

**SAFEGUARD DILEMMAS: THE NEED FOR PRACTICAL
SPECIAL AND DIFFERENTIAL TREATMENT FOR
DEVELOPING COUNTRIES**

BY

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DECLARATION

I declare that *Safeguard Dilemmas: The need for Practical Special and Differential Treatment for Developing Countries* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Karugarama Richard Lebero

Signed



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GLOSSARY

Causation-This is one of the prerequisites for a successful safeguard measure. Causation means that 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.

Developed countries-These are Countries that possess a high income per capita and a very high Human Development Index.

Developing countries-These are countries with relatively low standards of living, an undeveloped industrial base, and moderate to low Human Development Index.

Dispute Settlement Body (DSB) – This is an international dispute settlement body introduced to allow Members of the WTO to effectively and expeditiously settle international disputes that arise between them.

Grey area measures-These are various escape clause techniques used to restrain imports which are injuring competing domestic industries.

Least developed countries-According to the United Nations; these are countries which exhibit the lowest indicators of socio-economic development and with the lowest Human Development Index ratings of all countries in the world.

Most Favoured Nation (MFN) treatment-According to this principle any advantage, favour, privilege or immunity granted by any contradicting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Provisional Safeguard Measure-This is a measure applicable in critical circumstances where a Member state cannot afford to wait until the investigation is completed because a delay may cause irreversible damages.

Safeguard measure-A safeguard measure is an emergency measure imposed when the domestic industry is injured by a surge in imports.

Serious injury-This is one of the requirements for a successful safeguard measure. Serious injury means a significant overall impairment in the position of the domestic industry.

Special and Differential Treatment-This is a term used to describe preferential treatment in favour of developing and least developed countries.

The *de minimis* Rule-The *de minimis* rule seeks to balance the need for favorable treatment and the need to protect infant industries in developing countries. It encompasses the prohibition to apply safeguard measures on imports from a developing country importing less than three per cent as well as grant MFN treatment to all developing countries provided collectively the total amount of imports are less than nine per cent.

Threat of serious injury-This is one of the requirements for a successful safeguard measure. It entails a demonstration of threat of serious injury that is clearly imminent.

Unforeseen Development-This is a development that occurs after the negotiation of the relevant tariff concession which was not foreseeable at the time the concession was negotiated.

World Trade Organisation (WTO)-This is a global international organization which sets the rules for the global trading system of Member states that are signatories to its Agreements.

ABBREVIATIONS AND ACRONYMS

AD	Anti-dumping
ATC	Agreement on Textiles and Clothing
CBC	Central Bank of Chile
CVD	Countervailing Duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Ibid	Ibidem
IP	Intellectual Property
ITAC	International Trade Commission of South Africa
ITO	International Trade Organization.
LDC	Least Developed Countries
MFN	Most Favoured Nation
OMA	Orderly Marketing Arrangements
S&D	Special and Differential Treatment
SA	South Africa
SACU	Southern African Customs Union
SGA	Agreement on Safeguards
SSG	Special Safeguard Measures
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
US	United States of America

USITC	United States International Trade Commission
VCLT	Vienna Convention on the Law of Treaties
VRA	Voluntary Restraint Agreements
WTO	World Trade Organisation



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Happy are those who are concerned for the poor, The Lord will help them when they are in trouble.

Psalms 41:1 The Good News Bible



As we enter the new millennium, we must make trade work for the poor. We must show sensitivity to the needs and concerns of the weaker partners in the global trading system.

Kofi Annan UN Secretary General



CHAPTER 1: INTRODUCTION

1.1 Introduction

Safeguards are among the most controversial of all trade remedies, due to the fact that they are contrary to the general principles of international fair trade as articulated in the various agreements governing the relationship between Members of the World Trade Organisation (WTO).¹ To illustrate this point: the decision by Member states to implement safeguards has in the past, and still is, severely criticised by the standing Appellate Body, the highest dispute settlement arena of the WTO.² Thus, developing countries, least developed countries (LDC), South Africa, and other Sub-Saharan African countries, are hard-pressed to deploy and consider safeguards as an option, even in *bona fide* instances where these remedies are consistent with underlying trade and legal theory, considered together with the WTO rules. While pressure groups often seek to exert influence on governments to invoke safeguard measures for political and economic reasons, governments are seldom prepared to do so in light of the controversy surrounding safeguards and the strict interpretation thereof under the WTO structures.³

This thesis rests upon two central interlinked propositions-in essence a two-pronged argument and overarching statement of policy. First, the legal constraints on safeguards, many of which evolve out of the strict Appellate Body decisions (which I shall refer to herein as “jurisprudence”), are reasonable on legal and policy grounds even though such controlling measures are applied likewise to fairly-traded and not just to unfairly-traded merchandise. Secondly, developing countries like South Africa should properly be accorded special and differential treatment to apply safeguards. In other words, this thesis argues that while the general legal trend to restrict the use of safeguards is proper to prevent abuse, there must be an exception for poor countries so that, as a practical matter, safeguards as applied relative to these countries is a usable

¹ The other remedies counter what are said to be unfair practices such as dumping, illegal subsidisation, and intellectual property (IP) infringement. Safeguards target a foreigner that has done nothing wrong other than be successful in a product market. For the purposes of this thesis, unfair trade practices will not be discussed.

² AO Sykes ‘The Safeguard Mess: A Critique of the WTO Jurisprudence’ (2003) 2 *World Trade Review* 262.

³ K Brown ‘ANC Summit Calls on Government to Institute ‘Safeguard’ Measures to Prevent More Job Losses’ http://www.tralac.org/scripts/content.php?id=3586_ (accessed 15 April 2006).

remedy. The overarching contention is that the existing exceptions offered to developing countries and LDCs should be extended, given cogent policy considerations prevailing in these countries.

Statistics released by the WTO Appellate Body between January 1995 and June 2005 show that a total of 139 safeguard investigations were initiated and 68 safeguard measures imposed.⁴ The numbers of incidents relative to safeguards are low, compared to the 2,743 anti-dumping (AD) initiations and 1,729 AD measures, and the 176 countervailing duty (CVD) initiations and 108 CVD measures notified during the same period.⁵ These statistics alone illustrate that the WTO Appellate Body has over the stated time interpreted the provisions of GATT Article XIX and the Agreement on Safeguards (SGA) conservatively. Proponents of free trade may well embrace the conservative approach adopted by the Appellate Body as laudable policy, but such approach may create discontent in countries advocating a mechanism providing a tangible form of legitimate protection in the face of a genuine need for protection from unfettered trade. It has been argued by some commentators that the Appellate Body applies GATT Article XIX and the SGA in an incoherent way by failing to demonstrate precisely what is required to implement safeguards, and there is no deep insight demonstrated in a string of adverse Appellate Body rulings.⁶ This thesis opposes these negative arguments and criticisms of the Appellate Body. Rather, this thesis contends that by strictly enforcing GATT Article XIX and the SGA the Appellate Body has acted as the true guardian of free trade against “protectionist abuse” of safeguard measures. Notwithstanding this position, certain arguments and solutions are proposed which ameliorate the negative effects of safeguards as currently applied by the WTO.

It should be emphasised that safeguard measures were always available under GATT Article XIX, although “Contracting Parties” under GATT and “Members” under WTO sought to protect their domestic industries, not through formal safeguards, but rather through so called “grey area” measures such as bilateral negotiations outside

⁴See ‘WTO Secretariat Announces Statistics on Safeguard Measures’
http://www.wto.org/english/news_e/news05_e/safeg_nov05_e.htm (accessed 15 April 2006).

⁵ *Ibid.*

⁶ AO Sykes ‘The Safeguard Mess: A Critique of the WTO Jurisprudence’ (2003) 2 *World Trade Review* 262.

the auspices of GATT. This resulted in a plethora of voluntary restraint agreements (VRAs) by which exporting countries were persuaded to reduce or cease exports “voluntarily”, or to agree to other means of sharing given markets, in ways which were contrary to free trade.⁷ Grey area measures tended to erode the system of free trade and were popular among countries that sought to ease the hardships experienced through the process of adjustment to the system of free international trade rules.⁸ Therefore, it became of paramount importance to develop a new framework for safeguard measures under the auspices of the SGA. This Agreement, with its detailed requirements for the adoption of safeguard measures, is considered a significant achievement of the Uruguay Round (1986-1994).⁹ The abolition of grey area measures is thus an essential prerequisite to strengthening and reinforcing disciplines on safeguards.¹⁰

1.2 A Brief Review of the Economic and Political Reasons Why Countries Impose Safeguards

A detailed discussion of the economic and political reasons why countries impose safeguard measures is beyond the scope of this thesis. From an economic perspective safeguard measures are justified as a temporary economic adjustment to ameliorate the harm that is being caused by an increase in imports.¹¹ The adjustments are made with the view that through temporary protection the domestic industry is able to adjust to injury caused by the surge in imports. On the contrary, detractors of safeguard measures argue that there are other kinds of economic forces that may injure domestic

⁷ See ‘Understanding the WTO’ http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 15 April 2006).

⁸ YS Lee ‘Revival of Grey-Area Measures? – The US – Canada Softwood Lumber Agreement: Conflict with the WTO Agreement on Safeguards’ (2002) 36 *Journal of World Trade* 155.

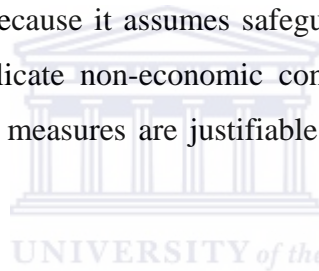
⁹ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (2 ed. 1997) 210; see also YS Lee ‘Destabilisation of the Discipline on Safeguards?-Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards’ (2001) 35 *Journal of World Trade* 1235; see also YS Lee ‘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’ (2002) 36 *Journal of World Trade* 642.

¹⁰ F Mueller ‘Is the General Agreement on Tariffs and Trade Article XIX “Unforeseen Development Clause” Still Effective Under the SGA?’ (2003) 37 *Journal of World Trade* 1122.

¹¹ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (2 ed. 1997) 176.

industries, which *inter alia* include consumer tastes, government spending, or lack thereof, and economic downturns.¹²

Another economic reason for safeguard measures is the idea that protection not only provides the time necessary for transition, but also helps the affected domestic industry to improve its competitiveness.¹³ There has been considerable academic argument around the restoration of competitiveness debate. In particular Sykes finds this argument unpersuasive because government intervention to restore competitiveness is simply unnecessary, especially in developed countries with substantial private capital markets.¹⁴ According to Sykes, in developed countries private lenders will finance efforts to become competitive provided the return from such investment justifies the apparent risk.¹⁵ In other words, private investors and lenders take economic risks even without government assistance if there is a likelihood of profits from such investment. The argument raised by the learned author is not immune from criticism because it assumes safeguards are an economic issue, when in reality they may implicate non-economic concerns.¹⁶ Whether economic reasons for imposing safeguard measures are justifiable is beyond the scope of this work.¹⁷



Politically, safeguard measures serve as a political safety valve.¹⁸ The underlying theory is that safeguard measures should provide governments with the means to “take action” when pressure from interests groups is mounting about the surge in imports. Obviously this does not deter selfish politicians from abusing safeguard measures to meet their own political interests. The political argument is complemented by the public choice theory.¹⁹ At the core of the public choice theory is the realization that “policy making under democratic governments depends on the

¹² *Ibid.*

¹³ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2 ed. 2005) 9.

¹⁴ AO Sykes ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’ (1991) 51 *The University of Chicago Law Review* 264.

¹⁵ *Ibid.*

¹⁶ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 945.

¹⁷ For an extended discussion see JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (2 ed. 1997) 176; see also R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 943-945.

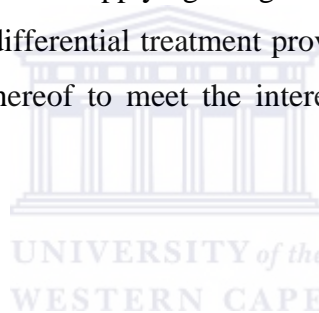
¹⁸ R Bhala *International Trade Law: Theory and Practice* (2 ed. 2001) 1120.

