO rule, determine the conflict through the use of conflict of norms principles, or decide that WTO law does not allow countermeasures,[872] as maintained by Article 31(3)(c) of the VCLT.

In *Peru – Agricultural Products*, the Appellate Body came to the conclusion that Guatemala had not acted inconsistent with good faith since:

> "Guatemala's good faith was acknowledged and Guatemala duly exercised its judgement as to whether the initiation of the procedure would be fruitful."[873]

Peru's argument that Guatemala had waived its rights, was limited by the undisputed fact that the FTA was not yet in force.[874] The Panel also concluded that it was "not convinced that the violation by a Member of the obligation contained in Article 18 of the Vienna Convention with respect to a treaty that does not form part of the WTO covered agreements can constitute evidence of lack of the good faith required by Articles 3.7 and 3.10"; Peru would have to show that Guatemala initiating the present procedure, constitutes an act which has the effect of defeating the object and purpose of the FTA,[875] and determining the object and purpose of the FTA would go beyond the panel's scope.[876]

This does though raise the question whether the issue of waiving rights would have been deemed differently if the FTA would have been in force. The panel and the Appellate Body would maybe come to the conclusion that if the FTA or RTA members had explicitly waived its rights, as elaborated below in *Argentina – Poultry*, the WTO DSB perhaps would not be able to review the matter. However, the WTO DSB would still be able to examine whether the RTA at issue is consistent with WTO law.

Before continue studying whether RTA law can be applied in WTO DSB, overlaps of jurisdiction will be introduced.

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[872] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 18.

[873] Panel Report, Peru – Additional Duty on Imports of Certain Agricultural Products, *(Peru — Agricultural Products),* WT/DS457/R, 27 November 2014, para. 7.75.

[874] Ibid, para. 7.88.

[875] Ibid, para. 7.92.

[876] Ibid, para. 7.92.

6.4 Overlaps of jurisdiction

6.4.1 Introduction

As presented in Chapter 1, *Procedural overlaps* occur when a country challenges another country under a regional trade agreement first and then before the WTO (*Argentina – Poultry*, *Mexico – Soft Drinks* and *Brazil – Retreaded Tyres* are examples). This is also referred to as the institutional perspective when discussing fragmentation of international law which was under the examination of the International Law Commission (ILC)[877]. An *overlap of substantial rules* occurs when a claim is brought before a court and special rules on applicable law and conflict exists which is outside the dispute settlement mechanism. There are three types of overlaps of jurisdiction that will be discussed here:

> when two fora claim to have jurisdiction over the matter – which disclose a factual conflict,
>
> when one forum claims to have jurisdiction and the other one offers jurisdiction – which could lead to a potential conflict, or
>
> when the dispute settlement mechanism of two different fora are available to examine the matter on a non-mandatory basis – which would be a conflict if the two fora try the conflict and end up with different results.[878]

Some agreements have clear rules on dispute settlement while others do not. There are currently two ways of handling procedural overlaps between the dispute settlement mechanism of RTAs and that of WTO law.[879]

> 1, Forum choice clause or forum election clause.
>
> 2, Forum choice clause and an Exclusivity forum clause (in order to not have more than one dispute on the same subject).

[877] However, they examine the substantive aspect in fragmentation of international law.

[878] Kwak, Kyung and Gabrielle, Marceau, Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements. In Lorand Bartels and Federico Ortino, (ed.) *Regional Trade Agreements and the WTO Legal System*. International Economic Law, (Oxford, 2006), page 468.

[879] Ibid, page 468 f.

Thus, an overlap of jurisdiction between an RTA dispute settlement mechanism and WTO dispute settlement mechanism would occur when:

- An RTA provide for an exclusive jurisdiction over a matter, or

- An RTA "offers" jurisdiction, on a permissive basis, for dealing with the same matter or a related one over which the WTO has exclusive jurisdiction; and

- The dispute concerns matter that fall within the scope of a WTO covered agreement.[880]

Choosing the North American Free Trade Agreement (NAFTA) as an example, the forum choice clause gives the complaining party the discretion to settle the dispute at either forum *i.e.* number 1 above.[881]

> NAFTA; Article 2005: GATT Dispute Settlement
>
> "1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party."

In relation to where the responding party claims that its action is subject to environmental issues the complaining party may thereafter have recourse to dispute settlement procedures solely under the NAFTA. Thus, the Parties are free to choose the dispute settlement mechanism of their choice. However, it is not stated that the same dispute cannot be tried at both dispute settlement mechanisms.

The second option mentioned above where European Free Trade Association (EFTA) is used as an example, it is stated that disputes may be settled in either forum at the discretion of the complaining party or the forum selected shall be used to the exclusion of the other.[882]

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[880] Kwak, Kyung and Gabrielle, Marceau, Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements. In Lorand Bartels and Federico Ortino, (ed.) *Regional Trade Agreements and the WTO Legal System*. International Economic Law, (Oxford, 2006), page 85 and Malacrida Reto and Marceau Gabrielle, The WTO Adjudicating Bodies in Howse Robert, Ruiz-Fabri Hélene, Ulfstein Geir and Zang Michelle Q, *The Legitimacy of International Trade Courts and Tribunals*, page 54.

[881] NAFTA chapter 20 Article 2005 (2).

[882] Agreement between the EFTA States and Singapore Article 56 (2).

EFTA; IX. Dispute settlement, Article 56

> "2. Disputes on the same matter arising under both this Agreement and the WTO Agreement, or any agreement thereunder, to which the Parties are party, may be settled in either forum at the discretion of the complaining Party. The forum thus selected shall be used to the exclusion of the other."

The Economic Partnership Agreements (EPAs) between the EU and African, Caribbean and Pacific countries give no other alternative than to settle the disputes according to the EPAs or according to the GATT where *it is so stated*. The wording in the agreements is rather precise which will be explained below. As an example, it is stated in the EU-SADC Article 33-34 (as seen below) that safeguard measures in *this* agreement are not subject to WTO Dispute Settlement provisions and that measures in accordance with Article XIX of the GATT shall not be subject to the Dispute Settlement provisions of this Agreement. It is an exclusivity forum clause but, in the agreements, there are two options, either a forum choice of WTO dispute settlement or EPA dispute settlement. This indicates that the forum of choice is somehow different in the EPAs from the exclusivity forum choice since the WTO is excluded in some of the areas of dispute settlement and has no jurisdiction. The parties to the EPA have waived their rights to bring a dispute to the WTO DSB in certain circumstances as was elaborated on in the *Argentina – Poultry* case.

In *Argentina – Poultry* the panel stated that there was no evidence that Brazil made an express statement that it would not bring WTO dispute settlement proceedings if previously challenged through MERCOSUR.[883] The panel also referred to *EEC (Member States) – Bananas I,* where estoppel can only "result from the express, or in exceptional cases implied consent of the complaining parties".[884]

There was also a discussion in the *Brazil – Retreaded Tyres* where the Appellate Body examined whether the explanation that Brazil had to exempt imports from MERCOSUR parties due to a ruling in a MERCOSUR tribunal was accurate but found that it was unjustifiable.[885] This will be attended to again below.

In the EPAs there is an express statement that the partners will not bring disputes on regional safeguard measures to the WTO, as seen below. However, in cases of general exclusivity clauses there is nothing that prevents a WTO panel to examine a claim if the parties agree to bring the dispute to the WTO DSB.

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[883] WTO, World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 174.

[884] Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003), para. 7.38.

[885] Appellate Body Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Tyres*), WT/DS332/AB/R, (17 December 2007), para. 227.

If the dispute is handled in the regional dispute system, there is a potential risk that the jurisdiction of the WTO could be slowly undermined. Also, if the regional dispute system comes to a conclusion it is questionable to which extent the conclusion is binding in the WTO dispute settlement body. Another concern is as mentioned whether exclusivity clauses as the one included in the Economic Partnership Agreements (EPAs) is binding to the extent where the WTO dispute settlement body cannot examine the dispute.

As was elaborated above, a clear waiving of rights in an agreement which is in force seem to indicate that the WTO DSB cannot examine the issue. Thus, the paragraph cited above which relate to bilateral safeguard measures could be clear and precise enough to waive the rights under the WTO.

6.4.2 Examples of rules on safeguard measures and forum selection

As will be seen below, many RTAs have choice of forum clauses where multilateral or global safeguard measures should be examined by the WTO DSB rather than the RTA dispute settlement mechanism. When it comes to regional or bilateral safeguard measures, they shall be examined by the RTA DSM or it is for the parties to choose which forum. Some examples have already been mentioned, but below some more examples are presented.

Customs unions under Article XXIV; SACU and MERCOSUR-SACU

The prohibition into or exportation of any goods from the SACU area, shall not be construed as to permit the protection of its own industries producing such goods.[886] Thus, regional safeguard measures between the Member States are not allowed.

The SACU agreement has no reference to WTO dispute settlement but has their own Ad Hoc Tribunal which has not been in operation as of yet. According to Article 13 in regard to the tribunal it is stated in paragraph 1 that:

> "Any dispute regarding the interpretation or application of this Agreement, or any dispute arising thereunder at the request of the Council, shall be settled by an ad hoc Tribunal."

Thus, the SACU Agreement only has one forum of choice and that is the Ad Hoc Tribunal. Thus, it is an exclusivity forum clause and does not cause any overlaps of jurisdiction.

Even though it is an FTA and not a customs union, another interesting example is the Preferential Trade Agreement between The Common Market of the South

[886] Article 25 SACU Agreement.

MERCOSUR and the Southern African Customs Union, 26 April 2016. The reason why it is emphasized here, is because of the forum issues that potentially could arise.

In PTA MERCOSUR-SACU Chapter XIII, Article 31 it is stated:

> "Any disputes arising in connection with the application of, interpretation of, or non-compliance with this Agreement shall be settled in accordance with the rules established in the Annex V of this Agreement."

When it comes to safeguard measures, they are included in Annex IV. Global safeguard measures are included in Part I where it is stated that the Signatory Parties retain their rights and obligations to apply safeguard measures consistent with Article XIX of GATT 1994 and the WTO Agreement on Safeguards.

Preferential (regional) safeguard measures are allowed between the parties and can be applied under similar circumstances as for the multilateral safeguard measures according to WTO law. Article 5 allow SACU and MERCOSUR respectively to:

> "apply preferential safeguard measures on a customs union-wide basis, in which the requirements for the determination of the existence of serious injury or threat thereof shall be based on the conditions prevailing in the SACU as a whole, or a SACU Signatory Party may apply preferential safeguard measures individually, if provided for in terms of the SACU Agreement, in which case the requirements for the determination of the existence of serious injury or threat thereof shall be based on the conditions prevailing in that Signatory Party and the measure shall be limited to that Signatory Party."[887]

It is also allowed to apply preferential safeguard measures only to imports from one or more of the Signatory Parties.[888]

Forum of choice clauses are formulated so that disputes arising in connection with the interpretation, application or non-compliance with the provisions of this Agreement between the Parties, as well as its Additional Protocols and related instruments, shall be subject to the Dispute Settlement Procedure of the RTA in question. Disputes regarding matters arising under the RTA that are also regulated in the agreements concluded at the WTO may be settled in accordance with the Annex or with the WTO DSU. [889]

The parties to the dispute shall reach an agreement on a forum, and if no agreement can be made then the complaining party shall select the forum for dispute settlement.

[887] Article 5.1, and Article 5.2 is exactly similar except for using MERCOSUR instead of SACU.

[888] Article 5.3.

[889] Annex V, Chapter 1, Article 2.1 and 2.2.

Once a dispute settlement procedure has been initiated, the choice of forum shall be final and a party to the dispute may not refer the same subject matter of the dispute to the other forum.[890] Thus, it is an exclusivity forum clause once after a choice of forum has been made. If a party has requested consultations under Article 4 of the DSU, then the dispute settlement shall be considered initiated under the WTO. Also, disputes under Chapter VIII of the RTA as well as Article 1 of Annex IV of the RTA (multilateral safeguard measures) shall exclusively be submitted to the WTO DSU.[891]

Annex V also state that:

> "2. Any dispute regarding matters arising under the Agreement that are also regulated in the agreements concluded at the World Trade Organization (hereinafter referred to as "the WTO") may be settled in accordance with this Annex or with the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (hereinafter referred to as the "DSU")."

Thus, the choice of forum clauses is either open choices where one jurisdiction is excluded over the other or an exclusive clause where there are no options.

RTAs under Article XXIV; EPAs

Multilateral safeguard measures are regulated in Article 24 in the CARIFORUM-EU Economic Partnership Agreement,[892] where it is stated that "nothing in this Agreement shall prevent the Signatory CARIFORUM States and the EC Party from adopting measures in accordance with Article XIX".[893] The provisions shall not be subject to the Dispute Settlement of this Agreement.[894] It is also stated that the EC Party shall exclude imports from any CARIFORUM States from any such measure.[895]

Regional safeguard measures are regulated in Article 25, and these measures shall not be subject to WTO Dispute Settlement provisions.[896]

[890] Annex V, Chapter 1, Article 3 and 5.

[891] Annex V, Chapter 1, Article 6 and 7.

[892] ECONOMIC PARTNERSHIP AGREEMENT between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJEU, L 289/I/3, 30 October 2008.

[893] CARIFORUM-EU EPA, Article 24.1.

[894] CARIFORUM-EU EPA, Article 24.4.

[895] CARIFORUM-EU EPA, Article 24.2.

[896] CARIFORUM-EU EPA, Article 25.10.

The agreements shall be interpreted in accordance with VCLT and thus in the same fashion as the WTO rules, and with the addition that the panel cannot add to or diminish the rights and obligations.

> "Article 219
>
> Rules of interpretation
>
> Arbitration panels shall interpret the provisions of this Agreement in accordance with customary rules of interpretation of public international law, including those set out in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided in the provisions of this Agreement."

Article 222 establish that "[a]rbitration bodies set up under this Agreement shall not adjudicate disputes on each Party or Signatory CARIFORUM States' rights and obligations under the Agreement establishing the WTO."

> "2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party or Signatory CARIFORUM State has, with regard to a particular measure, instituted a dispute settlement proceeding, either under Article 206(1) of this Part or under the WTO Agreement, it may not institute a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party or Signatory CARIFORUM State's request for the establishment of a panel under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO.
>
> 3. Nothing in this Agreement shall preclude a Party or Signatory CARIFORUM State from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO. Nothing in the WTO Agreement shall preclude Parties from suspending benefits under this Agreement."[897]

This indicate that it is possible to try the same measure at both dispute settlement mechanisms, and thus overlaps of jurisdiction occur apart from the application of safeguard measures where the dispute settlement is clear and precise.

[897] CARIFORUM-EU EPA, Article 222.2 and 3.

The SADC-EU EPA[898] has similar wordings in Article 33, where multilateral safeguards are regulated. EU shall exclude imports from SADC EPA States from any measures taken pursuant to Article XIX, Agreement on Safeguards and Article 5 of the WTO Agreement on Agriculture.[899] The application of multilateral safeguard measures shall not be subject to the provisions of Part III, which contain amongst others relation with WTO obligations.[900]

"Article 95

> 1. Arbitration bodies set up under this Agreement shall not arbitrate disputes on a Party's rights and obligations under the WTO Agreement.
>
> 2. Recourse to the dispute settlement provisions of this Agreement shall be without prejudice to any action in the WTO framework, including dispute settlement action. However, where a Party has, with regard to a particular measure, initiated a dispute settlement proceeding under this Agreement or under the WTO Agreement, it may not initiate a dispute settlement proceeding regarding the same measure in the other forum until the first proceeding has ended. For the purposes of this paragraph, dispute settlement proceedings under the WTO Agreement are deemed to be initiated by a Party's request for the establishment of a panel under Article 6 of the DSU.
>
> 3. Nothing in this Agreement shall preclude a Party from implementing the suspension of obligations authorised by the Dispute Settlement Body of the WTO."[901]

Regional safeguard measures are to be applied in accordance with Article 34 and these shall not be subject to WTO Dispute Settlement provisions.[902]

> Article 34, Bilateral safeguard
>
> "11. Safeguard measures adopted under the provisions of this Article shall not be subject to WTO Dispute Settlement provisions".

The SADC-EU agreement shall be interpreted the same way as the CARIFORUM-EU.

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[898] ECONOMIC PARTNERSHIP AGREEMENT between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, OJEU, L 250/3, 16 September 2016.

[899] SADC-EU EPA, Article 33.2.

[900] SADC-EU EPA, Article 33.4.

[901] SADC-EU EPA, Part III, Article 95.

[902] SADC-EU EPA, Article 33.10.

> "ARTICLE 92
>
> Rules of interpretation
>
> The arbitration panel shall interpret the provisions of this Agreement in accordance with the customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in this Agreement."

Thus, the CARIFORUM-EU EPA and the SADC-EU EPA has only exclusivity forum clauses regarding safeguard measures and it is not possible to choose which forum to use.