¹⁹ According to Bhala the public choice theory is nothing more than the application of microeconomic tools to political behaviour. For the relevant discussion see R Bhala *International Trade Law: Theory and Practice* (2 ed. 2001) 1122.

inter-play of special interest forces in the political market place”.²⁰ The inter-play between the various political camps is what makes politicians support safeguards in response to demand from concentrated constituencies lobbying for protection. In brief, public choice theory “predicts that a politician will focus on concerns of producers adversely impacted by trade liberalization as opposed to consumers beneficially affected by such liberalization”.²¹

1.3 The Aims of this Research

The purpose of this thesis is twofold: First, to examine the jurisprudence on safeguard measures as interpreted by the WTO Appellate Body. The Appellate Body interprets safeguard measures strictly, thus causing discomfort amongst certain WTO Members, practitioners, and scholars. Secondly in light of this strict construction developing countries have little hope of success in applying safeguard measures. Accordingly this thesis analyses the special and differential treatment provided by the WTO SGA and underscores the insufficiency thereof to meet the interests of developing countries such as South Africa.²²



1.4 Research Methodology

At the heart of this thesis is a review of GATT Article XIX, WTO SGA, Appellate Body cases, South African statutes, books and scholarly articles. The internet also provided a valuable source of information. Due to the complexity of safeguard measures, interviews have been held with a relevant cross section of distinguished scholars from African developing countries and LDCs.

²⁰ AO Sykes ‘Protectionism as a “Safeguard”’: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’ (1991) 51 *The University of Chicago Law Review* 275.

²¹ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 947.

²² According to the World Bank, developing countries include the following, South Africa, Rwanda, Angola, Kenya, Botswana, Cameron etc. See Annexure A for a detailed list of developing countries.

1.5 Overview of Chapters

Chapter One

Chapter One is an introductory Chapter and its purpose is to give the reader a brief overview of the controversy surrounding safeguard measures. It also aims at highlighting the problem under investigation.

Chapter Two

Chapter Two aims at providing the reader with an overview of the SGA. This *inter alia* includes a historical overview of Article XIX and the debates surrounding the birth of the SGA. In essence, Chapter Two aims at highlighting a theoretical framework of the SGA.

Chapter Three

Chapter Three aims at providing an in-depth analysis of the jurisprudence of safeguard measures so far adjudicated by the Panel and Appellate Body. It also provides an in-depth analysis of academic debates surrounding safeguard measures.

Chapter Four

Chapter Four considers the special and differential treatment in favour of developing countries. The record of developing countries with regard to safeguard measures is also highlighted. Particular reference is made to the Safeguard Regulation of South Africa.

Chapter Five

Chapter Five is a concluding Chapter. It proposes a modification of the SGA so that safeguard measures as applied to developing countries will be a usable remedy.

CHAPTER 2: THE SAFEGUARD FRAMEWORK

2.1 A Historical Overview of Article XIX

The institution of safeguard measures is found in a stipulation within the United States (US) and Mexico Trade Agreement of 1943.²³ The core of this proviso was to permit parties to apply temporary import restrictions when increased imports, resulting from trade concessions, caused or threatened to cause serious damage to its domestic industry.²⁴ This was often referred to as the GATT “escape clause” because of its dual purpose.²⁵ The escape clause permits an importing country to apply import restrictions, and at the same time “escape” from its agreed upon treaty obligations, to avoid an adverse effect of some kind which is caused by increases in imports.²⁶ The escape clause was conceived by the 1945 US Congress, which aimed at giving the US a default position in the event that free trade caused adverse effects.²⁷ In the congressional debate it was decided that an escape clause was necessary in all treaties involving the granting of concessions by the US, so that concessions could be renegotiated if situations of an emergency character arose.²⁸

The US subsequently proposed the inclusion of the escape clause in the GATT.²⁹ During the negotiations drafters of the GATT succumbed to the US desire to have an escape clause, which culminated in the adoption of the GATT Article XIX.³⁰ The inclusion of the escape clause is probably the reason why Congress agreed that the US would participate in the GATT through ratification.³¹ This gave birth to the first multilateral rules on safeguards, and the language was modelled after the 1947 executive order.³²

²³ Background Note by the Secretariat: Drafting History of Article XIX and its Place in GATT MTN.GNG/NG9/W/7 September 16 1987.

²⁴ *Ibid.*

²⁵ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2003) 83-92.

²⁶ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 939.

²⁷ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 941.

²⁸ *Ibid.*

²⁹ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2003) 83-92.

³⁰ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 941; see also JH Jackson *World Trade and the Law of GATT* (1969) 553.

³¹ R Bhala *International Trade Law: Theory and Practice* (2 ed. 2001) 1120.

³² YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2003) 83-92.

The fundamental requirements of an escape clause in the GATT Article XIX are substantially similar to those provided by the US and Mexico Trade Agreement of 1943.³³ An Article XIX escape clause allows Members to withdraw temporarily concessions on specific products if increasing imports of the products causes injury to the domestic industry.³⁴ The essence of Article XIX is to balance domestic economic interests with international trade liberalization.³⁵ Article XIX further seeks to provide temporary protection to domestic producers when unforeseen developments result in increased imports.³⁶ However, Article XIX is subject to an exception: Members could only enact temporary protection measures after showing that unforeseen circumstances, combined with GATT obligations, produced increased imports that caused or threatened to cause, serious injury to domestic producers.³⁷

The main problem with Article XIX lies in the difficulties encountered in its practical application. Member countries were frustrated by its demanding standards, irrelevance to economic realities, burdensome application and ambiguous language.³⁸ Perez-Lopez correctly argues that most trade restrictions outside the parameters established by GATT mainly arose as a result of the ambiguity of Article XIX.³⁹ Most importantly, Member countries had started resorting to other means of protection which defeated the purpose of Article XIX. Attempts to enact supplementary safeguard rules during the 1979 Tokyo Round of multilateral trade negotiations were unsuccessful, and during this time most Members used voluntary export restraints (VERs), VRAs and orderly marketing arrangements (OMAs).⁴⁰ These measures, instead of being adopted by the importing country, were formally taken by an exporting country or negotiated by exporting companies with the importing country. These practices defeated the true essence of Article XIX and Member countries started advocating for a change in the rules relating to safeguards. The US, being a key player in safeguard measures, complained that Article XIX was oblique because it

³³R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 941.

³⁴ Article XIX: 1(b) of the General Agreement on Tariffs and Trade October 30 1947.

³⁵ JF Perez-Lopez 'GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries' (1991) 23 *Case Western Reserve Journal of International Law* 517-519.

³⁶ Article XIX: 1(a) of the General Agreement on Tariffs and Trade October 30 1947.

³⁷ *Ibid.*

³⁸ JF Perez-Lopez 'GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries' (1991) 23 *Case Western Reserve Journal of International Law* 517-534.

³⁹ *Ibid.*

⁴⁰ JF Perez-Lopez 'GATT Safeguards: A Critical Review of Article XIX and its Implementation in Selected Countries' (1991) 23 *Case Western Reserve Journal of International Law* 517-538.

discouraged countries from using the escape clause on two grounds: First, the US complained about the requirement that an escape clause measure be undertaken on a non-discriminatory basis. In the mind of the US, Article XIX imposed a duty on a large number of other contracting parties to bear the costs of adjustment to fair international trade incurred by an industry in the contracting party invoking the escape clause.⁴¹ Secondly, the ability of countries, whose exports are affected by escape clause measures, to impose retaliatory measures against the country invoking the escape clause is limited if they are not compensated by that country.⁴²

Not surprisingly, the US being the driving force and power behind GATT Article XIX in the GATT negotiations of the mid 1940's, also again became a key advocate for the SGA in the 1986-1994 Uruguay Round negotiations.⁴³ During the Uruguay Round negotiations the US convinced GATT members to incorporate concepts from section 201 of the US Trade Act of 1974 into the new SGA.⁴⁴ This was mainly because Article XIX was only ever intended to serve as a transitional arrangement for the regulation of safeguards. In effect, when the International Trade Organisation (ITO) failed to kick off, both the GATT and Article XIX became the regulatory safeguard structure over a long time by default.⁴⁵ Even when the entire GATT system evolved Article XIX remained unchallenged although the language was oblique. The Article XIX rules on safeguards were later complemented with the present SGA.⁴⁶

⁴¹ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 943.

⁴² R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 942.

⁴³ *Ibid.*

⁴⁴ R Bhala & K Kennedy *World Trade Law* (1998) 1-9.

⁴⁵ AO Sykes 'The Safeguard Mess: A Critique of the WTO Jurisprudence' (2003) 2 *World Trade Review* 45.

⁴⁶ The Agreement on Safeguards (SGA) is reprinted in various sources which include WTO, *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, (1999) 275-283. The SGA can also be found on the WTO website, www.wto.org. Annexure C of this thesis contains the text of the SGA.

2.2 The Current Situation

The Uruguay Round of Multilateral Trade Negotiations identified safeguards as a critical issue demanding a comprehensive agreement to strengthen the GATT system.⁴⁷ The WTO incorporated stipulations similar to those in Article XIX into the SGA, but expressly prohibited “grey area”⁴⁸ measures, and established a “sunset clause”⁴⁹ limiting the duration of safeguard actions to a maximum of eight years.⁵⁰ Article XIX complements the SGA and the two agreements are interrelated. This reasoning is encapsulated in Article 1 of the SGA which provides that the rules for the application of safeguards shall be understood to mean those measures envisaged in Article XIX of GATT 1994.⁵¹ Put succinctly, Article XIX of GATT 1994 and the SGA are interlinked and interconnected.

This reasoning is in line with the interpretation accorded to Article XIX and the SGA by the Appellate Body.⁵² In *Korea-Dairy Products* it held that safeguard actions must conform to the provisions of Article XIX of the GATT 1994 as well as the provisions of the SGA.⁵³ Thus any measure imposed after entry into force of the SGA must comply with both the provisions of the SGA and Article XIX of the GATT 1994.⁵⁴ The Appellate Body therefore affirms the relationship between Article XIX of GATT and the SGA.⁵⁵

⁴⁷ GATT, *Ministerial Declaration on the Uruguay Round*, GATT/MIN.DEC 86-1572, section I.D, 33S/19, 24-25 (September 6 1986). The Uruguay Round Declaration directed that the negotiation of an SGA "shall contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement".

⁴⁸ Grey area measures are various escape clause techniques used to restrain imports which are damaging competing domestic industries. For a detailed discussion see JH Jackson et al *Legal Problems of International Economic Relations: Cases, Materials &Text* (1995) 654.

⁴⁹ “Sunset clause” means that when a condition is satisfied the Agreement will come to an end.

⁵⁰ Article 7.3 of the SGA.

⁵¹ Article 1 of the SGA.

⁵² For a detailed discussion see Chapters 3.2 and 3.3.

⁵³ Appellate Body Report, *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, para 77.

⁵⁴ *Ibid.*

⁵⁵ Appellate Body Report, *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, para 68.

The fundamental difference between Article XIX and the SGA is that the latter establishes clear obligations regarding the imposition of Article XIX safeguard actions, including extensive notification and consultation requirements. The SGA places greater restrictions on the application of safeguards by changing “the contracting party shall be free” language of the GATT 1947 into “A Member may apply a safeguard measure to a product only if...”.⁵⁶ The replacement of “shall” with “may” and the use of “only if” instead of “be free” indicate that the intention of the drafters of the WTO agreement was to clearly limit the use of safeguard measures to fewer instances.⁵⁷ Although the words “shall be free” are used in the SGA, it only applies in respect of the kind of action an affected exporting country can take in response to a safeguard measure applied by an importing country.

Furthermore, the SGA adds another requirement for the application of safeguards by providing that safeguard measures shall be applied to a product being imported irrespective of its source.⁵⁸ In contrast, there is no such consideration of origin in Article XIX of the GATT 1947 and its additional requirement confirm the principle of non-discrimination⁵⁹ which runs through all WTO agreements. The ambiguity of the term “serious injury”, as a requirement before a safeguard measure can successfully be imposed, is clarified in the SGA. The SGA states that it is the overall impact on “a domestic industry” as a whole and not the impact on certain producers within one domestic industry that should give rise to a safeguard application.⁶⁰ The changes in the SGA can be viewed both as an attempt to clarify the safeguard provisions in Article XIX of the GATT, and as part of the overall tendency to attach more restrictions on the use of safeguards. The SGA goes a step further to provide crucial constraints on the use of such measures. It also sets out substantive requirements such as serious injury, as well as procedural requirements that must be fulfilled in order to adopt a safeguard measure. Member countries can only fulfil these requirements

⁵⁶ Article 2 of the SGA.