Customs unions under the Enabling Clause; MERCOSUR

Disputes between Member States of the MERCOSUR Agreement[903] concerning the interpretation, application or default of the Asunción Treaty, the Ouro Preto Protocol, the Protocols and Agreements celebrated in the boundary mark of the Asunción Treaty, the Common Market Council's Decisions, the Common Market Group's Resolutions and Mercosur Trade Commission's Directives shall be submitted to the procedures established by the Olivos Protocol.[904] Disputes can be submitted to other dispute settlement systems but when a procedure has started it is no longer possible to change.[905]

> "2. Disputes within the scope of application of this Protocol that may also be subject to the dispute settlement system of the World Organization of Trade or other preferential trading schemes that are part of the individual member states of MERCOSUR may be subject to one or other jurisdiction, the choice of the complainant. Notwithstanding the foregoing, the parties to the dispute may, by mutual agreement, set the forum.
>
> Once initiated proceedings for settlement of disputes in accordance with the preceding paragraph, neither party may have recourse to dispute settlement

[903] MERCOSUR, or Mercado Común del Sur (Common Market of the South), was created in 1991 by the Treaty of Asunción,

[904] Article 1(1) of the Olivos Protocol.

[905] Article 1(2) of the Olivos Protocol.

> mechanisms established in other forums regarding the same object, defined in accordance with Article 14 of this Protocol."[906]

Before the Olivos Protocol was signed, it was possible to submit the same dispute to MERCOSUR and to other dispute settlement mechanisms. One of the cases where it happened is the *Argentina – Poultry* case.

In *Argentina – Poultry*, Argentina had raised a preliminary issue where Brazil had challenged the measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Thus, the panel should refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings or that the panel should be bound by the ruling of the MERCOSUR Tribunal. Brazil argued that "a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly." [907]

The panel considered thus that there was no limitation on Brazil to "bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR."[908] The reason for this is that the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. Thus, the forum of choice clause allows the dispute to be brought before different courts and there is no exclusive choice of forum clause.

Now after signing the Olivos Protocol, this is not possible since it now has a forum of choice clause which excludes one forum when the other has been chosen. Before the Olivos Protocol, it was possible both to choose forum and to bring the same dispute to different forums.

One interesting factor though is that the MERCOSUR dispute settlement system does not permit private parties, natural or legal persons to submit any cases against State parties for arbitration,[909] as some other RTAs do.

The MERCOSUR rules regarding applicable law state that international law can be used for interpretation.

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[906] Protocol of Olivos for dispute settlement in MERCOSUR, 18th February 2002 (2251 UNTS 243, UN Reg No A-37341), OXIO 148, Article 1(2).

[907] Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003), para. 7.17.

[908] Ibid, para. 7.38.

[909] Almedia, Paula Wojcikiewicz, The case of MERCOSUR, in Howse Robert, Ruiz-Fabri Hélene, Ulfstein Geir and Zang Michelle Q, *The Legitimacy of International Trade Courts and Tribunals*, Cambridge University Press, (2018), page 233.

"Article 34, Applicable law

1. The Ad Hoc Arbitration Courts and the Permanent Review Tribunal shall decide the dispute according to the Asunción Treaty, the Ouro Preto Protocol, the protocols and agreements concluded within the framework of the Treaty of Asunción, the Decisions of the Common Market Council, resolutions of the Group Common Market and the Guidelines of the Committee on Commerce of Mercosur , as well as the principles and provisions of international law applicable to the matter."

This is then another example where international law and thus WTO law can be used for interpretation.

RTAs under the Enabling Clause; ASEAN

The ASEAN Dispute Settlement Mechanism (DSM) has not been used even though it has been in place for some time and the countries within ASEAN do not even use the WTO system that often, especially not against each other.[910] There is no standing for non-state actors in the ASEAN DSM and the reports are not enforceable in national courts. The whole proceeding is also confidential.[911] In negotiations, the Members of ASEAN each negotiate with their own interest as a primary goal. This is in contrast to the EU; whose negotiators are supposed to set aside its own national interest and instead negotiate in the EU's best interest. The ASEAN countries historically fought for independence fairly recently, which makes it less likely that they would be willing to surrender their sovereignty. Looking at the participation of ASEAN Members in the WTO DSB it seems as if there is no strong will to take a dispute to a regional settlement mechanism. The ASEAN protocol on Enhanced Dispute Settlement Mechanism (EDSM) states in Article 1(3) that the provisions of the "Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting" to establish a panel. There is also a review of an Appellate Body if requested. However, these institutions or bodies have never actually dealt with any matters.

ASEAN dispute settlement mechanism does not have exclusive jurisdiction since the (EDSM) has a choice of forum clause which opens opportunities for forum shopping.

[910] Ibid, page 353.

[911] Luo, Yan, Dispute Settlement in the Proposed East Asia FTA, in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreements and the WTO Legal System*, (2006), Oxford University Press, page 435.

> "3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting ("SEOM") to establish a panel pursuant to paragraph 1 Article 5 of this Protocol."[912]

The coverage of the ASEAN dispute settlement includes all ASEAN economic agreements; however, none have been invoked so far.[913] Some intra-ASEAN trade disputes have instead been invoked at WTO dispute settlement mechanism.[914]

6.5 Which treaty prevail?

6.5.1 Introduction

When a choice of forum clause and an exclusive forum clause is absent problems will arise with *res judicata*.[915] *Lis alibi pendens*[916] could also constitute concern since once a dispute is pending in one forum, it cannot be brought before another forum. Also, the principle of *forum non conveniens*[917] provides that the adjudicative body could refer the dispute to another forum if it would be more appropriate for another forum to exercise jurisdiction.[918] Thus, there are some basic principles that could offer a guide on how to proceed when dealing with overlaps of jurisdiction.

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[912] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, 18 June, 2012, Article 1(3).

[913] Ewing-Chow, Michael and Yusran Ranyta, The ASEAN trade dispute settlement mechanism, in in Howse Robert, Ruiz-Fabri Hélene, Ulfstein Geir and Zang Michelle Q, *The Legitimacy of International Trade Courts and Tribunals*, page 365-366.

[914] Appellate Body Report on Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, (Thailand – Cigarettes (Philippines)), WT/DS371/AB/R, (17 June 2011) and Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, (*Indonesia – Iron or steel products*), (15 August 2018).

[915] Res judicata means literally "a matter judged" which implies that a case in which there has been a final judgment and is no longer subject to appeal the matter can no longer be raised again.

[916] The principle of lis alibi pendens addresses the problem of contradictory judgments, for example if two courts would reach different decisions.

[917] Forum non conveniens means that a court can refuse to take jurisdiction over a more convenient forum which is available. See Hague Convention on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, art. 22.1, June 20, 2011 "[The] court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defense on the merits."

[918] WTO, World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 174.

Article 38 of the ICJ Statute could give some guidance to regulate conflicts of norms in international law. However, this only relate to disputes in ICJ, and WTO law does not refer to it.[919] Thus, it appears as if the Article does not provide the guidance needed to solve overlaps of jurisdiction and forum of choice clauses in RTAs.

Pauwelyn has described eight basic rules of international law which could give answers to which treaty prevails and to the problem with choice of forum in the absence of exclusivity.[920] These will be presented below, but this study rather intends to introduce them – not examine them thoroughly.

The first rule states that unless otherwise provided, all treaties are in principle created equal. The only exception is norms or rules which have the status of *jus cogens* which for example is codified in the Vienna Convention on the Law of Treaties.[921] In terms of RTAs they are usually not considered *jus cogens* which mean that the treaties are all equal. However, if two treaties state that they can be subject to dispute settlement procedures, the conflict can be subject to two disputes with two different results. Article 53 in the VCLT regulate treaties conflicting with a peremptory norm of general international law "*jus cogens*".

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character."

As Pauwelyn also puts it:[922]

> "First, WTO obligations are not part of *jus cogens*. Only WTO Members are bound by the WTO treaty. Unlike *jus cogens* or obligations *erga omnes*, WTO obligations are not binding on *all* states. Moreover, pursuant to Article 22.6 of the WTO Dispute Settlement Understanding (DSU), WTO obligations can be suspended in response to breach. Hence, they can hardly be viewed as norms 'from which no derogation is permitted', under the definition of *jus cogens* in Article 53 of the Vienna Convention.

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[919] Songling, Yang, The solution for jurisdictional conflicts between the WTO and RTAs: the forum choice clause, *Michigan State International Law Review*, Vol. 23.1., page 121.

[920] Pauwelyn, Joost, Legal Avenues to "Multilateralizing regionalism", in Richard Baldwin and Patrick Low (ed), *Multilateralizing Regionalism, Challenges for the Global Trading System*, WTO The Graduate Institute, (Cambridge, 2009), pages 373-379.

[921] Vienna Convention on the Law of Treaties, Articles 53 and 64. Jus cogens means literally "compelling law" and describes norms from which no derogation is permitted.

[922] Pauwelyn, Joost, A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?, *European Journal of International Law,* (2003), Vol. 14 No. 5, 907–951, page 927.

> As obvious as it may sound, the fact that WTO norms are not part of *jus cogens* has an important consequence: it means that both earlier and later treaties in conflict with the WTO treaty are *not* invalid. On the contrary, in principle, later treaties will prevail over the WTO treaty between the parties to both treaties, pursuant to Article 30 of the Vienna Convention…"

The second rule states that a treaty is only binding upon the parties to it.[923] This rule also indicates that if one of the parties to the RTA is not a Member of the WTO, then the RTA will prevail, and the WTO DSB will be without effect in that relation. For example, if two countries are members of an RTA which excludes the possibility to use safeguard measures among the parties and one of the members (which also is a member of the WTO) decides to use a multilateral safeguard measure towards all imports (and thus all countries), then the only possible dispute settlement mechanisms for the non-WTO member would be to bring the dispute to the RTA.

The third rule according to Pauwelyn indicates that a treaty must be interpreted as taking account of "any relevant rules of international law applicable in the relations between the parties".[924] The Appellate Body in *Peru – Agricultural Products* stated that:

> "In order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted."[925]

This will be attended to in the next section below.

The fourth rule gives the alternative where one treaty prevails over another treaty despite rule number one. This is the issue with the forum of choice clauses as elaborated below. An example is some of the EPAs which state that they prevail over the Cotonou agreement in certain parts. Also, in the EPAs it is stated in the CARIFORUM that "the Parties agree that nothing in this Agreement requires them or the Signatory CARIFORUM States to act in a manner inconsistent with their WTO obligations" and also that "disputes shall not be set under the WTO Agreement and that recourse to dispute settlement shall be without prejudice to any action in the WTO". As elaborated above, this could have the effect that the parties waive their rights to have the dispute brought under the WTO DSB. In the *Peru – Agricultural Products*, as will be discussed below, Peru argued that the parties had modified their WTO rights and obligations in the FTA which thus should prevail.

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[923] Vienna Convention on the Law of Treaties, Article 26.

[924] Vienna Convention on the Law of Treaties, Article 31.3 (c).

[925] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para. 5.101.

Rule number five indicates that a treaty is valid and legal unless it is declared otherwise. One example is GATT Article XXIV which allows for exceptions from the MFN principle as long as the FTAs or custom unions meet the conditions set in GATT Article XXIV. This will be attended to again below with regard to the VCLT.

Rule number six states that a later treaty prevails over an earlier, also known as *lex posterior derogat lex priori*. However, the purpose of RTAs is not to divert multilateral negotiations but rather to enhance regional trade and thus does not intend to replace the WTO agreements. It is only where the RTA concerns the same subject matter as this will be relevant. Also, as will be elaborated on below, RTAs or FTAs might prevail over WTO disciplines in the event of lex superior. This will be attended to more below.

According to Pauwelyn's seventh rule a more specific treaty prevails over a more general rule, also known as *lex specialis derogat lex generalis*. A rule becomes "special" or "general" in relation to other rules not exactly in itself. The principle that special law derogates from general law is widely accepted when conflict of norms occur.[926] Also, a special rule can be considered to be an application of a general standard or instead as a modification and overruling of the general standard.[927] The notion of "self-contained regimes" such as the WTO is also a subcategory of lex specialis.[928] One example is paragraph 1 of the Enabling Clause which ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule (lex specialis), prevails over Article I:1. Also, the creation of bilateral and regional safeguards does not affect the integrity of the global safeguard measure since the two types of safeguards are not in relation to one another in order to apply the legal principle of *lex specialis derogate generali*.[929] The Appellate Body reviewed lex specialis in *EC – Bananas III,* in regards to different agreements.[930] As stated in a submission on third party rights by the EU:

> "if a conflict would arise between a general rule … and a specific rule … that conflict would be resolved by applying the principle of *lex specialis,* which, at least when applied within a single legal instrument, constitutes a rule of interpretation, and one

[926] Chapter X, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, page 284-285.

[927] Ibid, page 286.

[928] Ibid, page 288.

[929] Kotera, Akira and Kitamura, Tomofumi, On the comparison of safeguard mechanisms of free trade agreements, *RIETI Discussion paper series* 07-E-017, (2007), page 8.

[930] Appellate Body Report, *EC – Bananas III*, European Communities - Regime for the importation, sale and distribution of bananas, WT/DS27/AB/R, (9 September 1997).

that is part of the customary rules of interpretation of public international law, and hence applicable pursuant to Article 3.2 of the DSU."[931]

According to Kotera and Kitamura, the application of the principle of *lex specialis derogate generali* also means that regional safeguard measures does not affect the multilateral safeguard mechanism and that there is thus no scope for conflict.[932] Lee however, believes that two scenarios present a potential conflict as already presented.[933] One scenario is where the regional safeguard measure applicable to non-RTA members exceed the duty rate on an MFN basis. The other scenario is when the RTA require exemption of imports from RTA members.[934] This has also been discussed above.

The eighth rule covers the subject where dispute panels only have jurisdiction under their respective treaty. For example, the WTO panels have limited jurisdiction and can only find violations under the covered agreements of the WTO according to the Dispute Settlement Understanding Article 1. However, this does not indicate that other treaties are irrelevant. In the interpretation of the exclusivity forum choice, this implies that the clause clearly specifies which dispute settlement has jurisdiction over which treaty and that the disputes will be settled in the correct forum.[935] In the *Peru – Agricultural Products*, it was emphasized that the Appellate Body could not interpret the FTA since it was not the right forum to do so.

In *Indonesia – Iron or Steel products*, the panel found that the imposition of tariffs originating in countries including its RTA partners means that the "GATT obligation being suspended … is the GATT exception under Article XXIV of the GATT 1994.*"*[936] The panel then stated that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners.

If a dispute is handled in the regional dispute system, there is a potential risk that the jurisdiction of the WTO could be slowly undermined. Also, if the regional dispute system comes to a conclusion it is questionable to which extent the

[931] World Trade Organisation Article 22.6 Panel Proceedings, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (DS294), Written Submission by the European Union Regarding Third Party Rights, Geneva 11 March 2010.

[932] Kotera, Akira and Kitamura, Tomofumi, On the comparison of Safeguard Measures of Free Trade Agreements, *RIETI Discussion Paper Series* 07-E-017 (March 2007), page 8.

[933] Lee, Yong-Shik, *Safeguard Measures in World Trade Law, The Legal Analysis,* Kluwer Law International, 3rd ed, (2014), page 260.

[934] Ibid.

[935] Pauwelyn, Joost, Legal Avenues to "Multilateralizing regionalism", in Richard Baldwin and Patrick Low (ed), *Multilateralizing Regionalism, Challenges for the Global Trading System*, WTO The Graduate Institute, (Cambridge, 2009) pages 373-379.

[936] Panel report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/R, WT/DS496/R, (*Indonesia – Iron or steel products*), 18 August 2017, para. 7.19.

conclusion is binding in the WTO dispute settlement body. Another concern is as mentioned whether exclusivity clauses as the one included in the EPAs is binding to the extent where the WTO dispute settlement body cannot examine the dispute.[937] One difference between the regional dispute system and the WTO dispute body is that the WTO system can have positive (or negative) externalities for members that *are not parties* to the dispute. The *US – Tuna II* case is used to demonstrate the externality issues that may be with WTO dispute settlement and that sometimes the WTO DSB tries cases which perhaps ought to have been settled elsewhere.

The *US – Tuna II* case,[938] started in 2008 and has remained an issue at least until 2019. Allegedly Mexico failed to bring the dispute to NAFTA rather than the WTO DSB. After Mexico's failure to move its 'dolphin safe' labelling dispute from the WTO to the NAFTA, the United States had requested NAFTA dispute settlement consultations, as requested by the United States and as required by Article 2005 of the NAFTA.[939] In this case it was an exclusive forum choice, but it was not invoked, and despite this fact the WTO dispute settlement body tried it. Thus, the DSB came to a different conclusion then in the later *Peru – Agricultural Products*.

The issue of which treaty prevail might also get more attention due to the fact that the Appellate Body is becoming less functional. In the Appellate Body Annual Report 2017 it is stated that 2017 will be remembered as an extraordinary vigorous year for the Appellate Body and the WTO dispute settlement system as a whole. The reason being the increasing inflow of disputes and the composition of the Appellate Body which should be seven members but was down to only four members. Any new members has not been able to be appointed due to the view that the Appellate Body has allegedly addressed issues that were not within the scope of the case.[940] This could totally undermine the functioning of the WTO DSB.

The US blockage of appointing or re-appointing Appellate Body members, could be seen as violating good faith and protection of Appellate Body as legally described in Article 17 DSU (composed of seven members).[941] Some WTO Members[942]

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[937] WTO, World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 173-174.

[938] United States – measures concerning the importation, marketing and sale of tuna and tuna products, (*US – Tuna II*), WT/DS381/AB/R.

[939] Yang Songling, The solution for jurisdictional conflicts between the WTO and RTAs: the forum choice clause, *Michigan State International Law Review*, Vol. 23.1., page 126.

[940] Appellate Body Annual Report for 2017, WT/AB/28, 22 June 2018, page 6ff.