⁵⁷ TP Stewart et al ‘Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and that Special Needs Are Addressed’ (2000) 24 *Fordham International Law Journal* 652, 662-63.

⁵⁸ Article 2.2 of the SGA.

⁵⁹ Non-discrimination is a principle already established in the multilateral trade arena. It means that any advantage or similar benefit granted to nationals of any country (regardless whether that country is a WTO member or not) must similarly and unconditionally be conferred upon the nationals of *all* other WTO members.

⁶⁰ Article 4(c) of the SGA.

through investigation procedures carried out by authorities of the country seeking to impose a measure.⁶¹ The SGA provides that the procedure must be accounted for in a written document issued by the relevant authorities at the conclusion of the process.

In summary, the SGA seeks to: (i) clarify and reinforce GATT requirements, particularly those of Article XIX; (ii) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (iii) encourage structural adjustment on the part of the industries adversely affected by increased imports, thereby enhancing competition in international markets.⁶² The SGA is also structured quite differently to Article XIX. The SGA consists of fourteen articles and one annexure. It has in essence four main components: (1) general provisions (Articles 1 and 2); (2) rules governing Members' application of new safeguard measures (that is those applied after entry into force of the WTO Agreement (Articles 3-9); (3) rules pertaining to pre-existing measures that were applied before the WTO Agreement came into force (Articles 10 and 11); and (4) multilateral obligations and institutions regarding the application of safeguard measures (Articles 12-14).⁶³

2.3 When Can Safeguards Be Imposed?

The SGA clearly sets out the conditions that justify safeguard measures being imposed. These conditions are peremptory and a Member must comply with them before imposing a safeguard measure. It is the application of these conditions that has stirred controversy in the application of safeguard measures. A detailed discussion of this issue is undertaken in Chapter three.⁶⁴ These conditions are described in Article 2.1 of the Agreement, which states:

A Member 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

⁶¹ For a detailed discussion, see Chapter 3.11.

⁶² See the SGA Article 1 to Article 14.

⁶³ *Ibid.*

⁶⁴ Chapter three considers the approach of the Panel and Appellate Body to the interpretation of safeguard measures. The following safeguard requirements are discussed in detail: Article XIX, causation, serious injury and threat thereof, investigation, and burden of proof.

conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.⁶⁵

Article 2.1 must be read together with Article 4.2(a) of the Agreement of Safeguards, which sets out the operational requirements for determining whether the conditions identified in Article 2.1 exist. Article 4.2(a) requires in relevant part that:-

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.

The essence of Article 4.2 is to ensure that the import increases required by Article 2.1 are of such a nature as to cause or threaten to cause serious injury. It must be noted that serious injury, or the threat thereof, is the cornerstone of all safeguard measures. Lee correctly submits that it is highly doubtful whether it is justifiable to apply a safeguard measure based on anything less than serious injury to domestic industry.⁶⁶ In other words, if such increases in imports do not cause injury to, or threaten to injure, the domestic industry, a Member country cannot impose safeguard measures. Article 4.2 provides more detailed guidelines on how to establish an increase in imports as the cause of serious injury, and not other factors. A country has to show the existence of a causal link when factors other than increased imports are causing injury to the domestic industry at the same time; and such injury shall not be attributed to increased imports.⁶⁷

In practice this means that, for example, if South Africa wants to impose safeguard measures on products from China, it has to establish that it is the increased imports of products from China, and not other factors, that have caused serious injury to the industry. In principle, this means that if factors other than increased imports of

⁶⁵ Article 2.1 of the SGA.

⁶⁶ YS Lee 'Specific Safeguard Mechanism in the Protocol on China's Accession to the WTO-A Serious Step Backward from the Achievement of the Uruguay Round' (2002) 5 *Journal of World Intellectual Property* 219-227.

⁶⁷ Article 4.2(b) of the SGA.

products from China are the cause of injury to domestic industries, South Africa cannot impose safeguard measures. This could become quite a complex investigation of fact because there may be a number of different factors having an adverse effect on a given industry.

2.4 Procedural Requirements⁶⁸

The SGA stipulates conditions that a Member must fulfil before imposing safeguard measures. As mentioned earlier, these conditions are peremptory and a Member country can have legal recourse against an importing country if these conditions are not respected. Briefly put: “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...”.⁶⁹ The SGA further states that, “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 the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measures...”.⁷⁰

The initiation of a safeguard investigation, the making of a finding that the domestic industry has suffered or is threatened with serious injury caused by increased imports, and the decision to apply or extend safeguard measures (this includes provisional measures) are all subject to an obligation of immediate notification to the Committee on Safeguards.⁷¹ Obviously the purpose of notifying the Committee on Safeguards at a relatively early stage in the potentially disputed action is to try and find an amicable solution. It is reasonable to assume the Committee will mediate between conflicting Members before safeguard measures can be imposed.⁷² To achieve this goal the

⁶⁸ This thesis uses procedural to avoid confusion with substantive elements, which are discussed in Chapter 3.

⁶⁹ Article 8.1 of the SGA.

⁷⁰ Article 8.2 of the SGA.

⁷¹ Articles 12.1 & 12.4 of the SGA.

⁷² Article 13(c) of the SGA.

Committee has drawn up special forms and guidelines on safeguard measures. A Technical Cooperation Handbook has also been prepared by the WTO Secretariat.⁷³

Furthermore, Article 12.2 provides that the notifications concerning the injury findings and the measure proposed must supply “all pertinent information.” This includes 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 addition, in case of an extension of a measure, evidence of adjustment of the domestic industry must be provided.⁷⁴

Before imposing safeguard measures a Member proposing safeguard measures must offer exporting Members an adequate opportunity for prior consultations. The consultations are carried out with a view to, *inter alia*, review the information provided in the notification, exchange views on the measure and reach an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.⁷⁵ Furthermore, the results of consultation pursuant to Article 12, any form of compensation referred to in Article 8, the proposed suspension of substantially equivalent concessions under Article 8.2 and the results of mid term reviews under Article 7.4 are subject to immediate notification to the Council for Trade in Goods by all Members concerned.⁷⁶ The Agreement also requires safeguard measures to be taken following an investigation by competent authorities pursuant to procedures made public.⁷⁷

To ensure compliance the Agreement sets out requirements for a safeguard investigation, which includes public notice for hearings and other appropriate means for interested parties to present evidence, including whether a measure would be in the public interest. The Agreement requires competent national authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. However, the term ‘competent authority’ is subject to

⁷³ Docs.G/SG/1,1 July 1996 and WT/TC/NOTIF/SG/1, 15 October 1996.

⁷⁴ Article 12.2 of the SGA.

⁷⁵ Article 8 of the SGA.

⁷⁶ Article 7.4 of the SGA.

⁷⁷ Article 3 of the SGA.

interpretation. What are the standards to determine whether a competent authority has carried out investigations? Who will determine that a Member country actually has competent authorities to carry out investigations? Some developing countries may not even have competent authorities to carry out meaningful investigations. This may perhaps be one of the reasons why developing countries do not impose safeguard measures.⁷⁸

2.5 Types of Safeguard Measures

In the *Hatters' Fur* case the Court held that safeguard measures are supposed to be emergency measures and their duration must therefore be sufficiently regulated to avoid abuse.⁷⁹ This reasoning is in line with Article 7.1 of the SGA which allows safeguards “for such period of time” as may be necessary to prevent or remedy serious injury and to facilitate adjustments.⁸⁰ The SGA makes provision for safeguard measures to be imposed provisionally during critical circumstances pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. However, such measures may not exceed 200 days, and during this period the pertinent requirements of Articles 2 through 7 and 12 must be met.⁸¹ Article 6 further requires that if subsequent investigation shows that increased imports did not cause serious injury or threat thereof, then the proceeds of a provisional tariff increase must be refunded promptly. Bhala submits that Article 6 may *prima facie* be construed as not requiring consultation (however, a preliminary determination must be made), which is a key to any safeguard measure. Such an interpretation would according to Bhala be far fetched because the Article is merely a deferral of its implementation.⁸² Article 12.4 requires a Member to consult immediately the Committee on Safeguards upon imposing provisional safeguard measures.

⁷⁸ For a detailed discussion see Chapter 3 and Chapter 4. See also Chapter 5 for a proposed reform of Articles 4(a) and 4(b) of the SGA.

⁷⁹ *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT (“Hatters’ Fur”)*, GATT/CP/106, adopted 22 October 1951 para 50.

⁸⁰ Article 7.1 of the SGA.

⁸¹ Article 6 of the SGA.

⁸² R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 990.

There are three fundamental difficulties with provisional safeguard measures. First, it is hard to prove that a delay would cause damage that is difficult to repair. Secondly, the requirements are rather too strict and countries may well find it difficult to apply them. Thirdly, the Agreement does not clearly define critical circumstances. It is for this reason that Members have not been ready to impose provisional safeguard measures. This further explains why no case has been heard at either the Panel or Appellate Body. Accordingly Members will continue to find it difficult to impose provisional safeguard measures until such a time the Panel or Appellate Body clarifies what these provisions entail.

The SGA makes provision for the application of definitive safeguard measures for a period of four years and a maximum of eight years, which period includes provisional safeguards.⁸³ The extension is subject to the condition 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 the pertinent provisions of Articles 8 and 12 are being observed.⁸⁴ In the event that the application of a measure is extended such extended measure shall not be more restrictive than it was at the end of the initial period, and continued liberalization should take place if the measure exceeds one year.⁸⁵ This provision will be welcomed by those supporters of free trade, given the limitation of the time period. However, this provision is problematic because some industries may take longer than eight years to adjust despite safeguard measures being imposed. The most hard-pressed industries would be located in developing countries, which in fact need longer periods to adjust.⁸⁶ Also, reference is made to the fact that the measure continues to be necessary, implying therefore that regard must be made to economic data relating to the period subsequent to the initial imposition of the measure. This is also problematic especially to developing countries, which may not have sufficient expertise and the resulting economic data may not be reliable and even available. A plausible solution would be for the Agreement to accord an exception for developing countries to impose safeguards for longer than eight years.

⁸³ Article 7.3 of the SGA.

⁸⁴ Article 7.2 of the SGA.

⁸⁵ Article 7.4 of the SGA.

⁸⁶ See Chapter 4 for the relevant discussion.

Most importantly, the SGA ensures that the repeated application of safeguard measures with respect to the same product is limited. To this end, a safeguard measure may not be applied again to a product until a period of time equal to the duration of the initial measure, or at least two years, has elapsed.⁸⁷ However, if the first safeguard measure lasted less than 180 days, a new one may be applied to the same product if (1) at least one year has elapsed since the introduction of the first safeguard measure, and (2) the same product has not been the subject of a safeguard measure more than twice in the five year period immediately preceding the date of introduction of the measure.⁸⁸ Article 7 of the Agreement imposes a cooling off period after expiry of a measure before a new one can be applied to the same product. This is done to avoid a situation where temporary import protection is turned into permanent import restriction. The SGA requires a Member proposing or seeking to extend a safeguard measure to maintain a substantially equivalent level of concessions.⁸⁹ If no agreement is reached within 30 days, then the affected importing country shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days the application of substantially equivalent concessions to the Member applying safeguard measures.⁹⁰

In principle the provision seeks to balance the effects that safeguard measures may cause to the exporting country by providing it with a benefit in another area that does not affect the importing country. Needless to say, if the importing country fails to provide concessions, the exporting country may retaliate which may have adverse effects on the importing country. It is expected that importing countries wishing to impose safeguard measures will be prepared to give reasonable concessions because of the fear of retaliation. Bhala correctly argues that the right to retaliate is designed to encourage use of the escape clause in a manner consistent with Article XIX and the SGA, and hence discourage the use of non-transparent measures, and VRAs.⁹¹ However, the SGA does not specify exactly what kind of compensation will be sufficient to stave off the imposition of retaliatory measures, Members may use the threat of retaliation to avoid safeguard measures being imposed. Members may

⁸⁷ Article 7.5 of the SGA.