[941] Petersmann, Ernst-Ulrich, *How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?* EUI Working papers, RSCAS 2018/71 Robert Schuman Centre for Advanced Studies Global Governance Programme-331, page 3.

[942] European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico and Costa Rica.

proposed a way to overcome the challenge and what is of interest to this study is the proposal:

- to clarify, for greater certainty, that issues of law covered in the panel report and legal interpretations developed by the panel, in the meaning of Article 17.6 of the DSU, while they include the legal characterisation of the measures at issue under the WTO rules, and the panel's objective assessment according to Article 11 of the DSU, they do not include the meaning itself of the municipal measures.
- to amend Article 17.12 of the DSU to provide that the Appellate Body shall address each of the issues raised on appeal by the parties to the dispute to the extent this is necessary for the resolution of the dispute.[943]

The US response to this is that the WTO Appellate Body must follow the rules agreed upon in 1995 and that the proposal is not enough since it will not address the concerns that Members have raised. The US also believe it is better "to consider *why* the Appellate Body has felt free to depart from what WTO Members agreed to, and to discuss *how best* to ensure that the system adheres to WTO rules as written".[944]

6.5.2 Modifications of agreements

As stated in Chapter 1, the VCLT applies to treaties between States and is also applicable on RTAs between any of the parties to the VCLT.[945] Some RTAs also refer to rules of international law or the VCLT as will be illustrated below.[946]

[943] General Council 12-13 December 2018, Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico and Costa Rica to the general council, WT/GC/W/752/Rev.1, 10 December 2018.

[944] Statements by the United States at the Meeting of the WTO General Council, Geneva, December 12, 2018. Found at https://geneva.usmission.gov.

[945] Article 1, Vienna Convention on the Law of Treaties, 1155 UNTS 331, (adopted 22 May 1969, entered into force 27 January 1980).

[946] For example Article 102(2) in NAFTA, which doesn't explicitly mention the VCLT but state: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

Appellate Body in *US — Gasoline* stated that WTO law was not to be "read in clinical isolation from public international law".[947] The VCLT has been referred to by the WTO DSB.[948] In *EC — Sardines*, the Appellate Body stated that:

> "We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of pacta sunt servanda articulated in Article 26 of the Vienna Convention. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member."[949]

Pacta sunt servanda means that every treaty in force is binding upon the parties to it and must be performed by them in good faith as described above. Amongst others, the obligation excludes the contractors from entering into successive agreements incompatible with obligations entered into earlier. Article 30 VCLT deals with the application of successive treaties relating to the same subject matter and determines that states are free to renegotiate their own commitments towards each other, with the condition that the rights of third states are not affected this agreement. The principle of contractual freedom is generally limited by the obligation not to impinge on the rights of third states as laid out in Article 34 VCLT. Article 30(2) states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

This means that the exclusivity forum clause in the EPAs where it says that the provisions shall not be subject to either "this Agreement" or the "WTO Dispute Settlement Mechanism" the other treaty prevail accordingly. In accordance with Article 30(3) the provisions of the previous treaty apply only to the extent that they are compatible with the later treaty. The formation of the trade agreement as well as the exclusivity forum clause is compatible with the WTO Agreements and thereby Article 30(3). Also, the phrase that the RTAs prevail over WTO law seems to be intended for occasions where RTA provisions went beyond WTO disciplines, not to

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[947] Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, (US — Gasoline), WT/DS2/AB/R, 29 April 1996, p. 17. See also Appellate Body Reports, India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, (India — Patents (US)), WT/DS50/AB/R, 19 December 1997, para. 46; Appellate Body Report Japan — Taxes on Alcoholic Beverages (Japan — Alcoholic Beverages II), WT/DS8/AB/R ; WT/DS10/AB/R ; WT/DS11/AB/R, 4 October 1996, pp. 10-12.

[948] See for example Appellate Body Report in Brazil — Measures Affecting Imports of Retreaded Tyres (*Brazil — Retreaded Tyres*), WT/DS332/AB/R, 3 December 2007 and Appellate Body Report, European Communities — Trade Description of Sardines, (*EC — Sardines*), WT/DS231/AB/R, 26 September 2002, para. 278.

[949] Appellate Body Report, European Communities — Trade Description of Sardines, (*EC — Sardines),* WT/DS231/AB/R, (26 September 2002), para. 278.

prevail in the event of inconsistency.[950] The International Law Commission also advises States to include conflict clauses in treaties that might conflict with other treaties which also should be linked with appropriate dispute settlement mechanisms,[951] such as the ones found in the EPAs.

In *EC — Hormones (US) (Article 22.6 — EC),* the Arbitrators applied Article 30 in the context of declining to take certain bilateral agreements, invoked by the US, into account since "the EC schedule, in accordance with Article 30 of the Vienna Convention on the Law of Treaties, has superseded and prevails over the bilateral agreements."[952]

The panel in *Argentina – Poultry* found that Brazil had not failed to act in good faith when they challenged Argentina's anti-dumping measure before the MERCOSUR Ad Hoc Tribunal first and when they lost, they initiated a proceeding in the WTO dispute settlement system.[953] In the case *Peru –Agricultural Products*, the Appellate Body stated that the general rule of interpretation in Article 31 of VCLT of multilateral treaties such as the WTO covered agreements, aims at "establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties."[954] An interpretation of the treaty can apply to the parties to a dispute, but the purpose should be to create the mutual purposes of the parties to the treaty being interpreted.

It was also emphasised that "in order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted."[955] In this case, the Appellate Body came to the conclusion that it did not concern the same subject matter.[956]

The Appellate Body has also stated that:

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[950] WTO, Negotiating Group on Rules, *Compendium of issues related to regional trade agreements*, Background Note by the Secretariat, TN/RL/W/8/Rev.1, (1 August 2002), para. 120.

[951] United Nations, General Assembly, International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, A/CN.4/L.682/Add.1, (2 May 2006), page 12.

[952] Decision by the Arbitrators, European Communities – Measures concerning meat and meat products (Hormones) original complaint by the united states recourse to arbitration by the European Communities under Article 22.6 of the DSU, *(EC — Hormones (US) (Article 22.6 — EC),* WT/DS26/ARB, (12 July 1999), para. 50.

[953] Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003), para. 7.34.

[954] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, (*Peru – Agricultural Products*), WT/DS457/AB/R, (20 July 2015), para 5.95.

[955] Ibid, para 5.101.

[956] Ibid, para 5.104.

> "We further note that the rules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.[622] The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the Vienna Convention if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions. Moreover, a permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is "necessarily excluded" by the application of the Vienna Convention. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty."[957]

The Appellate Body will not interpret the hierarchy between the laws, but rather interpret the WTO rules with the terms, context and object and purpose of the treaty. The object and purpose with the Agreement on Safeguards is to restrict the possibility of using an "escape clause" and to establish a pure "emergency" (extraordinary) measure, which is applicable to all Members. In *EC – Poultry* the Appellate Body stated that it was its view that it was not necessary to have recourse to the Vienna Convention, because the text of the WTO Agreement and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between the WTO and the RTA treaty.[958]

The FTA between Peru and Guatemala also states that the parties confirm their existing rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), while another paragraph of the same provision states that, "in the event of any inconsistency between the FTA and the WTO covered agreements, the provisions of the FTA shall prevail to the extent of the inconsistency." The Appellate Body did not believe that it was clear whether a WTO-inconsistent measure would be allowed under these circumstances. When reading these provisions together; that Peru may maintain the Price Range System (PRS) and that the FTA shall prevail to the extent of the inconsistency, does not clearly indicate that a WTO inconsistent PRS would be allowed since it is not clear that the parties have agreed between themselves to modify Article 4.2 of the

[957] Appellate Body Report on United States – continued existence and application of zeroing methodology, (*US – Continued Zeroing*), WT/DS350/AB/R, (4 February 2009), para. 273.

[958] Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, (*EC – Poultry*), WT/DS69/AB/R, (13 July 1998), para. 79.

Agreement of Agriculture and Article II:1(b).[959] The Appellate Body continued and argued that the "alleged modification" might not be subject under Article 41 of the Vienna Convention.[960]

Article 40 in VCLT regulates amendments which concern all parties to a treaty, while Article 41 VCLT regulates the modification of multilateral agreements through succeeding agreements between some of the parties to the treaty. Basically, Article 41 allow for renegotiations between states, without affecting the rights of the third parties to a treaty at issue and in order to be lawful *inter se* modifications they must fulfil the requirements in Article 41.[961]

Article 41.1 VCLT state:

> "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
>
> (b) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

In *Turkey — Textiles*, the panel referred to Article 41 and then observed that "even if the Turkey-EC customs union agreement did require Turkey to adopt all EC trade policies, an issue that we do not have to address, we consider that such requirement would not be sufficient to exempt Turkey from its obligations under the WTO Agreement."[962] The Appellate Body in *Peru – Agricultural Products* went further and stated:

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[959] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, *(Peru – Agricultural Products),* WT/DS457/AB/R, (20 July 2015), para 5.109-5.110.

[960] Ibid, para 5.111.

[961] Vidigal, Geraldo, The Return of Voluntary Export Restraints? How WTO Law Regulates (and Doesn't Regulate) Bilateral Trade-Restrictive Agreements, 53(2) *Journal of World Trade* (2019), page 7.

[962] Panel Report, Turkey – Restrictions on imports of textile and clothing products, (*Turkey — Textiles*), WT/DS34/R, 31 May 1999, para. 9.182.

> "Nevertheless, we note that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements[300], which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA."

Thus, the correct way to determine whether a provision in an FTA that could depart from certain WTO rules is nevertheless consistent with the covered agreements, are the WTO provisions that allow the formation of RTAs and that is Article XXIV of the GATT, the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS).[963]

The "*inter se*" modifications in Article 41 may take the form of external treaties that changes the legal relationship between certain WTO Members,[964] but might also indicate modifications within a treaty that might for example disrupt the object and purpose.[965] *Inter se* was referred to by the International Law Commission (ILC) as "… an agreement entered into by some only of the parties to a multilateral treaty and intended to modify it between themselves alone".[966] *Inter se* agreements are often used as to take more effective or more far-reaching measures than the multilateral, *i.e.* RTAs.[967] WTO law expressly does not prohibit the formation of RTAs. RTAs are compatible with Article 41 VCLT as long as they are in compliance with the conditions set forth by the WTO Agreements.

Shaffer and Winters argue that the WTO Appellate Body could recognize that FTA rules constitute "consent" to a measure that would otherwise be non-consistent to WTO in accordance with Article 41 VCLT, and thus eliminate a conclusion of unlawful conduct (per Article 20 of the ILC Articles), provided (i) that the consent

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[963] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, (*Peru – Agricultural Products*), WT/DS457/AB/R, (20 July 2015), para 5.113.

[964] Cottier, Thomas and Foltea, Marina, Constitutional Functions in the WTO and Regional Trade Agreements, in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreeents and the WTO Legal System*, (2006), Oxford University Press, page 55.

[965] Mathis, James H., Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement, (The Hague: T.M.C. Asser Press, 2002), page 274.

[966] International Law Commission, *Report of the International Law Commission on the Work of the Second Part of its 17th Session*, (1996) UN Doc. A/6309/Rev.1.

[967] United Nations, General Assembly, International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, A/CN.4/L.682/Add.1, (2 May 2006), page 12.

is sufficiently clear and (ii) that other WTO Members are not adversely affected by it.[968]

Clearly, *inter se* modification such as clauses on grey area measures in RTAs would violate Article 41.1 since the modification in question is prohibited by the Agreement on Safeguards. The Agreement clearly emphasizes that it is not allowed to seek, take or maintain *any* voluntary export restraints, orderly marketing arrangements or *any* other similar measures on the export or the import side under *agreements, arrangements and understandings* entered into by two or more Members.

In case a conflict occurs between WTO law and RTAs, the RTAs need to surrender according to Cottier and Foltea, since they are an exception to WTO law,[969] also the *inter se* agreement is *lex posterior*, codified in Article 30(3) and (4) of the Vienna Convention, thereby the WTO law (*lex priori*) prevails.[970] The *lex posterior* will then be illegal based on the *lex priori*, but it will not be invalid.[971] However, WTO Law does not *inter se* affect the relationship of the parties to RTAs despite the fact that it is inconsistent with GATT Article XXIV and thus Article 41 VCLT,[972] since WTO law does not prohibit the formation of RTAs.

6.5.3 WTO jurisprudence on overlaps of jurisdiction

Some of the cases described below has already been mentioned above but will be repeated here due to issues which in one way or another deal with forum shopping or overlaps of jurisdiction.

Turkey – Textiles

This case does not concern forum shopping per se but is interesting for various reasons regarding overlaps of jurisdiction. Turkey argued for example that the complaint should be brought against the EC as well due to the Turkey – EC Customs Union, but the EC had not applied the measures. Also, Turkey arguably had applied

[968] Shaffer, Gregory and Winters, L. Alan, FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate Body Wrong in Peru-Additional Duty (DS457)?, RSCAS 2016/65, Robert Schuman Centre for Advanced Studies, *Global Governance Programme-241*, page 23.

[969] Cottier, Thomas and Foltea, Marina, Constitutional Functions in the WTO and Regional Trade Agreements, in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreeents and the WTO Legal System*, (2006), Oxford University Press, page 56-57.

[970] Pauwelyn, Joost, *Conflict of Norms in Public International Law. How WTO Law relates to other rules of international law.* Cambridge Studies in International and Comparative Law. Cambridge University Press (2003), page 310.

[971] Ibid, page 311.

[972] Cottier, Thomas and Foltea, Marina, Constitutional Functions in the WTO and Regional Trade Agreements, in Lorand Bartels and Federico Ortino (ed), *Regional Trade Agreements and the WTO Legal System*, (2006), Oxford University Press, page 61.

measures due to the obligations under the RTA and not WTO. Still, the case found its way to the WTO DSB. Here, Turkey was establishing a customs union with the EU and sought to harmonize its external trade policies with EU which had quantitative restrictions toward India.

This case has already been mentioned in Chapter 4, but in *Turkey – Textiles* the dispute concerned the issue of which restrictive trade measures that are allowed in a customs union.[973] It also concerned whether Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions and thus be posed as a defence for such a violation. Since safeguards are one of several types of measures restricting trade the conclusions that can be drawn from this particular case is of course of interest to this study.

India filed a complaint because of the Turkish quantitative restrictions[974] on imports of Indian textile and clothing products.[975] Article 12(2) of the Turkey – EC Association Council adopted Decision 1/95 stated that Turkey would apply "substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing." Turkey stated that if it did not impose quantitative restrictions on the textile and clothing from India, the EU would exclude 40 per cent of Turkey's exports from the customs union between Turkey and the EU and it would therefore not cover "substantially all the trade".[976] The panel concluded that the restrictions were inconsistent with the provisions of Articles XI and XIII of GATT 1994 and Article 2.4 of the Agreement on Textiles and Clothing and therefore not permitted under Article XXIV of the GATT 1994.[977]

Turkey appealed the panel's findings on the basis that these quantitative restrictions were justified by GATT Article XXIV.[978] The Appellate Body examined the text of the chapeau to Article XXIV to establish its ordinary meaning and held that Article XXIV may under certain conditions "justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible defence to a finding of such inconsistency."[979] Furthermore, the Appellate Body found that the text of the chapeau indicates that Article XXIV can justify measures

[973] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999).

[974] Safeguard measures can also consist of quantitative restrictions.

[975] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, *(Turkey-Textiles),* WT/DS34/AB/R, (19 November 1999), para. 1.

[976] Ibid, para 17.

[977] Ibid, para. 3.

[978] Ibid, para. 41.

[979] Ibid, para. 45.

inconsistent with certain other GATT provisions if they are introduced on the *formation* of a *customs union*.[980]

The Appellate Body noted that the terms provided that members of a customs union may maintain certain regulations restrictive of commerce that is otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. This statement makes it permissible to maintain *certain* restrictions *within* a customs union.[981] This means there is a possibility of liberalizing less than all trade and thus some flexibility when liberalizing the internal trade in customs unions.[982] The Appellate Body cautioned that the degree of flexibility allowed by the Article is limited by the requirement that duties and other restrictive regulations of commerce be eliminated with respect to substantially all internal trade.[983] The Appellate Body also noted that, GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met.[984]

Argentina – Poultry

In *Argentina – Poultry*, the case concerned that the issue had already been brought to the regional dispute settlement mechanism which had come to a ruling. Argentina had raised a preliminary issue where Brazil had challenged the measure before a MERCOSUR Ad Hoc Arbitral Tribunal. Thus, the panel should refrain from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings or that the panel should be bound by the ruling of the MERCOSUR Tribunal.[985] The dispute appeared to concern the same matter, and therefore Argentina argued that the case was already settled and the WTO DSB should be bound by the ruling. Brazil however argued that it did not concern the same legal basis and that it had the right to bring the dispute before the WTO.

Brazil argued:

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[980] Ibid, para. 46.

[981] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 113 and note 15.

[982] Estrella, Angela T. Gobbi and Horlick, Gary N., Mandatory abolition of anti-dumping, countervailing duties and safeguards in custom unions and free trade areas constituted between WTO Members: Revisiting a long-standing discussion in light of the Appellate Body's Turkey – Textiles Ruling. In Bartels, Lorand and Ortino, Federico, (ed.) *Regional Trade Agreements and the WTO Legal System*, Oxford University Press (2006), page 113.

[983] Ibid, page 113 and note 17.

[984] Appellate Body Report on Turkey-Restrictions on imports of textile and textile and clothing products, (*Turkey-Textiles*), WT/DS34/AB/R, (19 November 1999), para. 50.

[985] Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003), para. 7.17.

> "Brazil submits that the principle of estoppel is not applicable in the present case, in part because the dispute before the MERCOSUR Tribunal was grounded on a different legal basis from the dispute before this Panel. In any event, Brazil asserts that the principle of estoppel means that "a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly."[43] As noted by the panel in *EEC (Member States) – Bananas I*, "estoppel could only result from the express, or in exceptional cases implied, consent of such parties or of the CONTRACTING PARTIES".[44] According to Brazil, the simple fact that it had brought a similar dispute to the MERCOSUR Tribunal does not represent that Brazil has consented not to bring the current dispute before the WTO, especially when the dispute before this Panel is based on a different legal basis than the dispute brought before the MERCOSUR Tribunal."[986]

The panel concluded that the issue concerns the principles of good faith and estoppel and also related to Article 3.2 of the DSU and Article 31.3(c) of the Vienna Convention.[987] According to the Appellate Body in *US – Offset Act (Byrd Amendment)* "there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith".[988]

> "On the basis of the abovementioned Appellate Body finding, we consider that two conditions must be satisfied before a Member may be found to have failed to act in good faith. First, the Member must have violated a substantive provision of the WTO agreements. Second, there must be something "more than mere violation". With regard to the first condition, Argentina has not alleged that Brazil violated any substantive provision of the WTO agreements in bringing the present case. Thus, even without examining the second condition, there is no basis for us to find that Brazil violated the principle of good faith in bringing the present proceedings before the WTO."[989]

The panel found that Brazil had not made an express statement that it would not bring WTO dispute settlement proceedings previously challenged by MERCOSUR Tribunal.

> "We do not consider Argentina's response sufficient to establish that the three conditions it identified for the application of the principle of estoppel are fulfilled in the present case.[58] Regarding the first condition identified by Argentina, we do not

[986] Ibid, para. 7.22.

[987] Ibid, para. 7.33.

[988] Ibid, para. 7.35 and Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000 ("*US –Offset Act (Byrd Amendment)*"), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 297.

[989] Panel Report on Argentina – Definitive anti-dumping duties on poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R, (22 April 2003), para. 7.36.

> consider that Brazil has made a clear and unambiguous statement to the effect that, having brought a case under the MERCOSUR dispute settlement framework, it would not subsequently resort to WTO dispute settlement proceedings. In this regard, we note that the panel in *EEC (Member States) – Bananas I* found that estoppel can only "result from the express, or in exceptional cases implied consent of the complaining parties".[59] We agree. There is no evidence on the record that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR. Nor does the record indicate exceptional circumstances requiring us to imply any such statement. In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the *DSU*."[990]

The reason for this is that the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure.

Thus, the forum of choice clause allows the dispute to be brought before different courts and there is no exclusive choice of forum clause. As a conclusion, waivers of WTO rights could be recognised under some specific circumstances.

Mexico – Soft Drinks

In *Mexico – Soft Drinks*, Mexico demanded that the WTO panel should decline to exercise its jurisdiction, since the matter should be brought to the regional dispute settlement mechanism instead.

The United States had requested consultations with Mexico concerning certain tax measures imposed by Mexico on soft drinks and other beverages that use any sweetener other than cane sugar. Mexico had requested the panel to "decline to exercise its jurisdiction in this case" and that it "recommend to the parties that they submit their respective grievances to an Arbitration Panel, under Chapter Twenty of the NAFTA".[991]

The Appellate Body concluded however:

> "Before addressing Mexico's arguments, we note that "Mexico does not question that the Panel has jurisdiction to hear the United States' claims."[85] Moreover, Mexico does not claim "that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case".[86] Instead, Mexico's position is that,

[990] Ibid, para. 7.38.

[991] Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, *(Mexico — Soft Drinks*), WT/DS308/13, 29 March 2006, para. 3.

> although the Panel had the authority to rule on the merits of the United States' claims, it also had the "implied power" to abstain from ruling on them[87], and "should have exercised this power in the circumstances of this dispute."[88] Hence, the issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States' claims that were before it, but, rather, whether the Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' claims under Article III of the GATT 1994 that were before it."[992]

Thus, the issue was not whether the Appellate Body had jurisdiction, but rather that it should refrain from using it. The Appellate Body continued that:

> "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." Panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated." Panels may exercise judicial economy that is refrain from ruling on certain claims, when such rulings are not necessary "to resolve the matter in issue in the dispute". The Appellate Body has nevertheless cautioned that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy.""[993]

First, the Appellate Body will examine whether it has jurisdiction or not, and it has the possibility to refrain from ruling if it finds it not necessary. At this time, this was not the case. The Appellate Body in *Mexico – Soft Drinks* continues:

> "A decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.102 We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction.""[994]

The Appellate Body also noted that Mexico had expressly stated that a so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been exercised, but this constituted no legal impediments applicable in this case.[995]

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[992] Appellate Body Report, Mexico — Tax Measures on Soft Drinks and Other Beverages, (*Mexico — Soft Drinks*), WT/DS308/13, 29 March 2006, para. 44.

[993] Ibid, para. 45.

[994] Ibid, para. 53.

[995] Ibid, para. 55.

The Appellate Body went further:

> "…We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements. …"[996]

Based on this conclusion that the Appellate Body could not adjudicate on obligations arising from NAFTA, they upheld the panel's ruling. In a footnote it was also stated that:

> "We also note that the ruling of the PCIJ in the Factory at Chorzów case relied on by Mexico was made in a situation in which the party objecting to the exercise of jurisdiction by the PCIJ was the party that had committed the act alleged to be illegal. In the present case, the party objecting to the exercise of jurisdiction by the Panel (Mexico) relies instead on an allegedly illegal act committed by the other party (the United States)."[997]

Howse and Langille argue that this establishes the independence of the WTO dispute settlement system from other legal orders and that it could also protect the WTO system from the consequences if regional dispute settlements would make their own determinations that WTO norms have been violated.[998]

Brazil – Retreaded Tyres

This case is interesting since the foundation for an exemption to apply WTO law was based on a decision in an RTA dispute settlement mechanism. This case also somewhat concerned whether Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions and thus be posed as a defence for such a violation.

Brazil had imposed an import ban on retreaded tyres and exempted tyres imported from MERCOSUR. The question at issue was whether this was in accordance with WTO law and especially Article III, Article XI and Article XX.

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[996] Ibid, para. 56.

[997] Ibid, footnote 115.

[998] Howse, Robert and Langille, Joanna, Spheres of commerce: the WTO legal system and regional trading blocs–a reconsideration, *Georgia Journal of International and Comparative Law,* Vol. 46:649, page 688.

After determining that the exemption was discriminatory, the panel examined whether this discrimination was arbitrary or unjustifiable. The panel concluded that the import ban had been applied in a manner that would constitute arbitrary or unjustifiable discrimination.[999] The MERCOSUR tribunal had first found that the ban constituted a restriction of trade prohibited under MERCOSUR.[1000] The Appellate Body examined the chapeau of Article XX and stated that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.

> "In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."[425] The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[426] Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."[427] The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[428]"[1001]

The Appellate Body went further and examined whether the explanation that Brazil had to exempt imports from MERCOSUR parties due to a ruling in a MERCOSUR tribunal and found that it was unjustifiable.

> "Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX."[1002]

> "In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article

[999] Appellate Body Report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Tyres*), WT/DS332/AB/R, (17 December 2007), para. 216.

[1000] Ibid, para. 217.

[1001] Ibid, para. 224.

[1002] Ibid, para. 227.

> XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination."[1003]

Thus, the Appellate Body found that the ruling by the MERCOSUR tribunal and the application of the MERCOSUR agreement, was not a justifiable cause to apply measures inconsistent with WTO law. This ought to be the same conclusion if the applied measure was safeguard measures. They noted however "that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994." Only the "legitimate objective" of the WTO agreements could justify violations of the WTO obligations.

> "In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union."[1004]

Interestingly, the panel came to the conclusion that the MERCOSUR ruling was *res judicata*. Hence, if the ruling would have concerned safeguard measures, it would come to the same conclusion that it was *res judicata.*

> "We also note that MERCOSUR rulings are *res judicata* for the parties involved and that the European Communities does not dispute that Brazil had an obligation, under MERCOSUR, to implement the ruling."[1005]

Dominican Republic – Safeguard Measures

As introduced in Chapter 2, in the case *Dominican Republic – Safeguard Measures* the respondent claimed that the panel was not competent to analyse the violation of a concession granted outside the scope of the WTO and therefore lacked jurisdiction.

[1003] Ibid, para. 228.

[1004] Ibid, para. 234 and footnote 445.

[1005] Panel report on Brazil – Measures Affecting the Imports of Retreaded Tyres (*Brazil – Tyres*), WT/DS332/R, (12 June 2007), para. 7.271.

The Dominican Republic had not applied tariffs higher than the binding in its schedule of concessions. Along with China, Turkey, Panama, Colombia, United States and the European Union, all the members of the Dominican Republic – Central America filed a complaint on the application.[1006] In the case, as have been described before, the Dominican Republic had adopted a duty of 38 per cent Ad Valorem on imports of polypropylene bags and tubular fabric but argued that Article XIX was not applicable and that that the dispute concerned alleged violations of free trade agreements signed by the Dominican Republic, over which the panel lacked jurisdiction. The Dominican Republic argued that pursuant to Articles 3.2 and 7.2 of the DSU, the panel is not competent to analyse the infringement of a concession granted outside the scope of the WTO.[1007] However, the alleged inconsistencies are based on WTO law and not the FTA.

The panel did not find it necessary to rule on the request of lack of jurisdiction,[1008] but examined the context, object and purpose of the relevant agreements and concluded that the challenged measures were applicable under GATT Article XIX and the Agreement on Safeguards. The fact that the measures did not suspend any obligation under the Agreement or withdrew or modified concessions was considered of no practical relevance for resolving the dispute at issue.[1009]

Peru – Agricultural Products

In the case *Peru – Agricultural Products*, it was argued that the FTA should prevail over WTO law.

Guatemala complained over an additional duty on imports of agricultural products such as rice, sugar, maize, milk and certain dairy products that Peru had in place. These duties were determined using a mechanism called the Price Range System (PRS), which mean (i) a range constituted by a floor price and a ceiling price, which reflect international prices over the last 60 months; and (ii) a reference price published every two weeks, reflecting the average international market price for each product concerned. Guatemala claimed that the measures were inconsistent with various Articles of the GATT, such as Article II, and also Article 4.2 and footnote 1 of the Agreement on Agriculture and some Articles of the Customs Valuation Agreement.

[1006] The members of the Dominican Republic – Central America is Costa Rica, Dominican Republic, Guatemala, Honduras and Nicaragua. Interestingly, Panama has a bilateral agreement with the Dominican Republic, and US also has joined a CAFTA-DR. EU is part of the EU-CARIFORUM EPA agreement where the Dominican Republic is a party.

[1007] Panel Report on Dominican Republic – Safeguard measures on imports of polypropylene bags and tubular fabric, *(Dominican Republic – Safeguard Measures),* WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, (31 January 2012), para. 7.92.

[1008] Ibid, para. 8.1(b).

[1009] Ibid, para. 7.90.

Peru argued that (amongst others), under the FTA signed between Guatemala and Peru in December 2011, Peru was allowed to maintain its PRS. Peru also argued that the parties had modified their reciprocal WTO rights and obligations, and consequently, the FTA should prevail.

In the appeal, Peru argued that the panel had erred in the interpretation because it failed to take into account the FTA between Peru and Guatemala and ILC Articles 20 and 45, in accordance with Article 31(3) of the Vienna Convention.[1010] Peru also argued that according to ILC Article 20, Guatemala's approval and ratification of the FTA amounts to "consent" prohibiting the wrongfulness of Peru's maintenance of the PRS, and that "Guatemala's ratification of the FTA amounts to a waiver in the sense of Article 45(a) of the ILC Articles".[1011] Guatemala argued that that Peru is misusing Article 31 of the Vienna Convention, which is about the interpretation of a treaty. Guatemala also argued that Peru wants the Appellate Body to modify and amend Article 4.2, and to apply the provisions of the FTA or certain ILC Articles.[1012]

The Appellate Body continued:

> "We thus understand that, with multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 of the Vienna Convention is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted."[1013]

As also mentioned above, the Appellate Body then examined Article 31(3)(c) of the Vienna Convention and stated that:

> "In order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted.[291] In EC and certain member States – Large Civil Aircraft, the Appellate Body considered that Article 4 of the 1992 Agreement between the EEC and the United States on Trade in Civil Aircraft[292] was not relevant to the interpretation of "benefit" in Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because, while imposing certain quantitative limits on the amount of government support that may be provided for the development of large civil aircraft programmes, it did not

[1010] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para. 5.84.

[1011] Ibid. para. 5.91.

[1012] Guatemala's appellee's submission, para. 182.

[1013] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para. 5.95.

> "speak to the market-based concept of 'benefit' as reflected in Article 1.1(b) of the SCM Agreement and the market-based benchmark reflected in Article 14(b)".[293] The Appellate Body has also considered that agreements "regarding the interpretation of the treaty or the application of its provisions" within the meaning Article 31(3)(a) of the Vienna Convention are "agreements bearing specifically upon the interpretation of a treaty".”[2941014]

The Appellate Body concluded that the FTA and ILC Articles 20 and 45 were not “relevant” rules of international law within the meaning of Article 31(3)(c) and that the FTA was not a subsequent agreement regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b).

> “In the light of the above, we consider that, while Peru has brought arguments on appeal under Article 31(3)(a) and (c) of the Vienna Convention concerning the Panel's interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, in fact, Peru's arguments go beyond the interpretation of these provisions in accordance with Article 3.2 of the DSU and Article 31 of the Vienna Convention, and amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves.”[1015]

When it comes to the overlaps of jurisdictions, the Appellate Body stated:

> “In this respect, we note that paragraph 1 of Article 1.3 of the FTA states that the parties confirm their existing rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), while paragraph 2 of the same provision states that, in the event of any inconsistency between the FTA and the WTO covered agreements, the provisions of the FTA shall prevail to the extent of the inconsistency.[297] A reading of these provisions on their face reveals that it is not clear whether paragraph 9 of Annex 2.3, which states that Peru may maintain the PRS, should necessarily be construed as allowing Peru to maintain a WTO-inconsistent PRS, when read together with other provisions of the FTA.”[1016]

Due to the ambiguity, whether the FTA allows Peru to maintain a WTO-inconsistent PRS, the Appellate Body was not convinced that the parties had agreed between themselves to modify Article 4.2 and Article II:1(b). The Appellate Body was also

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[1014] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para. 5.101. (Original footnotes).

[1015] Ibid. para. 5.107.

[1016] Ibid. para. 5.109.

not convinced that the alleged modification as between the FTA parties would be subject to Article 41 of the Vienna Convention.[1017]

> "Nevertheless, we note that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements[300], which prevail over the general provisions of the Vienna Convention, such as Article 41. This is particularly true in the case of FTAs considering that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules in FTAs. However, Article XXIV conditions such departures on the fulfilment of the rule that the level of duties and other regulations of commerce, applicable in each of the FTA members to the trade of non-FTA members, shall not be higher or more restrictive than those applicable prior to the formation of the FTA."[1018]

The Appellate Body in *Peru – Agricultural Products* referred to the *Turkey – Textiles* case. In *Turkey – Textiles*, it was stated by the Appellate Body that GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. Furthermore, the Appellate Body found that the text of the chapeau indicates that Article XXIV can justify measures inconsistent with certain other GATT provisions if they are introduced on the formation of a customs union. However, the chapeau of Article XXIV:5 states that

> "…the provisions of this Agreement shall not prevent … the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area …"

Thus, the chapeau makes it clear that Article XXIV under certain conditions may justify the adoption of a measure which is inconsistent with certain other GATT provisions and may be invoked as a possible defence to a finding of inconsistency. This is however only the case if the measure is introduced upon the formation of a free trade area and only to the extent that the formation of the free trade area would be prevented if the introduction of the measure were not allowed. The Appellate Body in *Turkey – Textiles* relied also on paragraph 4 of this provision, which states that the purpose of a customs union or FTA is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries.[1019] The Appellate Body in *Peru – Agricultural Products* concluded that:

[1017] Ibid. para. 5.111.

[1018] Ibid. para. 5.112.

[1019] Appellate Body Report on Turkey – Restrictions on imports of textile and textile and clothing products, (*Turkey – Textiles*), WT/DS34/AB/R, (22 October 1999), para. 57.

> "In our view, the references in paragraph 4 to facilitating trade and closer integration are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements."[1020]

Thus, a conclusion would be that WTO Members must fulfil the requirements in accordance with Article XXIV of the GATT, the Enabling Clause and Article V of the General Agreement on Trade in Services (GATS)[1021] in order to be able to justify inconsistent measures under an FTA. However, Article XXIV cannot be used as a broad defence of all inconsistencies made.

One difference though between *Turkey – Textiles* and *Peru – Agricultural Products* is that in the former, the test was applied to set the conditions for validating a measure that violated a *third party's rights* in the WTO. In the latter, the test was applied to a measure that violated the WTO only between the *regional members* themselves.