⁸⁸ Article 7.5 of the SGA.

⁸⁹ Article 8.1 of the SGA.

⁹⁰ Article 8.2 of the SGA.

⁹¹ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 992.

therefore not consider applying safeguard measures because of the danger of retaliation.

2.6 Scope of Safeguard Regime

Previously Article XIX applied to all goods and to all situations. However, the position has changed substantially after the introduction and modification of the safeguard regime. The SGA remains the generally applied safeguard regime although it does not cover all goods. The WTO Agreement makes provision for the application of other special safeguard regimes that include the areas referred to below.

To start with, the Agreement on Agriculture makes provision for the imposition of special safeguard measures (SSG) on restricted agricultural products.⁹² Article 5 of the Agreement on Agriculture uses quantitative trigger threshold value (price) and or volume. This legal technique is different from GATT Article XIX language because these safeguards can be applied based on quantitative triggers or legal verbiage tests. For such products, safeguards may be imposed if (1) the volume of imports during a year exceeds a certain trigger level or (2) the price at which imports may enter falls below a certain trigger price.⁹³ However, these measures may only take the form of a tariff duty, to be applied until the end of the year in which it has been imposed.⁹⁴ On the other hand, imports that have not been designed as SSG can still be restrained generally under the SGA if the pertinent conditions set by the SGA are met.

Another Agreement of significance in this regard is the Agreement on Textiles and Clothing (ATC). Article 6 of the ATC recognises the need for Members to apply a specific transitional safeguard mechanism on certain textile products.⁹⁵ However, the ATC expired in 2005 and it is therefore of limited significance to Members.

⁹² The Agreement on Agriculture also had a special safeguard for textiles and apparel. This thesis will not dwell upon the Agreement on Agriculture considering the fact that it expired on 31 December 2004.

⁹³ Article 5 of the Agreement on Agriculture.

⁹⁴ *Ibid.*

⁹⁵ Article 6 of the Agreement on Textile and Clothing.

After lengthy and sometimes difficult negotiations, the People's Republic of China finally joined the WTO on December 11 2001.⁹⁶ The Agreement was code named the Protocol of Accession of the People's Republic of China.⁹⁷ China's Accession Protocol provides for a transitional safeguard clause that other WTO Members can rely on to limit imports from China.⁹⁸ This clause provides that a Member will impose safeguard measures if (1) imports from China increase in quantities or (2) enter in such conditions as to cause or threaten to cause serious injury (3) market disruption to the domestic producers of like or directly competitive products. If a measure is taken against China by an individual Member, other countries can also restrict imports from China if their can demonstrate that the same conditions are prevalent in their domestic economies. However, the application of this section is subject to Article 16.9 of the Protocol on China's Accession that terminates these measures 12 years after China's accession.

The Agreement on Trade in Services (GATS)⁹⁹ makes provision for safeguard measures. This is because GATT and the SGA do not cover trade in services. Article X of GATS makes room for negotiations on the question of emergency safeguard measures based on non-discrimination.¹⁰⁰ The deadline for completion of such negotiations was set at three years after entry into force of the WTO Agreement.¹⁰¹ Presently, negotiations are in progress to enact emergency safeguard measures for trade in services.¹⁰²

⁹⁶ China's WTO entry was officially approved one month earlier. See Press Release 252, *WTO's Ministerial Conference Approves China's Accession* (11 Nov 2001) http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (accessed 27 May 2006).

⁹⁷ *Ibid.*

⁹⁸ Part 1, Article 16 of WTO Ministerial Conference, Protocol on the Accession of the People's Republic of China, WT/L/432, at art. 16.9 (23 Nov 2001) available <http://www.docsonline.wto.org/DDFDocuments/t/WT/L/432.doc> (accessed 27 May 2006).

⁹⁹ Trade in services is defined as the supply of services from the territory of one Member into the territory of any other Member.

¹⁰⁰ Article X of the General Agreement on Trade in Services.

¹⁰¹ Article 10.3 of the General Agreement on Trade in Services.

¹⁰² See <http://www.dfait-maeci.gc.ca/tna-nac/TS/gats-negotiations-en.asp> (accessed 27 May 2006).

2.7 Non-Discriminatory Application of Safeguard Measures and Developing Countries

Article 2.2 of the SGA provides that should a Member wish to impose a safeguard measure, such measure must be applied on imported products irrespective of their source. In sum, Article 2.2 seeks to eliminate selective safeguard measures and promotes the use of Most Favoured Nation treatment (MFN), which principle occurs in all WTO Agreements. However, Article 5.2(b) allows countries to depart from MFN treatment when imports from certain Members have increased disproportionately.

Furthermore, the MFN treatment exempts developing country Members from safeguard action, provided that a given Member accounts for no more than three percent of total imports, and that developing countries collectively account for no more nine per cent.¹⁰³ Chad has argued that the exception introduces a bias in favour of developing countries that are new entrants or at least small producers of goods, whose market is still dominated by suppliers in developed countries.¹⁰⁴ The bias in favour of developing countries is not only justifiable, but also important, to enable them to achieve the benefits of free trade. Also, this is one way to provide developing countries with some kind of concession so as to reduce the negative impacts trade liberalization may cause. A detailed discussion of issues relating to developing countries is in Chapter 4.

¹⁰³ Article 9.1 of the SGA.

¹⁰⁴ BP Chad & R McCulloch 'The WTO Agreement on Safeguards: An Empirical Analysis of Discriminatory Impact' (2003) http://people.brandeis.edu/~crown/papers/bown_mcculloch_1.pdf (accessed 27 May 2006).

Chapter 3: THE WTO APPELLATE BODY JURISPRUDENCE ON SAFEGUARD MEASURES

3.1 The Nature of the WTO Dispute Settlement Body

The power to settle international disputes with binding authority distinguishes the WTO from most other intergovernmental institutions.¹⁰⁵ Consultation and disputes arising under the SGA are regulated by Articles XXII and XXIII of the GATT 1994 read together with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU gives the WTO unprecedented power to resolve trade-related conflicts between nations and, in appropriate circumstances (and within the limits of its jurisdiction) to assign penalties and compensation to the parties involved.¹⁰⁶ At the heart of dispute settlement is the process of consultation between parties, which must and usually does last 60 days.¹⁰⁷ If consultation between the parties fails, they may request the WTO Director-General to mediate or try to assist in the resolution of the matter in any other way.¹⁰⁸ A party must submit a written request for the establishment of a Panel, and indicate whether consultations were held, identify the measures at issue, and summarize the legal basis of the complaint.¹⁰⁹

Once the Panel has been set up, it has six months to conclude the case.¹¹⁰ In cases of urgency the deadline is truncated to three months.¹¹¹ The Panel must issue a report, which must be followed by the unsuccessful state or appealed. The Panel works in a systematic manner and begins by hearing the dispute of the complaining country including its defence, followed by the defence of the responding country, as well as any third parties that have announced an interest in the dispute.¹¹² At the Panel's second meeting the countries involved submit written rebuttals and present oral arguments. If one side raises scientific or other technical matters, the Panel may

¹⁰⁵ See, <http://www.cid.harvard.edu/cidtrade/issues/dispute.html> (accessed 10 July 2006).

¹⁰⁶ Article 22.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

¹⁰⁷ Article 4.7 of the DSU.

¹⁰⁸ Article 5.6 of the DSU.

¹⁰⁹ Article 6.2 of the DSU.

¹¹⁰ Article 12.8 of the DSU.

¹¹¹ *Ibid.*

¹¹² Article 1 of the DSU read with Appendix 3.4 and 5.

consult experts or appoint an expert review group to prepare an advisory report.¹¹³ The Panel submits a descriptive first draft (factual and argument sections) of its report to the opposing sides, giving them two weeks to comment. This report does not include findings and conclusions.¹¹⁴

The Panel then submits an interim report, including its findings and conclusions, to both sides, allowing them one week to request a review. Under normal circumstances the period of review must not exceed two weeks. During this time the Panel may hold additional meetings with both sides.¹¹⁵ A final report is submitted to the parties to the dispute, and three weeks later it is circulated to all WTO members. If the Panel decides that the disputed trade measure does contravene a WTO agreement or an obligation, it recommends the measure be made to conform to WTO rules. The Panel may suggest how this could be done.¹¹⁶ The report forms the Dispute Settlement Body's (DSB) ruling or recommendation within 60 days, unless a consensus of the DSB rejects it.¹¹⁷ Both sides can appeal the report (and in some cases both sides do). If any of the parties are unhappy with the Panel ruling the matter can go on appeal.¹¹⁸ On appeal the ruling of the Panel may be upheld, modified or reversed.¹¹⁹ Usually disputes should not last more than 60 days, with an absolute maximum of 90 days where the Panel report is not appealed, and 12 months where the Panel report is appealed.¹²⁰ The DSB must accept or reject the appeal report within 30 days.¹²¹ Rejection of the appeal report can only be done by consensus of the DSB.¹²²

¹¹³ Article 13.2 of the DSU.

¹¹⁴ Article 15.2 of the DSU read with Appendix 3.12(f) of the DSU.

¹¹⁵ Article 15.2 of the DSU.

¹¹⁶ Article 19.1 of the DSU.

¹¹⁷ Article 16.4 of the DSU.

¹¹⁸ *Ibid.*

¹¹⁹ Article 17.13 of the DSU.

¹²⁰ Article 20 of the DSU.

¹²¹ Article 17.14 of the DSU.

¹²² *Ibid.*

3.2 Relationship Between Article XIX of GATT and the WTO Agreement on Safeguards

The SGA has been described as “establishing clear rights and obligations.”¹²³ This is mainly because its rationale is to re-establish multilateral control over safeguards and eliminate measures that escape such control.¹²⁴ With such a strong reinforcement of law, the key question is whether Article XIX is legally binding on Member countries. If so, what is the precise nature of the relationship between the two agreements (GATT Article XIX and SGA)? The relevance of this question is obvious, considering that Article XIX can impose (and does) additional legal obligations on Member countries. From a substantive and procedural point of view the SGA repeats most of the provisions of Article XIX, but certainly not all.¹²⁵ The underlying rationale for the SGA is that it is intended, as the Preamble reads, to reinforce Article XIX and also (as was evident in the negotiating history) to iron out the ambiguities contained in Article XIX. As an example of such ambiguity: the Panel in *Argentina-Footwear* was persuaded to find that safeguard measures, imposed after the entry into force of the WTO Agreement, and which meet the requirements of the new SGA, automatically satisfy the requirements of Article XIX of GATT.¹²⁶ It is apparent from the Panel report that the Panel derived its reasoning from both the Preamble as well as Article 1 read with Article 11.1 of the SGA.

Article 1 of the SGA provides:

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*. (emphasis added)

¹²³ R Bhala *International Trade Law: Theory and Practice* (2 ed. 2001) 1124.

¹²⁴ Preamble of the SGA. It must be stressed that the significance of the agreement is even much wider than its Preamble suggests. The continued drawbacks of Article XIX played a vital role in the early proliferation of restrictions to world trade in textiles and clothing which were later legitimised by the Arrangement Regarding International Trade in Textiles (MFA). The MFA provides that after 1 January 2005 it will lapse and all safeguard measures in the textile and clothing industry will be covered by the SGA.

¹²⁵ Article XIX is simple and straightforward with only three paragraphs. It covers situations in which imports of certain merchandise increase as a result of tariff concessions or other GATT obligations undertaken by an importing country, the increase is unforeseen at the time of the tariff concession, and it occurs under conditions that cause or threaten to cause serious injury to domestic producers of like or directly competitive products. On the other hand, the SGA is made up of five detailed requirements.

¹²⁶ Panel Report, *Argentina-Footwear*, para 8.69.