Indonesia – Iron or Steel Products

The *Indonesia – Iron or Steel Products* is interesting since one of the two complaining parties was also party to an FTA with Indonesia and as such it was not subject to the MFN rate as mentioned in Chapter 2. Indonesia argued that it had applied a safeguard measure, because if they simply had increased the MFN rate then the suppliers from the FTA countries would not be affected by the measure. Hence, the case in a way concern issues on FTAs and WTO law rather than overlaps of jurisdictions.

The case was about increasing the MFN rate where Indonesia had no binding tariff obligation, as already mentioned. The existing MFN rate was 12.5% and the rate was increased to 20% in May 2015. At the time, Indonesia had RTA rates under the Association of Southeast Asian Nations (ASEAN)-China Free Trade Agreement (12.5%), the ASEAN-Korea Free Trade Agreement (10%), the ASEAN Trade in Goods Agreement (0%) and the Indonesia-Japan Economic Partnership Agreement (12.5%). The duty is applied in addition to the existing MFN and preferential duty rates. In its application, 120 Members were excluded based on that they were developing countries. The complaining parties are Chinese Taipei and Vietnam, the latter being a member of ASEAN.

Indonesia argued that tariff obligations under the ASEAN-Korea (10%) and the ASEAN Trade in Goods (0%) RTAs prevented it from "increase[ing] its tariff" on imports of galvalume. Indonesia also argued that "the application of the preferential

[1020] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para 5.116.

[1021] Ibid, para 5.113.

tariffs under Indonesia FTAs pursuant to Article XXIV of the GATT 1994 results in Indonesia's inability to counter [the] increased imports". Thus, the specific duty on imports of galvalume originating in countries including its RTA partners means that "the GATT obligation being suspended is in fact the GATT exception under Article XXIV of the GATT 1994".

The panel stated that:

> "We are of the view that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners.[47] Article XXIV of the GATT 1994 is a permissive provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures.[48] Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its ASEAN trading partners is established in the ASEAN Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the ASEAN-Korea Free Trade Agreement, not in Article XXIV.[49] In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a)."[1022]

Thus, the panel argues that the tariff obligation under the RTA does not prevent its members from raising tariffs under Article XXIV. It is the RTA that prevents its members from raising tariffs.

Even more interestingly, Indonesia and Vietnam have made an agreement for this specific dispute in regard to the blocking of appointing Appellate Body members.[1023] In this agreement, the parties have agreed to waive the right to appeal the case to the Appellate Body:

> "7. The parties agree that if, on the date of the circulation of the panel report under Article 21.5 of the DSU, the Appellate Body is composed of fewer than three

[1022] Panel report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/R, WT/DS496/R, (*Indonesia – Iron or steel products*), 18 August 2017, para. 7.20.

[1023] Indonesia – Safeguard on certain iron or steel products understanding between Indonesia and Vietnam regarding procedures under articles 21 and 22 of the DSU, WT/DS496/14, 27 March 2019.

> Members available to serve on a division in an appeal in these proceedings, they will not appeal that report under Articles 16.4 and 17 of the DSU."

The reason for this agreement at this time, is that the reasonable period of time (RPT) during which Indonesia would have to implement the recommendations and rulings of the DSB in this dispute would be seven months,[1024] and expired on 27 March 2019.[1025]

Russia – Measures Concerning Traffic in Transit

Russia had in *Russia – Measures Concerning Traffic in Transit* stated that the panel lacked jurisdiction.[1026] The panel however stated that:

> "The Panel recalls that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction which derives from the exercise of their adjudicative function.[144] One aspect of this inherent jurisdiction is the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction."[1027]

Also, as stated above, whether a violation of WTO law has occurred can only be decided through the recourse to dispute settlement in accordance with the rules and procedures of the DSU.[1028] Given the absence of any special treatment for disputes involving Article XXI, the said article is within the panel's terms of reference.[1029] Russia's argument that the panel lacks jurisdiction based on the fact that Article XXI(b)(iii) is "self-judging", fails since the panel has the power to review whether the requirements are met.[1030]

The US has also raised a defence on the imposition of the steel and aluminium Ad Valorem duties that these are political matters not capable of resolution by WTO dispute settlement. Thus, they argue that the WTO DSB does not have jurisdiction.

[1024] Seven months after the Appellate Body Report on Indonesia – Safeguard on certain Iron or Steel products, WT/DS490/AB/R, WT/DS496/AB/R, 15 August 2018.

[1025] Another way of dealing with the blocking, is to invoke Article 25 of the DSU via arbitration outside the dispute settlement system. This could be achieved by using for example FTA/RTA dispute settlement mechanisms as discussed in this Chapter.

[1026] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit*), (5 April 2019), para. 7.4.

[1027] Ibid, para. 7.53.

[1028] Article 23.2 Dispute Settlement Understanding.

[1029] Panel Report on Russia - Measures concerning traffic in transit, WT/DS512/R, (*Russia — Traffic in Transit*), (5 April 2019), para. 7.56.

[1030] Ibid, para. 7.102.

Even though the argument is based on national legislation rather than measures based on RTAs, it is interesting to see how the WTO DSB will review the matter.

6.6 Conclusion

The Agreement on Safeguards should be applicable to all Members according to the preamble. However, as illustrated above, this is not always the case. There are occasions where the non-discrimination principle is not mandatory and there are also instances where a member cannot apply the Agreement on Safeguards. Waiving the right to the WTO DSB in an RTA could mean that the Agreement on Safeguards is not applicable. Also, Members of the WTO may not make a unilateral determination that a violation of WTO law has occurred and may not take retaliation measures unilaterally concerning violations of WTO law according to Article 23.2 of the DSU. This means that whether a violation has occurred can only be decided through the recourse to dispute settlement in accordance with the rules and procedures of the DSU. Hence, violations of WTO law ought not to be handled in the RTA dispute settlement mechanism.

One of the difficulties here is that the Agreement on Safeguards provide the possibility to impose trade restrictive actions which otherwise would not be allowed according to WTO law. Thus, the Agreement on Safeguards provide an exemption. At the same time, Article XXIV provide the possibility to exempt from the MFN principle, allowing more favourable treatment towards parties to the RTA. This RTA in its turn provide the possibility to remove some of these favourable treatments by imposing regional safeguard measures or exclude the parties from applying multilateral safeguard measures.

By the cases examined in this Chapter, it was stated by the Appellate Body in *US — Gasoline* that WTO law was not to be "read in clinical isolation from public international law".[1031] However, it is clear that the governing law is WTO law rather than public international law.[1032] In the case *US – Certain EC Products*, the panel stated that it is a general obligation that the Members seek the redress of a WTO

[1031] Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, (*US — Gasoline*), WT/DS2/AB/R, 29 April 1996, p. 17. See also Appellate Body Reports, India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, (*India — Patents (US)),* WT/DS50/AB/R, 19 December 1997, para. 46; Appellate Body Report Japan — Taxes on Alcoholic Beverages (*Japan — Alcoholic Beverages II),* WT/DS8/AB/R ; WT/DS10/AB/R ; WT/DS11/AB/R, 4 October 1996, pp. 10-12.

[1032] Steger, Debra, The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation' in *Ten Years of WTO Dispute Settlement* (International Bar Association 2007).

violation through the DSU only.[1033] Members serve to preserve the rights and obligations under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law according to Article 3.2 of the DSU.

The interpretation of Article 3.2 DSU suggests that only the customary principles of interpretation of public international law apply in WTO dispute settlement.[1034] Some argue that WTO provisions can "evolve into customary international law" and be a base to interpreting RTAs.[1035]

The Appellate Body in *Peru – Agricultural Products* stated that:

> "In order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted." [1036]

It was also emphasised that "in order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted."[1037] In this case, the Appellate Body came to the conclusion that it did not concern the same subject matter.[1038]

In *EC – Poultry* the Appellate Body stated that it was its view that it was not necessary to have recourse to the Vienna Convention, because the text of the WTO Agreement and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between the WTO and the RTA treaty.[1039] The Appellate Body will not interpret the hierarchy between the laws, but rather interpret the WTO rules with the terms, context and object and purpose of the treaty. As stated above, only the legitimate objectives of the WTO Agreements can justify violations of the WTO obligations.

[1033] Panel Report on United States – Import measures on certain products from the European Communities, (*US — Certain EC Products*), WT/DS165/R, (17 July 2000), paras 6.19–6.20. This was upheld by the Appellate Body WT/DS165/AB/R, at para. 111.

[1034] Van Damme, Isabelle, *Treaty Interpretation by the WTO Appellate Body*, Oxford International Economic Law, (2009), page 14.

[1035] Hsu, Locknie, Applicability of WTO Law in Regional Trade Agreements: Identifying the Links in Bartels, Lorand and Ortino, Federico, *Regional Trade Agreements and the WTO Legal System*, International Economic Law, Oxford, (2006), pages 525 and 542.

[1036] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para. 5.101.

[1037] Ibid, para 5.101.

[1038] Ibid, para 5.104.

[1039] Appellate Body Report on European Communities - Measures Affecting Importation of Certain Poultry Products, (*EC – Poultry*), WT/DS69/AB/R, (13 July 1998), para. 79.

As presented in Chapter 1 and throughout, Lee has two scenarios which present probable conflicts between regional safeguard measures and multilateral safeguard measures. The first scenario is when a *regional* safeguard measure is applied at a level which exceeds the rate of duty applicable to non-RTA members on an MFN basis. The measures thus suspend the obligation in whole and in part or to withdraw or modify the concessions as stated in Article XIX (a) and consequently all the procedural and substantive requirements for the application of a *multilateral* safeguard measure apply. Such regional safeguard measure violates the terms of RTAs which prohibit suspension of concessions beyond the MFN rates. RTAs with regional safeguard measures that can be higher than the MFN rate does not comply with the Agreement on Safeguards.[1040] If the RTA then states that the right to bring the dispute to the WTO DSB has been waived, then this could cause problems.

In *Peru – Agricultural Products* the Appellate Body named a series of conditions for it to recognize a waiver of WTO rights.

- First, "any such relinquishment must be made clearly".
- Second, such waiver "should be ascertained… in relation to, or within the context of, the rules and procedures of the DSU." [1041]
- Third, the waiver may not go "beyond the settlement of specific disputes."[1042]
- Fourth, the Appellate Body warned that "the DSU emphasizes that '[a] solution mutually acceptable to the parties' must be "consistent with the covered agreements"[1043].[1044]

The first and third condition was also ascertained in *Argentina – Poultry* where the panel stated that there was no evidence that Brazil made an express statement that it would not bring WTO dispute settlement proceedings if previously challenged through MERCOSUR,[1045] and in *EEC (Member States) – Bananas I,* where estoppel can only "result from the express, or in exceptional cases implied consent of the

[1040] Lee, Yong-Shik, *Safeguard measures in world trade, The legal analysis*, 3rd Ed., Edward Elgar, (2014), page 260.

[1041] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, (*Peru – Agricultural Products*), WT/DS457/AB/R, (20 July 2015), para. 5.25.

[1042] Ibid, para 5.25, footnote 106.

[1043] Appellate Body Report in Peru – Agricultural Products, para 5.25.

[1044] Shaffer, Gregory and Winters, L. Alan, FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate Body Wrong in Peru-Additional Duty (DS457)?, RSCAS 2016/65, Robert Schuman Centre for Advanced Studies, Global Governance Programme-241, page 20.

[1045] WTO, World Trade Report 2011, *The WTO and preferential trade agreements: From co-existence to coherence*, (2011), page 174.

complaining parties".[1046] The second condition is established in the DSU itself, Article 1 and 3 for example. The fourth condition has also been emphasised in *Turkey – Textiles*, where it was held by the Appellate Body that GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. Inconsistencies are sometimes allowed under the WTO agreements, such as the use of countervailing duties, protection of environment and formation of free trade agreements and customs unions. Waivers in regard to selective safeguard measures ought to be allowed in some situations since, as mentioned above, there are circumstances under which selective measures are allowed. However, waivers in regard to voluntary export restraints or similar, ought to not be consistent with the covered agreements since these are prohibited in accordance with Article 11 in the Agreement on Safeguards.

To conclude, to be able to waive the rights to WTO law in RTAs, it must be clearly specified which rights and obligations are waived, so that it is well understood which rights are concerned. Also, if there are inconsistencies between WTO law and the RTA, they cannot go beyond the scope of Article XXIV; GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. Thus, this implies that it is only possible to waive the rights if the waiver is clear and is not inconsistent with WTO law, especially Article XXIV.

[1046] Panel Report, Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil, (*Argentina – Poultry*), WT/DS241/R (Nov. 7 2001), para. 7.38.

7 Final conclusions

7.1 Introduction

This thesis examines and analyses the rules on safeguard measures, the assessments by the Appellate Body and panels as well as the practice by WTO Members. Possible conflicts between the rules on multilateral and regional safeguard measures have been analysed as well as if regional safeguard measures are allowed at all according to WTO law. Exceptions from the principle of non-discrimination have been examined throughout the thesis and whether there is a space to discriminate under the safeguard rules.

The preamble as well as the history to the Agreement on Safeguards emphasised that there was a need to clarify and reinforce the disciplines of GATT 1994, especially Article XIX, and to re-establish multilateral control over safeguards and eliminate measures that escape such control, that safeguard measures should be non-discriminatory and that the Agreement is applicable to all. This thesis has in particular examined if "applicable to all" means that the possibility to discriminate is abolished and if it means that it is not possible to opt out from the Agreement.

As a general conclusion, one can argue that the DSB has succeeded in restricting the use of safeguard measures, since no disputed measures so far has been in compliance with WTO law. On the other hand, strengthening the control and eliminating measures that escape such control and at the same time providing a measure which is applicable to all, has failed. Especially, the DSB interpretation of safeguard measures has so far not limited the discriminatory options of protecting the industries, instead the interpretation has widened the scope for allowing discriminatory measures. The selective use of safeguard measures combined with some conflicts and overlaps has certainly shifted the framework of safeguards.

As stated above, Lee believes that the measures are not applied correctly by the WTO Members while Sykes argues that the rules are not designed correctly. Sykes also argues that the WTO DSB made it increasingly difficult for WTO Members to impose safeguard measures at all. When it comes to RTAs and safeguard measures, Pauwelyn argues that the WTO jurisprudence has not resolved the puzzle of how WTO Members, that are also parties to RTAs, could apply safeguards in compliance with WTO rules. As seen from the results of the thesis, there is clear lack of guidance from the DSB, but despite this, it could be argued that the DSB interpretation or

clarification of safeguard measures has failed due to their lack of examining the rules and practice in light of the context, and object and purpose.

The final conclusions and summary of the thesis is presented below.

7.2 Applicability and purpose of the Agreement on Safeguards

As outlined in Chapter 2, the purpose with the Agreement on Safeguards is to re-establish control over safeguards and eliminate measures that escape such control, and that the agreement is applicable to all Members. Therefore, it is of importance to establish what a safeguard measure is and what distinguishes a safeguard measure from other measures. It is also important to understand when an applied measure should be analysed under the Agreement on Safeguards.

It is apparent that some circumstances are more beneficial than others for arguing it is the rules on safeguard measures that has been applied. Hence, WTO Members want to claim they have applied a safeguard measure in some situations, and there are other situations where they do not want to. One reason could be the possibility to retaliate under the safeguard rules. Another reason for claiming that it was or was not a safeguard measures, is the fact that some WTO Members are also parties to RTAs which can influence the use of different trade defence measures and who is affected by them. The latter reason will be attended to again under section 7.6.

To qualify under the Agreement on Safeguards, it is neither a requirement that the measure was initiated and notified as a safeguard measure, nor what the country claim to have applied. The most important factor to review to understand whether a safeguard measure has been applied, is what the measure aims to combat, *i.e.* serious injury to the domestic industry, and that the measure suspends in whole or in part, a GATT obligation or withdraws or modifies a GATT concession. If the measure does not aim to protect the industries from serious injury and the measure has not suspended or withdrawn a GATT obligation or concession, then it is not a safeguard measure.

Whether the measure was a safeguard measure or not does not have to be disputed, as seen in *India – Iron and Steel products* where the panel examined the applicability of the Agreement on Safeguards despite that it was not disputed. The panel concluded that it was entitled and required to carry out an "independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute." The WTO DSB can assess applicability of a specific rule, even though this is not disputed by the parties, in accordance with Article 11 DSU.

When it comes to the US imposition of the Ad Valorem duties on aluminium and steel, it constitutes an extraordinary duty which is distinct from the ordinary customs duty. Thus, it is clear that the tariffs suspend obligations under GATT Article II:1(b) since they exceed the bound levels and the aim is to suspend the obligation in whole or in part or to withdraw or modify the concession. It is said that the duties aim to combat the systematic use of unfair trade practices to intentionally erode the US innovation which poses a risk to national security and that the US wants to rely on their own ability rather than imports. Regardless of this, it does not seem debateable that the duties are meant to combat serious injury due to increased imports.