The Appellate Body, however, reversed the Panel's finding. It held that Article 1 of the SGA suggests that Article XIX continues in full force and effect, and in fact establishes certain prerequisites for the imposition of safeguard measures. The Appellate Body further contended that the ordinary meaning of the language in Article 11.1(a)¹²⁷ is an express indication that any safeguard action must conform to the provisions of Article XIX as well as with the provisions of the SGA. In other words, the provisions of the SGA do not suggest that any safeguard action taken after entry into force of the SGA must conform with the provisions of the SGA only and not also with Article XIX of the GATT.¹²⁸

This decision makes it mandatory that any safeguard measure imposed after entry into force of the WTO Agreement must comply with the provisions of both the SGA and Article XIX of the GATT 1994.¹²⁹ In sum, it was held that the ordinary meaning of Articles 1 and 11.1(a) of the SGA confirms the intention of the negotiators to have the provisions of Article XIX of GATT and the SGA apply cumulatively, except to the extent of a conflict between specific provisions.¹³⁰

Despite the Appellate Body's correct interpretation there is considerable disagreement among legal scholars about the precise relationship between Article XIX and the SGA.¹³¹ At the fore of this body of critics is Lee who argues that the SGA is of such a comprehensive nature that it is doubtful whether it can be supplemented by the outdated rules of Article XIX.¹³² Lee opines that the general reference to Article XIX in Article 1 of SGA does not necessarily mean that every term and condition in Article XIX is still effective.¹³³ The learned author is of the further opinion that the reference could be judged as a clause limited effect explaining, and referring to, the origin of the SGA only. In other words, the relevant phrase in Article 11.1(a) SGA seems to affirm, rather than deny, that the SGA prevails in the application of

¹²⁷ Article 11.1(a) provides that 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 in accordance with the SGA.

¹²⁸ Appellate Body Report, *Argentina-Footwear*, para 83.

¹²⁹ Appellate Body Report, *Argentina-Footwear*, para 84.

¹³⁰ Appellate Body Report, *Argentina-Footwear*, para 89.

¹³¹ M Trebilock & R Howse *The Regulation of International Trade* (2 ed. 1999) 275; see also M Bronckers 'Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards' in *The Uruguay Round Results: A European Lawyers Perspective* JHL Bourgeois et al (eds) (1995) 275.

¹³² YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2 ed. 2005) 50.

¹³³ *Ibid.*

safeguards because it states that the provisions of Article XIX should be applied in accordance with the SGA.¹³⁴ Lastly Lee submits that the SGA replaces the old regime as a complete set of disciplines governing the application of safeguards.¹³⁵

Lee's submissions are not, in the view of the present writer, convincing for the following reasons. As a matter of fact, nothing in the provisions of Articles 1 and 11.1(a) of the SGA state that a safeguard measure taken after the entry into force of the WTO Agreement need only comply with the provisions of the SGA. Because of the wording of Articles 1 and 11.1(a) it would be far-fetched to imply such a conclusion. In effect it can be argued that the provisions of Article 11.1(a) are substantially different from the provisions of other Agreements, such as Article 2.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) which provides that:

Sanitary or Phytosanitary measures which conform to the relevant provisions of the Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of the GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX (b).¹³⁶

This distinction in the wording clearly illustrates, in my view, that the SGA shows an intention not to cover all the conditions a Member must meet to impose a safeguard measure. In short, the SGA explicitly refers to Article XIX and Member countries must be advised accordingly. In essence, if it was the intention of the SGA to encapsulate exhaustively all the requirements of safeguard measures, it presumably would have done so and expressed the exclusive nature of the SGA. This submission is in line with the spirit and purport of the Preamble to the SGA as well as with Article 11.1(a). These two provisions clearly show that a Member must meet all the requirements of the SGA as well as Article XIX. Although there are many instruments of “intentional” ambiguity in many of the WTO Agreements, I doubt that the framers of the SGA, after the many years of negotiations, would have left this kind of

¹³⁴ YS Lee ‘Destabilization of the Discipline on Safeguards? - Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement on Safeguards’ (2001) 35 *Journal of World Trade* 1239; see also YS Lee ‘Critical Issues in the Application of the WTO Rules on Safeguards -In the Light of the Recent Panel Reports and the Appellate Body Decisions’ (2000) 34 *Journal of World Trade* 135.

¹³⁵ YS Lee *Safeguard Measures in World Trade: The legal Analysis* (2 ed. 2005) 50.

¹³⁶ This reasoning was used by the Appellate Body in *Argentina-Footwear* at p8 footnote 73

ambiguity in such a comprehensive Agreement. To my mind this seems to be unlikely in the face of Article 11.1(b). In fact, had the framers intended the SGA to be the sole agreement, words like “replace” and/or “repeal” would have been used to indicate that intention. There is therefore a strong presumption in favour of the approach taken by the Appellate Body because it is both legally sound and in conformity with the spirit and purpose of the SGA.

All other SGA related disputes have subsequently followed the approach adopted in *Argentina-Footwear* and view Article XIX as forming an integral part of the SGA. The last in the string of cases is the *United States-Lamb* matter where the Appellate Body observed that the SGA expresses the full and continuing applicability of Article XIX of the GATT which no longer stands in isolation, but has been clarified and reinforced by the SGA.¹³⁷ Therefore the SGA and Article XIX are to be understood, and must be used, as a single undertaking with the far-reaching result that the prerequisite factors for any safeguard measures contained in each Agreement are cumulative and Members must ensure compliance with all simultaneously.¹³⁸

3.3 Unforeseen Developments

The approach taken by the Appellate Body in interpreting the unforeseen developments clause has been described as dubious and questionable.¹³⁹ Horn and Mavroidis stress that the Appellate Body imported into Article 2 of the SGA a requirement that does not exist.¹⁴⁰ The learned authors base their opinion on the fact that the phrase “unforeseen developments” does not exist as such in the SGA. But are these authors correct in this assumption? Another related contentious issue is the exact meaning of “unforeseen developments”? One may enquire therefore: would the Appellate Body import a binding legal requirement without proper justification and a cogent legal basis for doing so? Article XIX: 1(a) of GATT 1994 provides:

¹³⁷ Appellate Body Report, *United States-Lamb*, para 70.

¹³⁸ Appellate Body Report, *Korea-Dairy Products*, para 74.

¹³⁹ HK Horn & PC Mavroidis ‘United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What should be required of a Safeguard Investigation?’ (2003) 2 *World Trade Review* 400.

¹⁴⁰ *Ibid.*

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, 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 obligations in whole or in part or to withdraw or modify the concession. (emphasis added). (Here the terminology “contracting party” is used as opposed to Member, but the meaning is the same).

In the wording of Article XIX:1(a) the requirements for unforeseen developments are prerequisite for a successful safeguard action. However, the SGA does not contain unforeseen developments as a prerequisite for the application of a safeguard measure. Article 2.1 of the SGA provides as follows:

A Member 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.

Taking the language of Article XIX:1(a) and comparing it with Article 2.1, one observes that the words “*as a result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions...” do not appear in Article 2.1 of the SGA. This could mean that the requirement for unforeseen developments is not legally binding because it is not one of the conditions in the SGA. The Panel advanced this opinion in *Argentina-Footwear* and observed that “unforeseen developments” was expressly omitted by the Uruguay Round negotiators, implying therefore that the omitted phrase has no meaning.¹⁴¹ The Appellate Body took the view that the two Agreements are in principle cumulative and interdependent. The Appellant Body has decided to include the term into the application of the SGA and emphasized that, had the Uruguay Round negotiators

¹⁴¹ Panel Report, *Argentina-Footwear*, para 8.55.

intended to *omit expressly* the “unforeseen developments” clause, they would and could have said so in the SGA.¹⁴²

The interpretation adopted by the Appellate Body has been subject to criticism by legal scholars. Some argue that the existence of unforeseen developments is not a substantive requirement and does not have any legal significance.¹⁴³ The argument here is that the Uruguay Round negotiators would have expressly included unforeseen developments as part and parcel of the SGA. Lee, for instance, argues that the clause is too ambiguous to be an objective legal requirement.¹⁴⁴ According to Lee the addition of such a requirement does not seem to be consistent with the intent of the negotiators in the Uruguay Round. Furthermore, the negotiating history explicitly acknowledges the SGA as the sole legal authority on safeguards.¹⁴⁵ Lee’s submission is based on the fact that an earlier draft of the SGA contained unforeseen developments but by mid-1990 it was omitted in the SGA while other requirements of Article XIX were included almost verbatim.¹⁴⁶ This, according to Lee, is an express indication that Article XIX was not intended to form part of the SGA.

My own opinion differs from that of the learned authors who criticise the Appellate Body principally on the basis of the negotiating history. As a point of departure one needs to consider the canons of statutory interpretations encapsulated in Article 32 of the Vienna Convention on the Law of Treaties. The Vienna Convention makes mention of the fact that the negotiating history can be an appropriate means for statutory interpretation.¹⁴⁷ Article 32 of the Vienna Convention goes further, and states that recourse should be made 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

¹⁴² Appellant Body Report, *Argentina-Footwear*, para 88.

¹⁴³ M Trebilock & R Howse *The Regulation of International Trade* (2ed. 1999) 275; see also M Bronckers ‘Voluntary Export Restraints and the GATT 1994 Agreement on Safeguards’ in *The Uruguay Round Results: A European Lawyers Perspective* JHL Bourgeois et al (eds) (1995) 275.

¹⁴⁴ YS Lee ‘Destabilization of the Discipline on Safeguards? - Inherent Problems with the Continuing Application of Article XIX after the settlement of the Agreement on Safeguards’ (2001) 35 *Journal of World Trade* 1239; see also YS Lee ‘Critical Issues in the Application of the WTO Rules on Safeguards - In the Light of the Recent Panel Reports and the Appellate Body Decisions’ (2000) 34 *Journal of World Trade*; see also YS Lee *Safeguard Measures in World Trade: The legal Analysis* (2ed 2005) 41.

¹⁴⁵ *Ibid.*

¹⁴⁶ GATT Doc. MTN.GNG/NG9/W/25 (June 27 1989).

¹⁴⁷ Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol.1155, 331.

determine the meaning when the interpretation of Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.¹⁴⁸

Article 32 of the Vienna Convention illustrates clearly the importance of history as one of the canons of interpretation but this is not conclusive as other factors can be taken into account. In this particular instance the Preamble to the SGA must have meaning and relevance. The intention of the framers is well articulated in the Preamble¹⁴⁹ which specifically highlights the existence of Article XIX: 1(a). To this effect, a series of Appellate Body cases, notably *Korea-Dairy Products*, *Argentina-Footwear* and *United States-Lamb*, has correctly stated that there is nothing in the language of the SGA that suggests an intention on the part of the Uruguay Round negotiators to subsume the requirements of Article XIX of GATT within the SGA and thus to render Article XIX's conditions non-applicable.¹⁵⁰ To conclude: the approach adopted by the Appellate Body is in line with the text of the SGA. To meet the requirements Members must prove the existence of unforeseen developments before imposing a safeguard measure.

Having established that the Uruguay Round negotiators intended Article XIX:1(a) to form part of the SGA, the next contentious issue is to ascertain precisely the meaning of the words- “as a result of unforeseen developments and of the effect of the obligation incurred by a contracting party under this Agreement, including tariff concessions...”. The literal meaning of the phrase “unforeseen developments” especially when it relates to development is synonymous with “unexpected”, while “unforeseeable” means “unpredictable” or “incapable of being foreseen or anticipated”.¹⁵¹ The Appellate Body determined that the ordinary meaning of the phrase “as a result of unforeseen developments” requires that the developments which

¹⁴⁸ One of the canons of the general rule of interpretation in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy.

¹⁴⁹ The Preamble clearly indicates that the negotiators' intention was to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX, to re-establish multilateral control over safeguards, and to eliminate measures that escape such control.

¹⁵⁰ Appellate Body Report, *Korea-Dairy*, para 77; see also Appellate Body Report, *Argentina-Footwear*, para 83; see also Appellate Body Report, *US-Lamb*, para 70.

¹⁵¹ Appellate Body Report, *Argentina-Footwear*, para 91; Appellate Body Report, *Korea-Dairy*, para 84.

led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been “unexpected”.¹⁵² Considering the phrase “of the effect of obligations incurred by a contracting party under this Agreement, including tariff concessions...”, the Appellate Body reasoned the phrase to mean that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Article II of the GATT 1994 encapsulates the schedules of such tariff concessions as an integral part of the Agreement.¹⁵³

The approach adopted by the Appellate Body is in line with an early land-mark decision in the *Hatters’ Fur* case.¹⁵⁴ In *casu*, all the members of the Working Party, except the US, agreed “that the term ‘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 concessions could and should have foreseen at the time when the concession was negotiated”.¹⁵⁵ The essence of this decision is that unforeseen developments are to be invoked in instances when an importing Member finds itself with developments it had not foreseen when it incurred obligations under GATT 1994.¹⁵⁶

In a recent Panel case, *United States-Steel Products*, the Court emphasized that what was unforeseen when the contracting parties negotiated their first tariff concession in all likelihood differs from what can be considered as unforeseen developments today.¹⁵⁷ The Panel further stated that there is an objective element in the standard of determining unforeseen developments. In other words, the appropriate focus is on what should or could have been foreseen in light of the circumstances, and that the

¹⁵² *Ibid.*

¹⁵³ Appellate Body Report, *Argentina-Footwear*, para 91; see also Appellate Body Report, *Korea-Dairy*, para 84.