To conclude whether certain measures are justified as other trade defence measures instead of safeguard measures, or vice versa, the Ad Valorem duties were said to be actions which the US considers necessary for the protection of its essential security interests and taken in time of war or other emergency in international relations. In the case *Russia — Traffic in Transit*, the Panel concluded that the measures constituted an emergency in international relations within the meaning of subparagraph (iii) of Article XXI(b) and also that the measures were "taken in time of". There is little resemblance with the US case, in so far as the measures do not seem to have been taken due to an emergency in "international relations" nor "taken in time of". Rather, the suspension of the obligations is designed to prevent or remedy serious injury to the US's domestic industry on steel and aluminium caused by increased imports of the product at issue at a temporary manner. The measure at issue was not imposed as safeguard measures according to domestic law and it was not notified as such either. However, this particular circumstance is not relevant when distinguishing a safeguard measure from a national security exception, it is though part of the overall evaluation. Just because a Member notify a measure and claim to apply a safeguard measure, it does not necessarily mean they have, and vice versa.

Still, as emphasised in *Indonesia – Iron Steel*, despite the fact that other measures claims to have been applied, a measure is a safeguard measure when it has *suspended, in whole or in part, a GATT obligation or withdraw or modify a GATT concession*. Further, the suspension, withdrawal, or modification in question must be *designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product*. Thus, the fact that the US Ad Valorem duty has suspended the GATT obligations combined with that the measure is designed to prevent or remedy serious injury to the domestic industry, points to that it is a safeguard measure.

As described in the introductory Chapter, the Ministerial Conference and the General Council have exclusive authority to adopt interpretations of the WTO Agreement. The Appellate Body has emphasised in *US – Wool Shirts and Blouses* that they "do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need

only address those claims which must be addressed in order to resolve the matter at issue in the dispute." The Appellate Body has also stated in *US – FSC* that "the rulings and recommendations of the DSB serve only 'to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements.'" Therefore, it is also clear that the DSB cannot go beyond their mandate and what is stated in the covered agreements. Nevertheless, neither the rules nor the practices comply with the purpose of the Agreement on Safeguards fully.

The purpose of safeguard measures is to provide an escape from liberalization at the same time as it controls the possibility to impose measures. As mentioned above, this suggests that the rules on safeguard measures rest on a contradiction: trade restrictions to promote trade liberalization, so that as long as countries can opt out from the tariff cuts, they will promote trade liberalization. Also, as Sykes stated, since the Appellate Body has failed to articulate any coherent doctrine as to when safeguard measures are allowable this may cause a return to measures such as voluntary restraint agreements, measures that the WTO Agreement on Safeguards wanted to eliminate. This is perhaps truer now than ever, since the practice of safeguard measures shows a different outcome. The restrictive interpretation of the possibility to use of safeguard measures creates a need for something else since the countries see it necessary to protect their industries. Hence, the interpretation of safeguard measures does not seem to meet the object and purpose of safeguard measures. The Appellate Body has not provided a proper balance between free trade and protection since it not so far has established when safeguard measures are permissible.

What makes this even more complicated is the increasing number of RTAs which include rules on regional safeguard measures, with their own jurisdiction and interpretation. These RTAs can affect the multilateral agreements, both in terms of interpretations as to when and if safeguard measures are applicable but also where the RTAs prevail over WTO law.

Nevertheless, the object and purpose of the Agreement on Safeguards is to eliminate the so-called grey area measures and provide for a measure which is applicable to all WTO Members. Neither the design nor the application of the rules does however re-establish multilateral control over safeguards and eliminate measures that escape such control. This study has shown that selective measures and perhaps also grey area measures exist and that it is still unclear when a safeguard measure has or has not been applied in accordance with WTO law. Also, the application of the rules shows that the non-discrimination principle does not apply equally to all Members. It is both possible to apply selective measures as well as sign RTAs which can prevail over WTO law. Despite the fact that one of the purposes with the Agreement on Safeguards mentioned in the preamble was to limit *selective* measures, this purpose has clearly not been fulfilled.

Unlike the Agreement on Anti-dumping and the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards has a preamble. This preamble implies that the overall objective of the Members to improve and strengthen the international trading system should be emphasised. The multilateral control over safeguards should be recognised together with the need to enhance rather than to limit competition in international markets. This indicates that the object and purpose behind the Agreement on Safeguards is, to some extent, to restrict the use of safeguard measures rather than to provide the possibility of easily invoking them. As illustrated in this study, there are several *disincentives* to *apply* safeguard measures while they (safeguard measures) at the same time can be seen as an *incentive* to *sign* a free trade agreement. The Appellate Body stated in *Argentina – Footwear (EC)* that the object and purpose of Article XIX is to allow a Member to readjust "temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances". Although the rules on safeguard measures permit the temporary protection of a domestic industry under certain circumstances, while at the same time facilitate trade liberalization, the WTO DSB has so far only produced disincentives to apply safeguard measures.

Safeguard measures was not intended to affect "guilty" nations and was not intended to combat competing imports, but despite this fact, a measure can be a safeguard measure without notifying it as such. When the US steel and aluminium Ad valorem duties were introduced, many countries reacted to this and stated that it in fact was a safeguard measure. Japan also stated that "these measures could disturb global steel and aluminium trade, and may have significant negative impacts on the multilateral trading system as a whole." It was also emphasized that countries "had been forced to take some measures due to their concerns over trade distortive effects caused by the US Section 232 measures".

When it comes to the re-establishment of control, it does not seem as if the Agreement on Safeguards provides the control that was pursued. The practice of selective safeguard measures, regional safeguard measures as well as other practices in the field of trade defence measures do show that the elimination of measures that escape the control was not very successful. Grey area measures disappeared in accordance with the Agreement on Safeguards, but due to the need of protectionist measures, other practices seem to have filled their place such as the use of bilateral agreements and other trade defence measures.

7.3 Non-discrimination and selectivity in multilateral rules on safeguard measures

Safeguard measures should be applied without discrimination, to all sources, when an injury occurs. One exception is asymmetrical rules in favour of developing countries as described in Article 9 of the Agreement on Safeguards. Under WTO law, developing country status brings certain rights. Efforts are also being made in the Doha Round negotiations to improve trading opportunities for developing countries. It is stated in the Doha Declaration that all peoples are to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. In what way is this developmental perspective expressed when it comes to the design, interpretation and application of multilateral and regional rules on safeguards?

Asymmetry is to be observed in the design of the multilateral safeguard provisions in WTO law and developing country Members receives *de jure* special treatment both when applying the measures themselves and when they themselves are targeted. They are allowed to apply the measure for a longer period and their exports can be excluded from an application of safeguard measures by other WTO Members. This exclusion is an example of an exception from the principle of non-discrimination which is generally proscribed in WTO law.

It seems clear though that the multilateral safeguard provisions in Article XIX of the GATT 1994 and the Agreement on Safeguards do not *de facto* make the application of the measure easier for developing countries. The explicit acknowledgement of the developing countries' needs for special treatment that are expressed in the law cannot be regarded as resulting in the application process being easier to apply in practice. Developing countries still have to fulfil all the requirements necessary and as has been demonstrated in this and several other studies, the measure is difficult to apply. Even so, it seems that some developing countries such as Jordan, the Philippines and Indonesia favour safeguard measures.

The special safeguard (SSG) differs from general safeguard measures since higher duties can be imposed automatically when import volumes rise above a certain level and serious injury does not have to be demonstrated. The SSG has not been used frequently and only 38 WTO Members have reserved the right to use this special safeguard on agricultural products. The proposed special safeguard mechanism (SSM) might change that since it is only meant for developing countries.

Two views exist on the purpose of the SSM. One views it as an emergency measure for poor and vulnerable farmers while the other views it as a means of helping liberalization. These differing views could have an effect on how easy or limiting the application of the SSM will be. Just as in the case of regional safeguard measures, the lack of an injury test and the lack of any requirement for compensation

in the SSG and the SSM make their application easier since developing countries often do not have the capacity or means allowing them to compensate the injuries caused by the safeguard measures. However, like the regional safeguard measures, this could have a negative effect on developing countries if they are targeted by safeguard measures and do not receive compensation, as described above. Compensation can also restrict the use of safeguard measures and avoid unnecessary actions. Since developing countries risk being the target of safeguard measures, it is important that there is here a *de minimis* exception for them.

Evidently the SSG is more favourable for developed countries than the SSM, since developed countries cannot use the SSM, while it is so far mainly developed nations which have applied the SSG. The SSM should *in its entirety* be seen as a special and differential treatment for developing countries only. That said, there is no specific exclusion of developing country exports in the application of the SSM which potentially could target developing country exports which are themselves targeted by other developing countries. This means that the SSM provides for special and differential treatment when *applying* the measure, not when being targeted. Again, a *de minimis* exception would be preferable. The two main examples of exemptions from the non-discrimination principle, as expressed in GATT Article I (the MFN-principle) are GATT Article XXIV which allows customs unions and free trade areas and the Enabling Clause which is the legal basis for preferences targeted at developing countries.

The reason why the Agreement on Safeguards was created, was basically because Article XIX was too vague and required more clarity. Since it was vague, it gave the countries more space to act in their own interest. The vagueness created room for interpretations and also provided the opportunity to use grey area measures to protect industries from injurious imports. Grey area measures were generally bilateral agreements, and typically exporters were asked to "voluntarily" agree on quantitative export limitations (*i.e.* "voluntary export restraints", "voluntary restraint agreements" or "orderly marketing arrangements"). Consequently, these agreements were selective and only targeted specific countries.

Developing countries wanted a more restrictive use of safeguard measures. Compensation and some structural adjustments were also of importance to developing countries, as well as the injury criteria. A report during the Tokyo Round identified some key areas of disagreement, where selectivity was one of them. Some Members stated that grey area measures could be under the safeguard control if selectivity was permitted. It was argued during the negotiations of the Agreement that there was a need to be able to apply safeguard measures on a selective basis to be able to combat grey area measures. For example, the US argued that if grey area measures were not at all permitted, then selectivity must be allowed. Perhaps this was a way of still being able to target "guilty" nations and avoid compensating all other Members. As seen above, this would imply some degree of unfair trade practice. This also has a close connection to MFN. The foundation was that since

concessions were negotiated on a non-discriminatory and most-favoured-nation basis, their withdrawal should also be on that basis. The options that one way or the other were on the table are illustrated below.

Table 17: "Options" for grey area measures and selectivity

	Selectivity permitted	**Selectivity prohibited**
Grey area measures permitted	Discrimination is allowed since grey area measures are permitted as well as selectivity and thus the former are not regulated under the Agreement on Safeguards. Safeguard measures, *i.e.* withdrawals from concessions, would be an exception to the MFN principle and therefore suggest a level of unfair trade practice. Would target "guilty" nations similar to anti-dumping measures and countervailing duties.	Discrimination is allowed since grey area measures are permitted, but not regulated under the Agreement on Safeguards while selectivity is. This suggest a possible conflict of norms. Concessions are negotiated on a non-discriminatory and MFN basis and thus their withdrawal should be made on that basis. Requires that the safeguard measures are applied on an MFN basis.
Grey area measures prohibited	Grey area measures are not regulated under the Agreement on Safeguards and there is a risk that there would be a conflict of norms since the selective approach would interfere with the prohibition of grey area measures. Safeguard measures and thus withdrawals from concessions would be an exception to the MFN principle.	Grey area measures are regulated in and controlled under the Agreement on Safeguards. Concessions are negotiated on a non-discriminatory and MFN basis and thus their withdrawal should be made on that basis. Requires that the safeguard measures are applied on an MFN basis and therefore applicable to all.

As a result of the negotiations and discussions, the Agreement on Safeguards was created where selectivity had little possibility. This also changed the objective with safeguard measures; with Article XIX the countries had more space to act in their own interest, while the original idea with the Agreement on Safeguards seems to have been to restrict this possibility. Thus, the negotiations that led to the creation of the Agreement on Safeguards, aimed at prohibiting grey area measures as well as prohibiting selectivity as illustrated in the table above in the bottom right corner.

However, the reality shows (as emphasized above and below) that selectivity is sometimes allowed due to for example RTAs. Also, grey area measures – or measures that are similar to them – still exist. Therefore, the interpretation of safeguard measures seems to have moved from the bottom right corner in the table above, to the top left corner. Although Article 32 VCLT admits, in appropriate cases and as a supplementary means of interpretation, the examination of the historical background against which the treaty was negotiated, this practice does not seem to have been used in the cases on safeguard measures. Instead, there has been a more textual approach to interpret safeguard measures, and based on this, the DSB has concluded that selectivity is allowed even though no measures so far has been

applied in accordance with WTO law. Even though the approach is correct, it can be criticized since the elimination of selective and discriminatory measures clearly has not worked.

7.4 Rules on safeguard measures in RTAs

To benefit from the exception authorized by GATT Article XXIV, the level of trade liberalization in RTAs must be such that duties and regulations are eliminated with respect to substantially all the trade between the parties. The absence of reference to GATT Article XIX in GATT Article XXIV has raised questions, as discussed in Chapter 4. There are different opinions as to whether the provision in GATT Article XXIV:8 allows or disallows regional safeguard measures. The Appellate Body has not ruled on the question and since so many RTAs do include rules on regional safeguard measures, they could be seen as allowed *de facto* albeit possibly not *de jure* according to some authors. However, duties and other restrictive regulations of commerce must be eliminated with respect to substantially all the trade. Substantially all the trade is though not the same as all the trade, which ought to mean that Article XXIV is wide enough to include rules on safeguard measures. Thus, nothing in Article XXIV seems to prevent the inclusion of safeguard measures. The Enabling Clause allows for the inclusion of regional safeguard measures, but they can only violate GATT Article I.

In this thesis, the conclusion is that rules on safeguard measures are not prohibited to be included in trade agreements under either GATT Article XXIV or the Enabling Clause, but that there are some differences between the two. Regional safeguard measures are rarely included in customs unions under GATT Article XXIV, but free trade agreements most often include regional safeguard measures.

The term "substantially all the trade" is absent in the Enabling Clause. This implies that agreements notified under the Enabling Clause do not have to eliminate internal trade barriers entirely. Accordingly, since the Enabling Clause does not cover non-tariff measures, safeguard measures are justifiable under the Enabling Clause. However, the Enabling Clause allows for the inclusion of regional safeguard measures, but they can only violate GATT Article I. There has also been a long discussion whether customs unions are possible under the Enabling Clause and there are no results to that discussion. Notifying a customs union under the Enabling Clause is nevertheless not prohibited.

The conclusion is that neither Article XXIV nor the Enabling Clause require that safeguard measures are abolished in RTAs. As seen above though, safeguard measures applied in accordance with the Enabling Clause can only violate GATT Article I and no other WTO provisions. Thus, Article XXIV provides a broader defence than the Enabling Clause. Also, Article XXIV provides a more thorough

defence than the Enabling Clause if the safeguard measure is applied on behalf of a customs union and if the measure excludes the parties of the union.

However, Article XXIV cannot be raised as a defence due to a violation of Article I if the requirements of Article XXIV are not fulfilled. This means that agreements under the Enabling Clause that do not fulfil the requirements of Article XXIV cannot rely on Article XXIV as a defence of violations of Article I. The result is that Article XXIV can only be used as a defence if the requirements in the article have been met. Thus, parties to an agreement under the Enabling Clause must rely on the Enabling Clause in order to provide a defence.

7.5 Non-discrimination and selectivity under regional rules

There are two aspects of non-discrimination in RTAs. One is how they are designed in order to have some kind of asymmetrical application towards developing countries and thus differential treatment. The other concerns the practice to exclude certain parties from the application of *multilateral* safeguard measures. First, differential treatment will be addressed and after that the exclusion.

Differential treatment in the form of asymmetric rules in favour of developing countries can, just as in the WTO rules on multilateral safeguards, also be found in some of the RTAs. However, these rules do not make it easier for developing countries to apply the measures as such; they only allow their use for a longer time-period. Nor is there in general any relief for developing countries when they are affected by a safeguard measure, as is the case with multilateral safeguards in WTO law. This means that developing country exports are often not exempted from the application of regional safeguard measures used by other parties to the agreements. It is true that the lack of an injury test and the compensation requirement for all users to be found in some RTAs make their application easier for developing countries since they often do not have the capacity and means to fulfil such requirements. However, this could also have a negative effect on developing countries if they were targeted by safeguard measures and do not receive compensation. Also, the lack of an injury test could lead to developing countries being targeted more often. *De minimis* rules could be a solution.

It is vital that development aspects are included in the RTAs if the interests of developing countries are to be protected. As stated above, WTO law does contain such a clear developmental perspective. The legal basis in WTO law for concluding RTAs is found in GATT Article XXIV. However, Article XXIV does not contain any obligation to include any development aspects in such agreements.

Renegotiating the Agreement on Safeguards or GATT Article XXIV is likely to be difficult even though some work has been done on Article XXIV. Progress can be made via the Appellate Body as it works at interpreting the rules and clarifying the limits of their application. However, since the Appellate Body uses a contextual and effective interpretation, improvement is unlikely to be accomplished short of changing the agreements.

Nevertheless, the lack of development aspects in some of the agreements covered by WTO law, the RTAs and the dispute settlement provisions need to be attended to. The General Agreement on Trade in Services (GATS) could here serve as a blueprint. In Article V of GATS, a development aspect is stressed by the following wording "there shall be flexibility in agreements concerning substantial sectorial coverage and the elimination of substantially all discrimination when developing countries are parties". If a similar statement was to be included in GATT Article XXIV it could create awareness among regional parties of the need to improve developing countries' interests.

With this in mind, the practice of excluding certain parties from the application of multilateral safeguard measures will be turned to.

The fact that some RTAs explicitly require that members do not apply safeguard measures on imports from contracting parties raises questions. Does GATT Article XXIV prohibit, require, or permit members of free trade agreements or customs unions to exempt imports from other members from the application of safeguard measures?