¹⁵⁴ *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT (“Hatters’ Fur”)*, GATT/CP/106, adopted 22 October 1951.

¹⁵⁵ *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT (“Hatters’ Fur”)*, GATT/CP/106, adopted 22 October 1951 para.9.

¹⁵⁶ Appellate Body Report, *Argentina-Footwear*, para 93.

¹⁵⁷ Panel Report, *United States-Steel Products*, para 10.42.

standard is not what the specific negotiators had in mind, but rather what they could reasonably have had in mind.¹⁵⁸

Mueller correctly points out that it is a complex matter to lay down general and abstract rules' regarding the issue of what is to be determined as unforeseen developments.¹⁵⁹ Mueller is of the opinion that this question should rather be answered by the WTO's adjudicative bodies on a case by case basis, and a determination will certainly depend on the relevant overall situation and circumstance.¹⁶⁰ Mueller's opinion is credible because different Members of the WTO are at different levels of development and what could be unforeseen in one part of the world may not necessarily be foreseen in another part of the world. This reasoning is in line with the developmental levels of the Members considering that the WTO Members are at different levels of economic development, with differing access to resources.

3.4 Determination of Increase in Imports

One of the set of conditions which may trigger a Member's decision to impose safeguard measures is an increase in imports. The principle goal of a safeguard action is to protect domestic industries from a surge in imports which causes or threatens to cause serious injury to the domestic industry. A Member can therefore impose a safeguard measure only if there is an increase in imports. The SGA explicitly states in Article 2.1:¹⁶¹

A Member 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)

¹⁵⁸ Panel Report, *United States-Steel Products*, para 10.43.

¹⁵⁹ F Mueller 'Is the General Agreement on Tariffs and Trade Article XIX "Unforeseen Development Clause" Still Effective Under the Agreement on Safeguards' (2003) 35 *Journal of World Trade* 1143.

¹⁶⁰ *Ibid.*

¹⁶¹ It must be stressed that Article 2.1 sets the conditions for applying a safeguard measure while Article 4.2 sets out the operational requirements for determining whether the conditions in Article 2.1 exist. For the detailed provisions of Article 4.2 see Annexure C.

The key issue is: how does a Member determine that a product is being imported into its territory in such increased quantities, absolute or relative to domestic production? Other issues are: how rapid must the rate of increase be, and what amounts to an increase in imports? Furthermore, is this a factual enquiry?

The Appellate Body in *Argentina-Footwear* reiterated that it is not enough for the investigation to show that imports of the products this year were more than last year, or five years ago. Therefore, not just an increase in quantities *per se* will suffice. There must be such increased quantities as to cause or threaten to cause serious injury to the domestic industry. The increase must have been recent enough, sudden enough, sharp enough, and significant enough, both (quantitatively) and (qualitatively), to cause or threaten to cause serious injury.¹⁶² Pursuant to *Argentina-Footwear* the Panel in *United States-Wheat Gluten* concurred that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury.¹⁶³ In *Chile-Agricultural Products*, the Panel emphasized the approach of the Appellate Body and held that the increase in imports must be an actual increase; a mere threat of increase is not sufficient.¹⁶⁴

In a recent landmark decision, *United States-Steel Products*, the Appellate Body agreed with the Panel that whether an increase is recent enough, sudden enough, and significant enough to cause or threaten to cause serious injury is to be determined on a case by case basis by the competent domestic authorities. In other words, the determination of an increase in imports cannot be made in the abstract.¹⁶⁵ Perhaps most importantly, competent authorities are required to examine the trends in imports over the entire period of investigation, and not merely at the end point.¹⁶⁶

The application of a safeguard action is supposed to be an emergency measure in response to increased imports of certain products. In the mind of both the Panel and Appellate Body the competent authority must be careful when determining an

¹⁶² Appellate Body Report, *Argentina-Footwear*, para 131.

¹⁶³ Panel Report, *United States-Wheat Gluten*, para 8.31.

¹⁶⁴ Panel Report, *Chile-Price Band System and Safeguard Measures relating to Certain Agricultural Products*, para 7.161.

¹⁶⁵ Appellate Body Report, *United States-Steel Products*, para 360.

¹⁶⁶ Appellate Body Report, *United States-Steel Products*, para 355.

increase in imports and all factors should be taken into account. Furthermore, competent authorities should ensure that their investigation is not biased towards the end result; a complete trend of imports must be given consideration. In addition, competent authorities should demonstrate that there is an actual increase in imports and not merely a threat. In essence, a boom in imports does not necessarily represent an increase in imports, only a specific boom which amounts to a significant overall increase in the trend of imports will suffice.

However, some commentators believe the Panel and Appellate Body have erred in their interpretations. For example, Sykes argues that the phrase “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury” hardly provides any useful guidance.¹⁶⁷ According to Sykes, the insistence on ‘not just any increase’ but ‘such increased quantities’ as to cause injury, is equally useless.¹⁶⁸ Sykes’s criticisms are in the view of the present writer somewhat harsh because the approach taken by the Appellate Body is in compliance with the general principles of safeguards. The insistence by the Appellate Body is not entirely without merit because sometimes the increase in imports may not actually cause any injury. It is imperative for the increase to cause injury. Would Members be required to impose a safeguard in instances where there is no injury?

The answer is obviously in the negative. Furthermore, the Appellate Body’s approach avoids a situation where Members rush to impose a safeguard measure under a misconception that increased imports are causing injury when such imports are not actually causing any injury currently. This interpretation also avoids a situation where safeguards are imposed on increased imports that caused injury a few years ago but are not actually causing any injury at the present time. Although imports need not be increasing at the time of the final determination, Members must show a trend over time when imports increased to cause injury, which trend should obviously be recent. Bhala and Gantz correctly submit that “time is of the essence” in any safeguard action. Once imports have increased, either in absolute or relative terms, for a few

¹⁶⁷ AO Sykes ‘The Safeguard Mess: A Critique of the WTO Jurisprudence (2003) 2 *World Trade Review* 279.

¹⁶⁸ *Ibid.*

years, then a safeguard action should be adopted immediately or soon thereafter because any delay may create room for a new, downwards trend in imports.¹⁶⁹

3.5 Determination of Serious Injury

Unlike other trade remedies that counter unfair trade practices,¹⁷⁰ safeguards target a foreigner who has done nothing other than be successful in a free market economy. Safeguards are therefore an exception to the general GATT principles which promote free trade, because they seek to enhance protectionist tendencies which may destabilize the world trading system.¹⁷¹ The SGA therefore allows a limited measure of trade distortion in the world trading system when the injury to the domestic industry is serious. Serious injury is an important aspect and is defined in Article 4.1 as a significant overall impairment in the position of a domestic industry. Article 4.1 is to be read with Article 4.2 which encapsulates the factors to be considered in the assessment of serious injury.

Article 4.2 specifically provides;

...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 an 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. (emphasis added)

The provisions of Article 4.1 and 4.2 raise some important questions. Precisely what is the scope of serious injury? Does a competent national authority have to evaluate all the relevant factors mentioned in Article 4.2? Can it be said, if one factor is not met, that the national authority has failed to establish the existence of a serious injury?

¹⁶⁹ R Bhala & D Gantz 'WTO Case Review' (2003) 21 *Arizona Journal of International and Comparative Law* 317.

¹⁷⁰ The application of safeguard measures does not depend upon unfair trade action, as is the case with anti-dumping or countervailing measures. In essence the import restrictions that are imposed on products of exporting Members when a safeguard measure is taken must be seen as extraordinary, and when considering taking such measures their extraordinary nature must be taken into account. For a full discussion, see Appellant Body Report, *Argentina-Footwear*, para 94.

¹⁷¹ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (2 ed. 1997) 191; see also YS Lee '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' (2002) 36 *Journal of World Trade* 642.

In interpreting “serious injury” the Appellate Body in *United States-Lamb* held that, in making a determination of serious injury national authorities must always be mindful of the very high standard implied by these terms. In effect serious injury requires a very high standard.¹⁷² In *United States-Wheat Gluten* the Appellate Body referred to the standard of “serious injury” as being exacting.¹⁷³ The Appellate Body stressed that the word “injury” is qualified by the adjective “serious” which in principle underscores the extent and degree of “significant overall impairment” that the domestic industry must be suffering, or must be about to suffer, for the standard to be met.

In *Argentina-Footwear* the Appellate Body discussed the relationship between the definition of serious injury in Article 4.1(a) and the requirement of an evaluation of “all relevant factors” in Article 4.2(a).¹⁷⁴ The Panel on *United States-Lamb* agreed with the approach taken in *Argentina-Footwear* and found that not each of the listed factors in Article 4.2(a) need show a declining tendency but rather a competent authority must make an assessment of all injury factors as a whole.¹⁷⁵ Article 4.1(a) does not therefore require the competent authorities to show that each listed factor is declining. The competent national authority is required to make a determination in light of the development of injury factors as the whole in order to ascertain whether the relevant industry is facing significant overall impairment.¹⁷⁶

¹⁷² Appellate Body Report, *United States-Lamb*, para 126. The court was also of the view that the standard of serious injury in the Agreement on Safeguards is a very high one when contrasted with the standard of material injury envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures*. The Court opined that the word ‘serious’ connotes a much higher standard of injury than the word ‘material’. In the opinion of the Court this accords with the object and purpose of the SGA that the injury standard for the application of a safeguard measure should be higher than the injury standard for anti-dumping or countervailing measures.

¹⁷³ Appellate Body Report, *United States-Wheat Gluten*, para 78.

¹⁷⁴ Appellate Body Report, *Argentina-Footwear*, para 139. The Court mentioned that although the core of Article 4.2(a) is that certain listed factors must be evaluated, in relation to all other relevant factors, it does not precisely state what such an evaluation must demonstrate. In some cases a certain factor may not be declining but the overall picture may nonetheless demonstrate significant overall impairment. The Court was of the view that in addition to a technical examination whether the competent authorities have evaluated all the listed factors and any other relevant factor, it is paramount for a Panel to take the definition of serious injury into account in its review of any determination of serious injury. The test is therefore whether a competent national authority has evaluated all the listed factors and any other relevant factors; the competent national authority is therefore not obliged to meet all the prerequisites in Article 4.2.

¹⁷⁵ Panel Report, *United States-Lamb*, para 7.188.

¹⁷⁶ Panel Report, *United States-Lamb*, para 7.203.

There is a pragmatic concern that if the national authority is not required to consider all factors, this gives national authorities a discretion to consider a few factors which support the determination of injury and leave out those crucial factors which indicate otherwise.¹⁷⁷ However, I question the existence of such a situation arising in particular because the Panel or Appellate Body can request a national authority to give reasons why other factors have not been considered. Furthermore, national authorities have an inherent duty to give reasons for how specific factors support or detract from a finding of serious injury. In addition, Article 4.2(c) stipulates that competent national authority 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.¹⁷⁸

Bhala and Kennedy aptly point out that Article 4.2(c) may require the publication of an injury assessment before the publication of the final report in terms of Article 3.1.¹⁷⁹ This is necessary to assess whether all factors have been considered in the determination of serious injury. This may also serve to remove any tendencies on the part of the applicable national authority to consider only those factors that support a serious injury. It is critical that national authorities provide convincing reasons, especially when alternative reasons have been put forward to explain the injury and which is considered, would have altered the outcome of the analysis, or where a national authority claims the existence of injury based on a minute decrease in injury factors.¹⁸⁰ A duty is placed on national authorities to demonstrate how each factor supports or detracts from the determination of serious injury.