As described in Chapter 5, WTO jurisprudence on customs unions shows that it is not allowed to exempt imports from Member countries from the application of safeguards when the requisite injury determination is based on imports from all sources. Nevertheless, is it allowed if the responsible investigating authority bases the injury determination on imports from non-member states only?

According to GATT Article XXIV:8(a)(ii) this is not consistent with the requirements but since the case law on the matter is somewhat vague, no conclusion can be drawn as to whether GATT Article XXIV can or cannot be used to justify such a selective application of safeguard measures under Article 2.2 of the Agreement on Safeguards. Therefore, it is not clear whether Article XXIV could be used to justify selective applications of safeguard measures. From the case *US – Wheat Gluten* the conclusion might be drawn that customs unions could exclude countries if the *formation of the customs union itself* would be prevented if it were not allowed to include the corresponding measure. The formation of customs unions is constructed on a common customs tariff for third country imports while free trade agreements are not. Contracting parties to free trade agreements are most likely to apply safeguard measures as single units. Consequently, the investigation of products being imported into the territory and the effects of those imports on

domestic industry requires the single unit under Article 2.2 of the Agreement on Safeguards to apply those measures to imports from all sources.

Thus, as a conclusion of this study, discriminatory application of safeguard measures could be allowed if:

(i) the existence of the customs union would be prevented if it were not allowed to introduce the selective measure in the first place;

(ii) the injury determination is based on imports from third countries only; or

(iii) it related to exports from developing countries as stated in Article 9.1 of the Agreement on Safeguards. As mentioned in Chapter 1, there is also a possibility to apply discriminatory safeguard measures in accordance with Article 5.2 in the Agreement on Safeguards. In other cases, multilateral safeguard measures ought to be applied in a non-discriminative manner according to Article 2.2 of the Agreement on Safeguards.

By merely looking at the Agreement on Safeguards and its history, it did not seem as if this discriminatory application due to RTAs was meant to be allowed under the Agreement on Safeguards. As emphasised above, selective application of safeguard measures was supposed to be eliminated through the Agreement. It was not the intention of the drafters that these selective measures were supposed to be allowed.

7.6 Potential conflicts and overlaps

Multilateral and regional rules on safeguard measures can be described as two different remedies which deal with problems arising from two different initiatives. That is why regional safeguard measures have their own justification alongside the multilateral ones. This also explains why there is variety in the required level of injury and in the determination of the increase of imports. That is also why a *regional* anti-dumping or countervailing duty is less important since these would target the same unfair trade as multilateral measures. The inclusion of safeguard measures in RTAs can on one hand be seen as an incentive to sign the agreement but on the other hand can the non-discriminative aspect be seen as a disincentive to apply them.

One interesting observation is that multilateral safeguard measures seem to have been used as a consequence of the additional trade liberalization that has occurred due to the increase in RTAs. This can be illustrated by examining the consequences for Indonesia after signing the ASEAN China Free Trade Area Agreement. In this case, Indonesia seems to have used multilateral measures to combat the effects of regional trade liberalization instead of using regional safeguard measures, as had been expected. Some of these multilateral measures have been criticized by WTO

Members, for example in the case *Indonesia — Iron or Steel Products* which has been mentioned above. Multilateral safeguard measures can only be invoked in situations where a Member finds itself confronted with developments it had not foreseen when it incurred that obligation and it will often be difficult to demonstrate that the increased imports due to liberalization were not foreseen. Regional safeguard measures, however, do not usually require an injury test or a causal link between the increased imports and the injury.

This suggests that the injurious imports could be a result of the liberalization due to the RTA, but the use of regional safeguard measures would still be allowed, at least according to the RTA. However, as implicated, unforeseen developments would be difficult to prove when using multilateral safeguard measures if the injury has occurred due to regional liberalization.

Even though the requirements for showing that regional safeguard measures are applicable are easier to satisfy than is the case with multilateral (general) safeguard measures, they are still not applied as often. Regional partners tend to use safeguard measures under WTO law rather than under the relevant RTA. Possible explanations could be the tariff levels, the structure of the regional measure or political pressure. Regional safeguard measures only target regional trade while multilateral safeguard measures target a product irrespective of its source. Thus, multilateral safeguard measures could be seen as less politically sensitive in this regard.

The result of a comparison between the rules on multilateral and regional safeguard measures shows two different purposes at play. The purpose of the rules on safeguard measures in WTO law, *i.e.* GATT Article XIX and the Agreement on Safeguards, should be seen in the light of the earlier and problematic grey area measures. The objective of the Agreement on Safeguards is to clarify and reinforce GATT Article XIX and to restore multilateral control over safeguards. This is done by a non-selective application of the rules to all imports of certain products. Thus, the Agreement on Safeguards serves to uphold the goal of trade liberalization and the principle of non-discrimination. Hence, the object and purpose behind this Agreement is rather to restrict the use of safeguard measures than to provide a way of easily invoking them. When it comes to regional safeguard measures, the picture is somewhat different. At an *ex ante* level, regional safeguard measures are an incentive for parties to sign the agreements, while at the *ex post* level, the intensity of liberalization will be affected. This shows that countries are willing to reduce tariffs as long as they have the option to temporarily raise them again thus providing for an escape clause. This can be demonstrated by the following table.

Table 18: Purpose and target of rules on multilateral and regional safeguard measures

	Purpose	Target
Rules on multilateral safeguard measures	Restore control over safeguard measures (ex ante)	Target *unforeseen developments* due to increased imports which cause injury
Rules on regional safeguard measures	Provide the possibility to go back to status quo (ex post) and hence to liberalize further in negotiations (ex ante)	Target *regional* liberalization which causes injury

As stated above however, also the rules on multilateral safeguard measures were seen as an incentive to liberalize trade although the main focus seems to have been to re-establish the control over safeguard measures, if examining the preamble to the Agreement on Safeguards. Thus, the purposes are as seen from above table different, but the incentives to liberalize further exist for both multilateral and regional safeguard measures.

Evidently, safeguard measures are important in the regulation of trade, but they are also problematic since they vary with the different purposes at play in multilateral or regional trade agreements. Since there are now fewer barriers to trade to choose from the rules, it is likely that those that do exist will be used more frequently than before. Members with an interest in enhanced protectionism may well be pushing to expand the range of circumstances where safeguard measures in particular can be used. This is also demonstrated by the slowly increasing number of safeguard investigations. Also, protectionism has become more complex and refined and there are less "obvious" protectionist measures which would need further investigation.

Safeguard measures exist in multilateral as well as regional or bilateral trade agreements. Thus, safeguard measures exist in different forms and in different jurisdictions. Forum of choice clauses and the possibility to waive the right to WTO dispute settlement system have the potential to make this even more complicated. If it is possible to waive the right to the WTO DSB and thus also the right to dispute multilateral safeguard measures, is the Agreement on Safeguards applicable on all parties as stated in the preamble?

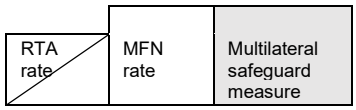
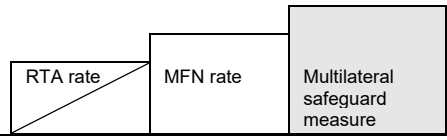
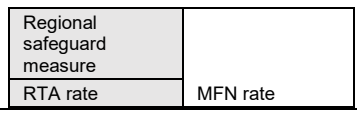
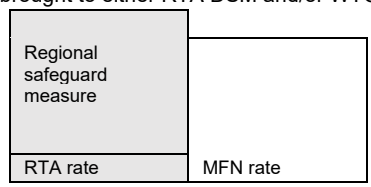
Some RTAs include clauses on choice of forum as well as choice of law also in relation to the use of safeguard measures. For example, some RTAs has wordings such as "in the event of any inconsistency" between WTO rules and RTA rules, the RTA rules "shall prevail." Combined with this there might be clauses in the RTA that might not be in coherence with WTO law. The preference in the choice of forum clauses can be linked to different factors, such as economic, political and duration of proceedings etc. One factor that could be a reason for forum shopping is safeguard measures, for example regional rules on safeguard measures in RTAs or the possibility to use selective safeguard measures. Selective safeguard measures are, as pointed out above, when a country imposes safeguard measures not to all

imports but exclude certain partners from the application of the measures and thus in a way discriminate trade partners.

If a measure is directed selectively against specific imports, the imports that are not targeted will simply enjoy the benefit of lower or zero import duties. If cheap imported goods are subjected to safeguard measures, their price will increase and thus eventually they could change direction and be exported to another country which might also face injury to the domestic production. In that sense, safeguard measures as well as other trade defence measures, can easily have the effect of simply re-routing exports. One example of this is the recent US Ad Valorem duties on steel and aluminium, which has caused effects on the steel trade world-wide. This demonstrates the importance of the principle of non-discrimination in the application of safeguard measures since no importer is supposed to benefit over another when all imports are targeted by a measure. As mentioned though, the drafters did not likely have the particular problem of market disruption in their minds, nor did they possibly consider the issue with legal pluralism. Lowering tariffs and making trade concessions most likely result in increased imports. The notion with safeguard measures is that it provides an "escape" from injurious imports, and a protection for the domestic industries while doing economic adjustments. Thus, it is a measure to restrict imports of a product temporarily in order to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry. Safeguard measures also provides a mean for the governments to relieve itself from political pressure to act against injurious imports.

The rules on safeguard measures in RTAs are not all similar and they are also very different from the rules in the WTO. Thus, this creates a potential conflict between the different RTAs, but also between the RTAs and the WTO. Lee stated that one scenario which poses a conflict, is when a *regional* safeguard measure is applied at a level which exceeds the rate of duty applicable to non-RTA members on an MFN basis. Another scenario is when regional parties are excluded from the safeguard measure. A third scenario could be when there is no possibility to interpret the clauses or application of safeguard measure due to a waiver in the RTA. The complexity with these scenarios; regional safeguard measures above the MFN level, safeguard measures and exclusion of certain parties, as well as waivers can be illustrated by the following table.

Table 19: MFN and safeguard measures

	Lower than or equal to MFN	Above the MFN and/or suspend concessions
Multilateral safeguard measures	Aim to target imports from all countries but would only affect RTA members if they are not excluded and thus RTA Members would likely complaint to WTO DSB. 	Aim to target and would affect the imports from all countries (if it is not applied as selective measures) and would affect RTA members also and thus RTA Members would likely complaint to WTO DSB. 
Regional safeguard measures	Aim to target and affect only RTA Members and possible disputes are likely brought to the RTA DSM. 	Aim to target only RTA members and thus regional parties would be disadvantaged compared to other trading parties and also violate GATT Article I. A dispute would likely be brought to either RTA DSM and/or WTO. 

The RTA rate is lower than the MFN rate; the duty which is applied to all imports from WTO Members besides parties of the RTA. The Ad Valorem duty is below the bound rate. This was the scenario in the *Dominican Republic – Bags* case. The Ad Valorem duty was higher than the RTA rate and the MFN rate and was later considered to be a safeguard measure. The bound rates are the ceiling rates as listed in members' "schedules" or lists of commitments. As emphasised in *Indonesia – Iron or Steel Products*, a measure is a safeguard measure when it has suspended, in whole or in part, a GATT obligation or withdraws or modifies a GATT concession. Despite that the measure applied was lower than the bound rate, the measure in the *Dominican Republic – Bags* case was a safeguard measure. The reason why this conclusion was made by the panel was because the measure did result in a suspension of obligations incurred by the Dominican Republic. The measure was also applied to remedy serious injury, the procedure of Article XIX and the Agreement on Safeguards was followed, and it was also notified as a safeguard measure.

In *Indonesia – Iron or Steel products*, Indonesia increased the MFN rate but argued that it was a safeguard measure. All parties to the dispute were also in some kind of agreement that the measure was in fact a safeguard measure. One of the complaining parties, Vietnam, was also party to an FTA with Indonesia and as such it was not subject to the MFN rate, it had a lower FTA rate. Vietnam was also one of the largest

exporters of the iron or steel products. Indonesia argued that it had applied a safeguard measure, likely because if they had simply increased the MFN rate then the suppliers from the FTA countries would not be affected by the measure. Therefore, since the FTA party would not be affected, they would be able to continue to export their products at the same price. Also, if using a regional safeguard measure instead, only the parties to the FTA would be affected. RTAs with regional safeguard measures that can be higher than the MFN rate does not comply with the Agreement on Safeguards. If the RTA then state that the right to bring the dispute to the WTO DSB has been waived, then this could cause problems.

How the agreements are linked to the dispute settlement systems is illustrated below.

Table 20: WTO and RTA jurisdiction and Dispute Settlement Systems

	WTO Agreements	**Regional Trade Agreements**
WTO Dispute Settlement Body	Whether a violation of WTO Agreements has occurred can only be decided through the recourse to dispute settlement in accordance with the rules and procedures of the DSU (Article 23.1 "exclusive dispute resolution clause").	WTO DSB resolve disputes about the application of the provisions of the WTO Agreement and serves to preserve the Members' rights and obligations under the WTO Agreement according to Article 3.2 of the DSU. The Appellate Body has ruled that customary rules of interpretation of public international law can be used to interpret the WTO Agreements. Only the "legitimate objective" of the WTO agreements can justify violations of the WTO obligations. Inconsistencies between WTO law and the FTA cannot go beyond the scope of Article XXIV and waivers must be clearly specified which rights and obligations are waived. Thus, the WTO DSB does not per se interpret RTAs and even though the WTO DSB can use international law, it is likely not to use an RTA to interpret the WTO Agreements if it is not "relevant" rules of international law within the meaning of Article 31(3)(c).
Regional Dispute settlement system	It would violate Article 23.1 to bring a dispute concerning WTO Agreements to another forum than the WTO DSB. Some RTAs allow for customary rules of interpretation of public international law to interpret the RTA and thus could potentially use the WTO Agreements/DSB rulings to interpret the RTA.	The RTAs commonly state that the Regional Dispute settlement system can interpret this agreement. However, some RTAs include forum of choice clauses in regard to for example safeguard measures so that other foras are required to examine the dispute at issue.

In the cases where only RTA members are affected by multilateral safeguard measures, it is likely that they would be disadvantaged and would perhaps want to

bring a dispute to the WTO DSB instead of the RTA Dispute Settlement System. The reason being that the measures likely would be inconsistent with the WTO law. However, they may be inconsistent with the RTA, if regional safeguard measures are allowed according to the RTA.

Non-WTO law (*i.e* for example an RTA) can be applied in a dispute when used as a defence where the WTO law otherwise would be violated, as supported by Pauwelyn and as seen above in Chapter 6. As illustrated in the thesis, the application of regional safeguard measures is a perfect example where countries have used non-WTO law as a defence. The other example where non-WTO law can be applied is when the non-WTO law will outrule WTO law so that the DSB has no jurisdiction. The choice of forum clauses is one example of this practice.

The Appellate Body will not interpret the hierarchy between the laws, but rather interpret the WTO rules with the terms, context and object and purpose of the treaty. Only the legitimate objectives of the WTO Agreements can justify violations of the WTO obligations.

The question of whether RTA law can prevail over WTO law has had somewhat little consideration previously, but it is likely to rise due to the rising protectionism in the world. Also, regional dispute systems can become more important since they might ensure the protection of private party rights, which the WTO DSB does not. Moreover, the current blocking of AB Members can also affect the need to turn to regional dispute settlements rather than a multilateral one.

The Agreement on Safeguards should be applicable to all Members. However, this is not always the case. There are occasions where the non-discrimination principle is not mandatory and there are also instances where a member cannot apply the Agreement on Safeguards. Waiving the right to the WTO DSB in an RTA could mean that the Agreement on Safeguards is not applicable. In *Peru – Agricultural Products* the Appellate Body named some conditions for it to recognize a waiver of WTO rights.

- First, "any such relinquishment must be made clearly".
- Second, such waiver "should be ascertained… in relation to, or within the context of, the rules and procedures of the DSU."
- Third, the waiver may not go "beyond the settlement of specific disputes."
- Fourth, the Appellate Body warned that "the DSU emphasizes that '[a] solution mutually acceptable to the parties' must be "consistent with the covered agreements".[1047]

[1047] Appellate Body Report on Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/AB/R, (*Peru – Agricultural Products*), (20 July 2015), para 5.25 and Gregory Shaffer and L. Alan Winters, FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate

To conclude, to be able to waive the rights to WTO law in RTAs, it must be clearly specified which rights and obligations are waived, so that it is well understood which rights are concerned.

Also, if there are inconsistencies between WTO law and the RTA, they cannot go beyond the scope of Article XXIV; GATT inconsistent measures can only be justified under Article XXIV if the requirements in Article XXIV:8 are met. Thus, this implies that it is only possible to waive the rights if the waiver is clear and is not inconsistent with WTO law especially Article XXIV or the Enabling Clause. If these conditions are met, the RTA can prevail over WTO law.

RTAs can include the possibility to use regional safeguard measures as well as multilateral safeguard measures. They can also disallow the use of safeguard measures, by eliminating the possibility to use safeguard measures between the parties, *i.e.* selective safeguard measures. Thus, even though it is stated in the Agreement on Safeguards that it is applicable to all Members, the specific phrasing of the RTAs can make it non-applicable for the parties. Also, as briefly mentioned in Chapter 1, quantitative import restrictions imply that the measure already is selective.