Ultimately it is through this demonstration that the Panel or Appellate Body will determine whether all factors affecting serious injury have been considered and a determination reached. However, the listed factors must not be seen as a *numerus clausus* but should be seen as a benchmark against which a national authority makes a determination of serious injury. Each factor must be considered in light of the impact

¹⁷⁷ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2 ed. 2005) 70.

¹⁷⁸ This means that the court can review and demand a national authority to demonstrate why some other factors have not been considered. For instance, in *Korea-Dairy products*, a national authority was put to task to explain why certain increases were disregarded in the analysis of the production of domestic industry. Panel Report, *Korea-Dairy Products*, para 7.67.

¹⁷⁹ R Bhala & K Kennedy *World Trade Law* (1998) 927.

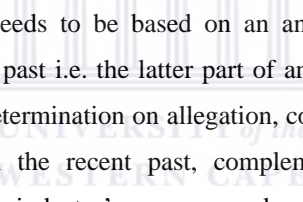
¹⁸⁰ YS Lee *Safeguard Measures in World Trade: The Legal Analysis* (2 ed. 2005) 72.

on the general list of factors as a whole. The Appellate Body in *United States-Lamb Meat* correctly reasoned that the listed factors are “not a mere check list”, but rather that the national authorities must conduct a substantive evaluation of the “bearing or the influence or effect” or “impact” that the relevant factors have on the “situation of (the) domestic industry”.¹⁸¹

3.6 Threat of Serious Injury

A safeguard action can also be applied if there is a threat of serious injury. Article 4.1(b) states that a threat of serious injury shall be understood to mean serious injury that is clearly imminent and a determination of such injury shall be based on facts and not merely on allegation, conjecture, or remote possibility.¹⁸²

The Panel in *United States-Lamb Meat* held that in determining a threat of serious injury the following approach should be taken;

- 
- (i) the threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past i.e. the latter part of an investigation period as a starting point so as to avoid basing a determination on allegation, conjecture or remote possibility;
 - (ii) that factual information from the recent past, complemented by fact-based projections concerning developments in the industry’s concern, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry’s position is imminent in the near future;
 - (iii) that the analysis needs to determine whether injury of a serious degree will actually occur in the near future unless safeguard action is taken.¹⁸³

The Appellate Body concurred with the approach taken by the Panel. According to the Appellate Body Article 4.1(b) builds on the definition of serious injury in that in order to constitute a threat the injury must be clearly imminent. Furthermore, the word ‘imminent’ relates to the moment in time when the threat is likely to materialize.

¹⁸¹ Appellate Body Report, *United States- Lamb Meat*, para 104.

¹⁸² The SGA does not elucidate the methodology to be used in a determination of a threat of serious injury. This concern was first raised by the Panel in *United States-Lamb Meat*, para 7.127. The Appellate Body later agreed with the Panel’s concern (Appellate Body Report, *United States-Lamb Meat*, para 37).

¹⁸³ Panel Report, *United States-Lamb Meat*, para 7.127-7.129.

Added to this, the envisioned serious injury must be on the verge of occurring.¹⁸⁴ To conclude, competent national authorities must be careful when making a determination of a threat of serious injury because the standard implied by this term is high.¹⁸⁵ The investigation should therefore examine the most recent data, which obliges competent national authorities to make a thorough evaluation of the overall injury to the domestic industry.¹⁸⁶

A contentious issue is whether “a threat of serious injury” and “serious injury” materially mean the same. The concepts “threat of serious injury” and “serious injury” seem mutually inclusive. One argument would be that where a national authority has determined serious injury would there be need to prove threat? Does the domestic industry for instance have to suffer first from a threat before the national authority can justify a serious injury? Would it be justifiable to classify the two terms as mere labels intended to make the application of safeguard measures even more difficult? What is the actual distinction between these two concepts? We will now attempt to answer some of these questions.

In *United States-Line Pipe* the United States International Trade Commission (USITC) made a finding of serious injury or threat of serious injury, without any distinction between the two. The US was of the opinion that the distinct is not important, as serious injury and its threat are not mutually exclusive of each other—they are only different labels addressing the timing of the injury and neither of them indicates the precise state of the domestic industry.¹⁸⁷ The Panel disagreed with the US position and found both “serious injury” and “threat of serious injury” refer to two distinctive different states of the domestic industry. Serious injury represents “a significant overall impairment in the position of a domestic industry” and threat is associated with serious injury that is clearly imminent but materialization of which cannot in fact be assured with certainty. Therefore these two terms cannot be used interchangeably.¹⁸⁸ In the mind of the Panel it follows that a distinction be made for a

¹⁸⁴ Appellate Body Report, *United States-Lamb Meat*, para 125.

¹⁸⁵ Appellate Body Report, *United States-Lamb Meat*, para 126.

¹⁸⁶ Appellate Body Report, *United States-Lamb Meat*, para 104.

¹⁸⁷ Panel Report, *United States- Line Pipe*, para 7.261.

¹⁸⁸ Panel Report, *United States- Line Pipe*, para 7.264.

discrete finding of either “serious injury” or of “threat of serious injury” when making a determination relating to the application of a safeguard action.¹⁸⁹

By and large the Appellate Body agreed with the Panel finding that the two concepts are distinct and therefore need to be given distinctive meanings when interpreting the SGA.¹⁹⁰ However, the Appellate Body reversed the decision taken by the Panel. The Appellate Body viewed the two definitions as reflecting the reality of how injury occurs to the domestic industry. In principle serious injury is often the realization of a threat of serious injury and the precise point where a threat of serious injury becomes serious injury may sometimes be difficult to discern.¹⁹¹ The Court was also of the opinion that defining a threat of serious injury separately from serious injury serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure.¹⁹²

In light of the foregoing the following submission can be made. National authorities need to first ascertain the state of the domestic industry before opting to impose a safeguard measure. This is the only way the competent authorities will realize whether there is a threat of serious injury or a serious injury. Furthermore, national authorities have the discretion to argue that there is either a threat or serious injury caused by a surge in imports. Most importantly, national authorities cannot argue that the two conditions exist simultaneously. Therefore, although these two conditions can apply at different moments, it is imperative for the national authority to determine the precise nature of the injury. A failure to demonstrate this key factor may well be taken to be a strong indication that the national authorities have not arrived at a reasoned conclusion. In such circumstances the decision may well be subject to challenge on substantive and technical grounds.

¹⁸⁹ Panel Report, *United States- Line Pipe*, para 7.266.

¹⁹⁰ Appellate Body, *United States- Line Pipe*, para 167.

¹⁹¹ Appellate Body, *United States- Line Pipe*, para 168.

¹⁹² According to the Appellate Body the Uruguay Round negotiators made this distinction so that an importing Member may act swiftly to take preventative action when increased imports pose a threat of serious injury to a domestic industry but have not yet caused serious injury. It should therefore be easier for Members to prove a threat compared to actual serious injury. Appellate Body, *United States- Line Pipe*, para 169.

3.7 Determination of Domestic Industry

The purpose of safeguard measures is to protect domestic industries from competition of like or directly competitive products. It is therefore appropriate to examine the scope and definition of a domestic industry. Article 4.1(c) defines a domestic industry 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.

The first step in identifying the scope of a domestic industry is to identify the products which are like or directly competitive with the imported products. In *United States-Lamb* the US argued that “domestic industry” should include the growers and feeders of live lambs because, as the USITC had found, (1) there is a “continuous line of production” from the raw product, live lambs, to the end-product, lamb meat; and (2) there is a “substantial coincidence of economic interests” between the producers of the raw product and the producers of the end-product.¹⁹³ The Appellate Body argued that although the interpretation advanced by the USITC has its basis in the USITC case law, it is not supported in the SGA. The text of Article 4.1(c) defines the “domestic industry” exclusively by reference to the “producers ... of the like or directly competitive product”. On the contrary, there is no reference in that definition to the two criteria relied upon by the US.¹⁹⁴ Accordingly the Appellate Body disagreed with the US and held that the words “as a whole” do not imply that producers of other products, which are not like or directly competitive with the imported product, can be included in the definition of a domestic industry.¹⁹⁵

3.8 Causation

For a national authority to impose successfully a safeguard action there must be a causal link between the increase in imports and the injury. In principle, if the injury is

¹⁹³ Appellate Body, *United States-Lamb Meat*, para 89.

¹⁹⁴ Appellate Body, *United States-Lamb Meat*, para 90.

¹⁹⁵ Appellate Body, *United States-Lamb Meat*, para 91.

caused by factors other than an increase in imports, such injury cannot be attributed to an importing country. Article 4.2(b) provides: -

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.* (emphasis added)

The issue of causation is a difficult one and has given rise to considerable controversy. For instance, how does a competent national authority demonstrate that increased imports are the only cause of the injury, and not other factors? To answer this question the Panel in *Argentina-Footwear* proposed a threefold test for the determination of causation. The first leg is to determine whether an upward trend in imports coincides with downward negative trends in the injury factors, and if not, whether a reasoned explanation is provided as to why the data shows causation notwithstanding such trend. The second leg is whether the conditions of competition in the market between imports and domestic products as analyzed demonstrate, on the basis of objective evidence, a causal link between imports and injury. The third leg is whether other relevant factors have been analyzed and whether it is established that injury caused by factors other than imports have not been attributed to imports.¹⁹⁶ Subsequently all other cases have confirmed and in fact repeated the threefold test articulated by the Panel in *Argentina-Footwear*.¹⁹⁷

Although the Appellate Body did not approve or disapprove of the approach taken by the Panel it nevertheless stated that it saw no error in the Panel's interpretation of the causation requirement or in its interpretation of Article 4.2(b) of the SGA.¹⁹⁸ In a practical example, the first leg of the test will be met when the competent national authorities differentiate between the trend in imports and the injurious effects it is causing to the domestic industry. The Panel in *United States-Wheat Gluten* considered

¹⁹⁶ Panel Report, *Argentina-Footwear*, para 8.229.

¹⁹⁷ See, Panel Report, *United States-Wheat Gluten*, para 8.9; see also Panel Report, *United States-Lamb Meat*, para 7.232.

¹⁹⁸ Appellate Body Report, *Argentina-Footwear*, para 145. The Appellate Body also concurred that it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination. Appellate Body Report, *Argentina-Footwear*, para 144.

the first leg met if there is an overall coincidence (co-relationship) of the upward trend in increased imports and the negative trend in injury factors over the period of investigation. However, absence of a slight coincidence in the movement of individual injury factors does not mean a failure of causation.¹⁹⁹ The second leg of the test can be met if the competent national authorities demonstrate that there was competition between the domestic industry and increased imports, and the latter triumphed. To achieve this, the national authorities should illustrate a downward decline in the domestic industry caused by stiff competition which resulted from an import surge.²⁰⁰ A national authority will have a plausible argument if it can show a decline of market share of the domestic industry caused by an import surge *vis-a-vis* an upward increase in the market share of the imported goods.

To meet the third leg, the competent national authority should demonstrate that other relevant factors have been considered and that the injury to the domestic industry is caused by an import surge. Perhaps the most intricate question is the significance of the increase in imports as a causal factor.²⁰¹ To answer this question the Appellate Body in *United States-Wheat Gluten* was of the view that Article 4.2(b) (also known as the non-attribution requirement) does not require increased imports to be the sole cause of serious injury, or that “other factors” causing injury must be excluded from the determination of serious injury. Furthermore, a 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.²⁰² In the view of the Appellate Body the competent national authorities will be able to establish a causal link where they find “a genuine and substantial relationship of cause and effect” between the increased imports and injury after separating and examining the injurious effects of other factors.²⁰³

¹⁹⁹ Panel Report, *United States-Wheat Gluten*, para 8.95.

²⁰⁰ The Panel in *Argentina-Footwear* found that, in the absence of price comparisons between imported and domestic products, there was no factual basis for the statement that imports were cheaper than domestic products, and that there was no evidence that lower-priced imports had any injurious effects on the domestic industry. Panel Report, *Argentina-Footwear*, para 8.261.

²⁰¹ YS Lee ‘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’ (2002) 36 *Journal of World Trade* 656.

²⁰² Appellate Body Report, *United States-Wheat Gluten*, para 67.

²⁰³ Appellate Body Report, *United States-Wheat Gluten*, para 69.