This thesis has shown that discriminatory application of safeguard measures is allowed, which was not the intention when creating the Agreement on Safeguards. It is possible to apply selective measures and there is also a possibility to waive the rights to WTO DSB. Thus, the Agreement is neither *de jure* nor *de facto* applicable to all Members. It seems therefore as if the interpretation based primarily on the terms of the treaty, does not match the context and the treaty's object and purpose.

Consequently, while the rules lean more towards providing and establishing a protection, the interpretation by the DSB so far lean more towards free trade.

Body Wrong in Peru-Additional Duty (DS457)?, RSCAS 2016/65, Robert Schuman Centre for Advanced Studies, Global Governance Programme-241, page 20.

Appendix 1: Article XIX GATT and the Agreement on Safeguards

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 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.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be affected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTINGPARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the3 provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

AGREEMENT ON SAFEGUARDS

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby *agree* as follows:

Article 1

General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

Article 2

Conditions

1. A Member[1048] 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.
2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Article 3

Investigation

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The

[1048] Original footnote 2.1: A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

Article 4

Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

   (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;

   (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

   (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

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.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

Article 5

Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

Article 6

Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

Article 7

Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

   (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

   (b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

Article 8

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

Article 9

Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[1049]

[1049] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

Article 10

Pre-existing Article XIX Measures

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

Article 11

Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.[1050],[1051] These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into

[1050] An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

[1051] Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

3. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member[1052], the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

4. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:

[1052] The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4.A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5.The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6.Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7.Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8.Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement

that have not been notified by other Members that are required by this Agreement to make such notifications.

9.Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10.All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11.The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 13

Surveillance

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

Article 14

Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

ANNEX

EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE 11

Members concerned	Product	Termination
EC/Japan	Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).	31 December 1999

Appendix 2: Disputes on safeguard measures brought to the WTO DSB

Case number	Dispute	Date	Results
DS595	European Union (formerly EC) — Safeguard Measures on Certain Steel Products	13 March 2020	In consultations
DS573	Turkey — Additional duties on imports of air conditioning machines from Thailand	5 December 2018	Panel composed
DS568	China — Certain Measures Concerning Imports of Sugar	16 October 2018	In consultations
DS564	United States – Certain Measures on Steel and Aluminium Products (Complainant: Turkey)	15 August 2018	Panel composed
DS562	United States – Safeguard measure on imports of chrystalline silicon photovoltaic products (Complainant: China)	14 August 2018	Panel composed
DS556	United States – Certain Measures on Steel and Aluminium Products (Complainant: Switzerland)	9 July 2018	Panel composed
DS554	United States – Certain Measures on Steel and Aluminium Products (Complainant: Russian Federation)	29 June 2018	Panel composed
DS552	United States – Certain Measures on Steel and Aluminium Products (Complainant: Norway)	12 June 2018	Panel composed
DS551	United States – Certain Measures on Steel and Aluminium Products (Complainant: Mexico)	5 June 2018	Settled or terminated (withdrawn, mutually agreed solution)
DS550	United States – Certain Measures on Steel and Aluminium Products (Complainant: Canada)	1 June 2018	Settled or terminated (withdrawn, mutually agreed solution)
DS548	United States – Certain Measures on Steel and Aluminium Products (Complainant: European Union)	1 June 2018	Panel composed
DS547	United States – Certain Measures on Steel and Aluminium Products (Complainant: India)	18 May 2018	Panel composed

DS546	United States – Safeguard measure on imports of large residential washers (Complainant: Republic of Korea)	14 May 2018	Panel established, but not yet composed
DS545	United States – Safeguard measure on imports of chrystalline silicon photovoltaic products (Complainant: Republic of Korea)	14 May 2018	Panel established, but not yet composed
DS544	United States – Certain Measures on Steel and Aluminium Products (Complainant: China)	5 April 2018	In consultations
DS518	India – Certain Measures on Imports of Iron and Steel Products (Complainant: Japan)	20 December 2016	Panel composed
DS496	Indonesia – Safeguard on Certain Iron or Steel Products (Complainant: Vietnam)	1 June 2015	Reports adopted, with recommendation to bring measures into conformity
DS490	Indonesia – Safeguard on Certain Iron or Steel Products (Complainant: Chinese Taipei)	12 February 2015	Reports adopted, with recommendation to bring measures into conformity
DS468	Ukraine – Definitive Safeguard Measures on Certain Passenger cars (Complainant: Japan)	30 October 2013	Reports adopted, with recommendation to bring measures into conformity
DS446	Argentina – Measures affecting the importation of goods (Complainant: Mexico)	24 August 2012	In consultations
DS445	Argentina – Measures affecting the importation of goods (Complainant: Japan)	21 August 2012	Panel composed
DS444	Argentina – Measures affecting the importation of goods (Complainant: United States)	21 August 2012	Panel composed
DS438	Argentina – Measures affecting the importation of goods (Complainant: European Union)	25 May 2012	Panel composed
DS428	Turkey – Safeguard measures on imports of cotton yarn (other than sewing thread) (Complainant: India)	13 February 2012	In consultations
DS418	Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Complainant: El Salvador)	19 October 2010	Panel Report: Inconsistency due to the existence of unforeseen developments, definition of domestic directly competitive product, serious injury and the exclusion of developing countries.
DS417	Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Complainant: Honduras)	18 October 2010	Panel Report: as for El Salvador

DS416	Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Complainant: Guatemala)	15 October 2010	Panel Report: as for El Salvador
DS415	Dominican Republic — Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (Complainant: Costa Rica)	15 October 2010	Panel Report: as for El Salvador
DS356	Chile — Definitive Safeguard Measures on Certain Milk Products (Complainant: Argentina)	28 December 2006	Authority for panel lapsed on 1 August 2008
DS351	Chile — Provisional Safeguard Measure on Certain Milk Products (Complainant: Argentina)	25 October 2006	Authority for panel lapsed on 1 August 2008
DS328	European Communities — Definitive Safeguard Measure on Salmon (Complainant: Norway)	1 March 2005	In consultations
DS326	European Communities — Definitive Safeguard Measure on Salmon (Complainant: Chile)	8 February 2005	Settled or terminated (withdrawn, mutually agreed solution)
DS303	Ecuador — Definitive Safeguard Measure on Imports of Medium Density Fibreboard (Complainant: Chile)	24 November 2003	In consultations
DS278	Chile — Definitive Safeguard Measure on Imports of Fructose (Complainant: Argentina)	20 December 2002	In consultations
DS274	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Chinese Taipei)	1 November 2002	In consultations
DS260	European Communities — Provisional Safeguard Measures on Imports of Certain Steel Products (Complainant: United States of America)	30 May 2002	Panel established but not yet composed
DS259	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Brazil)	21 May 2002	Inconsistent with WTO law: due to the unforeseen developments, increased imports, parallelism and causation
DS258	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: New Zealand)	14 May 2002	Inconsistent with WTO law: as for Brazil
DS254	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Norway)	4 April 2002	Inconsistent with WTO law: as for Brazil
DS253	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Switzerland)	3 April 2002	Inconsistent with WTO law: as for Brazil

DS252	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: China)	26 March 2002	Inconsistent with WTO law: as for Brazil
DS251	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Korea (Republic of))	20 March 2002	Inconsistent with WTO law: as for Brazil
DS249	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: Japan)	20 March 2002	Inconsistent with WTO law: as for Brazil
DS248	United States of America — Definitive Safeguard Measures on Imports of Certain Steel Products (Complainant: European Communities)	7 March 2002	Inconsistent with WTO law: as for Brazil
DS238	Argentina — Definitive Safeguard Measure on Imports of Preserved Peaches (Complainant: Chile)	14 September 2001	Inconsistent with WTO law: due to unforeseen developments, increased imports and serious injury
DS235	Slovak Republic — Safeguard Measure on Imports of Sugar (Complainant: Poland)	11 July 2001	Settled or terminated (withdrawn, mutually agreed solution)
DS230	Chile — Safeguard Measures and Modification of Schedules Regarding Sugar (Complainant: Colombia)	17 April 2001	In consultations
DS228	Chile — Safeguard Measures on Sugar (Complainant: Colombia)	15 March 2001	Settled or terminated (withdrawn, mutually agreed solution)
DS226	Chile — Provisional Safeguard Measure on Mixtures of Edible Oils (Complainant: Argentina)	19 February 2001	In consultations
DS223	European Communities — Tariff-Rate Quota on Corn Gluten Feed from the United States (Complainant: United States of America)	25 January 2001	In consultations
DS220	Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complainant: Guatemala)	5 January 2001	In consultations
DS214	United States of America — Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe (Complainant: European Communities)	1 December 2000	Panel established but not yet composed
DS207	Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complainant: Argentina)	5 October 2000	Inconsistent with WTO law: due to other reasons

DS202	United States of America — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Complainant: Korea (Republic of))	13 June 2000	Inconsistent with WTO law: due to injury analysis, parallelism, developing country exception and others
DS178	United States of America — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from Australia (Complainant: Australia)	23 July 1999	Inconsistent with WTO law: due to unforeseen developments, definition of domestic industry, serious injury and causation
DS177	United States of America — Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand (Complainant: New Zealand)	16 July 1999	Inconsistent with WTO law: due to unforeseen developments, domestic industry, threat of serious injury and causation
DS166	United States of America — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (Complainant: European Communities)	17 March 1999	Inconsistent with WTO law: due to increased imports, serious injury, causation, parallelism, notification and objective assessment
DS164	Argentina — Measures Affecting Imports of Footwear (Complainant: United States of America)	1 March 1999	Panel established but not yet composed
DS123	Argentina — Safeguard Measures on Imports of Footwear (Complainant: Indonesia)	22 April 1998	In consultations
DS121	Argentina — Safeguard Measures on Imports of Footwear (Complainant: European Communities)	6 April 1998	Inconsistent with WTO law: due to unforeseen developments, parallelism, serious injury, increased imports and causation
DS98	Korea (Republic of) — Definitive Safeguard Measure on Imports of Certain Dairy Products (Complainant: European Communities)	12 August 1997	Inconsistent with WTO law: due to unforeseen developments, serious injury and measure
DS78	United States of America — Safeguard Measure Against Imports of Broom Corn Brooms (Complainant: Colombia)	28 April 1997	In consultations

Appendix 3: RTAs and trade defence measures

RTA	Date of entry into force	Relevant GATT provision	Type of agreement	Development status of members	AD	CVD	Multilateral safeguards	Regional safeguards
AFTA	1992	Enabling clause	FTA	Developing	No rules	No rules	No rules	Rules
ALADI	1981	Enabling clause	PTA	Developing	No rules	No rules	No rules	Rules
Andean-Community	1993	-	CU	Developing	Rules	Rules	No rules	Rules
Australian-Singapore	2003	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Disallowed
Australia-Thailand	2005	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
Australia-US	2005	Article XXIV	FTA	Developed	No rules	No rules	Rules	Rules
CACM	1961	Article XXIV	CU	Developing	Rules	Rules	No rules	No rules
Canada-Chile	1997	Article XXIV	FTA	Mixed	Disallowed	No rules	Rules	Rules
Canada-Costa Rica	2002	Article XXIV	FTA	Mixed	Rules	No rules	Rules	Rules
Canada-Israel	1997	Article XXIV	FTA	Mixed	No rules	Rules	Rules	Disallowed
CARICOM	1973	Article XXIV	CU	Developing	Rules	Rules	No rules	Rules
CEMAC	1999	Enabling clause	PTA	Developing	No rules	No rules	No rules	No rules
CER	1990	Article XXIV	FTA	Developed	Disallowed	Rules	No rules	Rules
China-Hong Kong	2004	Article XXIV	FTA	Developing	Disallowed	Disallowed	No rules	Rules
China-Macao	2004	Article XXIV	FTA	Developing	Disallowed	Disallowed	No rules	Rules
COMESA	1994	Enabling clause	PTA	Developing	Rules	Rules	No rules	Rules
EC-Algeria	1976	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EC-Andorra	1991	Article XXIV	CU	Mixed	No rules	No rules	No rules	No rules
EC-Chile	2003	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EC-Croatia	2002	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules

EC-Egypt	2004	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EC-Faroe Islands	1997	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-FYROM	2001	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-Israel	2000	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-Jordan	2002	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-Lebanon	2003	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EC-Mexico	2000	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EC-Morocco	2000	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-OCT	1971	Article XXIV	FTA	Mixed	No rules	No rules	No rules	Rules
EC-Palestine Authority	1997	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-South Africa	2000	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EC-Switz-Licht	1973	Article XXIV	FTA	Developed	Rules	No rules	No rules	Rules
EC-Syria	1977	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EC-Tunisia	1998	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Rules
EC-Turkey	1996	Article XXIV	CU	Mixed	Rules	No rules	No rules	Rules
EEA	1994	Article XXIV	FTA	Developed	Disallowed	Disallowed	No rules	Rules
EFTA	2001	Article XXIV	FTA	Developed	Disallowed	Disallowed	No rules	Rules
EFTA-Chile	2004	Article XXIV	FTA	Mixed	Disallowed	Rules	Rules	Rules
EFTA-Croatia	2002	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-FYROM	2001	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-Israel	1993	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-Jordan	2002	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-Morocco	1999	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-Palestine Authority	1999	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
EFTA-Singapore	2003	Article XXIV	FTA	Mixed	Disallowed	Rules	No rules	Rules
EFTA-Tunisia	2005	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
EFTA-Turkey	1992	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
European Comm.	1958	Article XXIV	CU	Developed	Disallowed	Disallowed	No rules	Disallowed

GCC	1981	Enabling clause	PTA	Developing	No rules	No rules	No rules	No rules
Group of 3	1995	-	FTA	Developing	Rules	Rules	Rules	Rules
Japan-Singapore	2002	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules
Korea-Chile	2004	Article XXIV	FTA	Developing	Rules	Rules	Rules	Rules
MERCOSUR	1991	Enabling clause	CU	Developing	Rules	Rules	No rules	Disallowed
Mexico-Chile	1999	Article XXIV	FTA	Developing	No rules	No rules	Rules	Rules
Mexico-EFTA	2001	Article XXIV	FTA	Mixed	Rules	Rules	No rules	Rules
Mexico-Israel	2000	Article XXIV	FTA	Developing	Rules	Rules	Rules	Rules
Mexico-Japan	2005	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules
Mexico-Nicaragua	1998	Article XXIV	FTA	Developing	Rules	Rules	Rules	Rules
Mexico-Northern Triangle	2001	-	FTA	Developing	Rules	Rules	Rules	Rules
Mexico-Uruguay	2004	-	FTA	Developing	Rules	Rules	Rules	Rules
NAFTA	1994	Article XXIV	FTA	Mixed	Rules	Rules	Rules	Rules
New Zealand-Singapore	2001	Article XXIV	FTA	Mixed	Rules	No rules	No rules	Disallowed
SACU	2002	Article XXIV	CU	Developing	Disallowed	Disallowed	No rules	Disallowed
SADC	2000	Article XXIV	FTA	Developing	Rules	Rules	No rules	Rules
SAFTA	1995	Enabling clause	PTA	Developing	Rules	Rules	No rules	Rules
SPARTECA	1981	Enabling clause	PTA	Mixed	Rules	No rules	No rules	Rules
Turkey-Israel	1997	Article XXIV	FTA	Developing	Rules	No rules	No rules	Rules
UEMOA	2000	Enabling clause	FTA	Developing	Rules	No rules	Rules	Rules
US-Bahrain	2006	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules
US-CAFTA & Dom. Rep.	2006	Article XXIV	FTA	Mixed	No rules	Rules	Rules	Rules
US-Chile	2004	Article XXIV	FTA	Mixed	No rules	Rules	Rules	Rules
US-Israel	1985	Article XXIV	FTA	Mixed	No rules	No rules	No rules	Rules
US-Jordan	2001	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules
US-Morocco	2006	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules
US-Singapore	2004	Article XXIV	FTA	Mixed	No rules	No rules	Rules	Rules

Found in: Preferential Trade Agreements for Development: Issues and implications, May 11-15, 2009, Washington DC, page 348, with some amendments by the author of this thesis Elenor Lissel.

Please notice that this list is not exhaustive and does not portray all the RTAs.

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Safeguard Measures

This thesis examines and analyzes the rules on safeguard measures, the assessments by the Appellate Body and panels as well as the practice by WTO Members.

One of the differences between safeguard measures on the one hand and anti-dumping and countervailing duties on the other under WTO law, is that the Agreement on Safeguards has a preamble. The preamble state that the Agreement is applicable to all Members. This thesis explores what applicable to all means. Another difference is that safeguard measures are applicable on fair trade, while anti-dumping and countervailing measures are applicable to unfair trade. The preamble to the Agreement on Safeguards emphasize that there is a need to re-establish multilateral control over safeguards and eliminate measures that escape such control, since the measure historically has been used to combat unfair trade as well as set up measures and bilateral agreements – grey area measures – that was outside of the rules. Despite the intentions with the Agreement, no safeguard measures to date has been found to comply with the WTO rules.

Safeguard measures are not only regulated under the multilateral rules, but also in Regional Trade Agreements. This can cause some difficulties as to know when and if safeguard measures can be used and to what parties. Some conflicts can arise which are described in this thesis. The safeguard rules under WTO law state that safeguard measures should be applied to products irrespective of its source, meaning that they are applicable to all imports without being able to select affected parties. Exceptions from the principle of non-discrimination have been examined throughout the thesis and whether there is a space to discriminate under the safeguard rules.

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