If, for instance, the competent national authorities recognize that certain “other factors” are actually causing injury to the domestic industry, they must also assess the injurious effects of these other factors and explain what impact the injurious effects have on the domestic industry. In *United States-Lamb Meat* the USITC did not provide any meaningful explanation of the nature and extent of the injurious effects of six "other" factors, which made it impossible to determine whether the USITC properly separated the injurious effects of the six other factors from the injurious effects of increased imports. The effect of this decision further made it impossible to determine whether the injury caused by these other factors had been attributed to increased imports. The Appellate Body was of the view that, if the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury.²⁰⁴ The Appellate Body in *Wheat Gluten* stressed that under Article 4.2(b) it is essential for the competent authorities to examine whether factors other than increased imports are simultaneously causing injury. On the other hand, if the competent authorities do not conduct this examination, they cannot ensure that the injury caused by other factors is not attributed to increased imports.²⁰⁵

Causation is perhaps one of the most complicated for the competent national authorities to prove. According to Ledet the Appellate Body’s insistence in breaking cause and effect down to minutia in the non-attribution analysis seems to be so overly complicated that it conflicts with its broader focus on evaluating factors that effect harm on the industry as a whole.²⁰⁶ Sykes contends that the current interpretation of the non-attribution requirement for the use of safeguard measures in the WTO Agreement obliges Members to make a demonstration that is logically impossible as an economic matter.²⁰⁷ True, these concerns and criticism are plausible and convincing but the problem is not the WTO Appellate Body. In fact, such criticisms are a case of “shooting the messenger”. There is an inherent problem with Article 4.2(b) because it does not precisely indicate how a Member can meet the causation

²⁰⁴ Appellate Body Report, *United States-Lamb Meat*, para 179-180.

²⁰⁵ Appellate Body Report, *United States- Wheat Gluten*, para 91.

²⁰⁶ C Ledet ‘Causation of Injury in Safeguards Cases: Why the US Can’t Win’ (2003) 34 *Law and Policy in International Business* 713.

²⁰⁷ AO Sykes ‘The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute’ (2004) 37 *Journal of International Economic Law* 537.

requirement. To say that the Appellate Body has made it even worse would, in the writers' opinion, be too harsh. As a matter of fact the Appellate Body seems to have explained, although it is here submitted not very persuasively, how a Member can prove the existence of causation. In the view of the Appellate Body Member countries are supposed to examine all the causal effects of other factors and ascertain whether such factors have a relationship to the increased imports. Although this may be a justifiable approach considering the ambiguity in the language of Article 4.2(b), it may still be difficult for developing countries to prove such a relationship. Developing countries are the most hard-pressed and short of the additional analytical skills required to make an evaluation of potential other factors causing the injury. These requirements would make it almost virtually impossible for them to impose a safeguard measure. This could, however, be achieved with considerable effort and resources.

3.9 Application of a Safeguard Measure

As discussed earlier, a safeguard action is an emergency measure and must only be applied as a matter of last resort. In the wording of Article 5, three pre-considerations need to be present before a safeguard measure can be imposed. First, the measure must be taken when there is serious injury (or threat thereof) to the domestic industry; secondly the measure must comply with the procedural requirements, namely investigation, consultation and notification; lastly, the measure should not be excessive and it must be proportionate to the extent of the injury caused by increased imports.²⁰⁸

There has been considerable debate as to whether the provisions of Article 5 require a Member to prove that the extent of its adopted measures is necessary to prevent or remedy injury, and to facilitate adjustments.²⁰⁹ The first point is that such a requirement may help to ensure that Members do not apply excessive measures. The

²⁰⁸ Article 5.1 reads: "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustments. 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".

²⁰⁹ YS Lee *Safeguard Measures in World Trade: The legal Analysis* (2 ed. 2005) 101.

second point is that such a requirement may place an incredible burden on Members since it would involve a series of complicated and costly economic analyses.²¹⁰ Both the Panel and Appellate Body have had opportunity to deal with this contention. In *Korea- Dairy Products* the Appellate Body concurred with the Panel that Article 5.1 imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of the Agreement irrespective of the particular form of safeguard measure.²¹¹ However, the Appellate Body reversed the Panel's decision with regard to the scope of the requirement to explain the necessity for a safeguard measure. According to the Appellate Body a Member is not obliged to justify in its recommendations or determination a measure in the form of a quantitative restriction which is consistent with the "average of imports in the last three representative years for which statistics are available".²¹²

The Appellate Body in *United States-Pipeline* also held that a Member imposing a safeguard measure must, in any event, meet several obligations under the SGA. When a Member meets all the obligations it will have clearly explained and justified the nature and extent of the safeguard measure.²¹³ The Court found compliance with Article 5.1 to have a striking similarity with the observance of the causation requirement in terms of Article 4.2. In the Court's opinion:

by separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including the detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Article 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Article 3.1, 4.2(b) and 4.2(c) of the SGA should have the incidental effect of providing sufficient 'justification' for a measure and, should also provide a benchmark against which the permissible extent of the measure should be determined.²¹⁴

²¹⁰ *Ibid.*

²¹¹ Appellate Body Report, *Korea-Dairy Products*, Para 96.

²¹² Appellate Body Report, *Korea-Dairy Products*, Para 103. The Panel was of the opinion that Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before them and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry. Panel Report, *Korea-Dairy*, para 7.109.

²¹³ Appellate Body Report, *United States- Pipeline*, para 236.

²¹⁴ Appellate Body Report, *United States-Pipeline*, para 236.

In short, if a Member does not comply with other provisions of the Agreement, then there is a presumption that Article 5.1 is not complied with. Article 5.1 should be regarded as the back-bone of any safeguard measure. In fact, once the Panel or Appellate Body finds that the other provisions have not been complied with, it “exercises judicial economy” over Article 5.1 and may well be disinclined to support the safeguard measure and uphold same.²¹⁵

3.10 Burden of Proof

The SGA does not indicate who bears the burden of proof in the event of opposition to the application of a safeguard. The question to be posed is: how will Members determine who bears the onus of prove? To answer this question, it is imperative to refer to Panel and Appellate Body decisions as well as other cases that have had the opportunity to deal with the burden of proof. In *European Community-Hormones* the Appellate Body was of the opinion that the initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on part of the defending party.²¹⁶ The Panel in *Korea-Dairy Products* followed this approach and accordingly held that: -

As a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process. The European Communities will therefore submit its arguments and evidence and Korea will rebut.²¹⁷

Ultimately the duty rests on the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions as to whether the complainant’s claims are well-founded.²¹⁸ The Panel subsequently defined a *prima facie* case as one which, in the absence of effective refutation by the defending party,

²¹⁵ The Panel in *United States- Lamb Meat*, after making findings of inconsistency between Article 2.1, 4.1(c), and, 4.2(b) of the SGA, exercised judicial economy with respect to claims raised under Article 5.1.

²¹⁶ Appellate Body Report, *European Community-Hormones*, para 98.

²¹⁷ Panel Report, *Korea-Dairy Products*, para 7.24.

²¹⁸ *Ibid.*

requires a Panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.²¹⁹

Pursuant to this decision the Panel in *Argentina-Preserved Peaches* stated that it will follow consistent practice in relation to the burden of proof, according to which the party who asserts a fact, or the affirmative of a particular claim or defence, whether the complainant or respondent, bears the burden of proof of that fact, or the affirmative of that claim or defence. If that party adduces evidence sufficient to raise a presumption that what is asserted is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.²²⁰

The following principles can be derived from the Panel as well as the Appellate Body jurisprudence. The onus of proof rests on the complaining party to establish a *prima facie* case regarding a breach of the SGA. The respondent must rebut the *prima facie* case, because, although the complaint is not conclusive, a failure to effectively rebut same will result in a presumption in favour of the complaining party. In essence, a Member seeking to apply a safeguard measure must provide stronger evidence once the complainant makes a *prima facie* case illustrating a breach of the rules on safeguards. The respondent must not only rebut the evidence, but also provide sound grounds why the safeguard should be imposed. The approach taken by the Panels as well as Appellate Body is consistent with international practice. In light of the foregoing the best approach should be to establish a presumption in favour of the complaining party. This is because of the special exceptional status of safeguard measures and the fact that safeguard measures should only be applied in emergency situations. The court should be easily satisfied. Once the complainant makes a *prima facie* case the onus of proof properly rests on the respondent to give reasons why a safeguard measure should be applied.

²¹⁹ Panel Report, *Korea-Dairy Products*, para 7.24. In the same case the Appellate Body confirmed the approach of the Panel. Appellate Body Report, *Korea-Dairy Products*, paras 142-150.

²²⁰ Panel Report, *Argentina-Preserved Peaches*, para 12.4.

3.11 Investigation

The application of a safeguard measure can only be imposed after the competent national authorities have carried out a thorough investigation. Article 3.1 provides:-

A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures established and made 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 competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

The underlying import of Article 3.1 is to promote procedural and substantive fairness. Competent national authorities are required to give public notice so that all interested parties are given a fair hearing and can make informed representations. The purpose is to ensure that the safeguard measure is in the public interest and not just in the interest of domestic government officials or a select interest group. The investigation is not only important to the interested parties but also to the competent national authorities who are enjoined to make informed decisions. Article 3.1 also calls upon competent national authorities to consider the interests of all interested parties before arriving at a decision to impose a safeguard measure. After weighing up the information gathered from all parties, the competent national authorities must make a value judgment whether the safeguard measure will be in the public interest. The competent authorities must, however, undertake additional investigative steps, when the circumstance so require, in order to fulfil their obligation to evaluate all relevant factors. The crux of Article 3.1 is to give considerable weight to interested parties, but Article 3.1 does not preclude the competent national authorities from considering other factors which are relevant to the domestic industry.²²¹

Article 3.1 further requires the competent national authorities to set present their findings and reasoned conclusions on all pertinent issues of fact and law in their

²²¹ Appellate Body Report, *United States-Wheat Gluten*, para 55.

published report.²²² The Panel in *Chile-Agricultural Products* had cause to interpret precisely the nature of a published report. In *casu* the minutes of the relevant Central Bank of Chile (CBC) sessions were not “published” through any official medium. They were transmitted to the interested parties and placed at the disposal of “whoever wishes to consult them” at the library of the CBC. The Panel found that those minutes did not constitute the published report required by Article 3.1, since it interpreted ‘publication’ in the Article to mean “to make generally available through an appropriate medium” rather than simply “making publicly available”. The Panel was of the view that various “transparency” provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the Trade Related Aspects of Intellectual Property Agreement (TRIPS), and Article 2.11 of the Technical Barriers to Trade (TBT) Agreement all distinguish between “to publish” and “to make publicly available”.²²³

This decision is in line with the approach adopted by the Panel in *Korea-Dairy Products*. In this case the Panel refused to acknowledge Korea’s report because it did not include all the necessary reasoning for its finding of serious injury in its final investigation report.²²⁴ During the hearing Korea adduced additional explanations for its injury determination and further pointed out that part of its analysis was included in its mid-investigation report, which was also published. The Panel found these arguments not convincing and rejected these additional explanations and analysis since they were not included in the final investigation.²²⁵ The point these two cases emphasise is the need for any competent authority to make a detailed report covering the most pertinent issues of the investigation. This is critical because of the likelihood of interested parties being given disguised information to make it possible for a competent national authority to impose a safeguard. Obviously nothing precludes a competent national authority from supplementing the information after the investigation especially because some issues are only analyzed afterwards. Of significance is also the need for this report to be easily accessible to all interested parties for sufficient comment.

²²² Article 3.1 of the SGA.

²²³ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.128.

²²⁴ Panel Report, *Korea-Dairy Products*, para 7.58-7.59.

²²⁵ Panel Report, *Korea-Dairy Products*, para 7.69.

3.11.2 Confidentiality

The SGA has an inbuilt mechanism in Article 3.2 to protect confidential information.²²⁶ The importance of Article 3.2 is to protect both the domestic industry and the competent national authorities who would not want important trade secrets to be made available for public scrutiny. Article 3.2 may constitute a laudable mechanism but it gives too much discretion on the part of the competent authorities, and this could be tantamount to most information being regarded as confidential. In fact it appears that a competent national authority can regard even the most trivial information as confidential. The approach taken by the Panel has not been very helpful on this aspect. For instance, in *United States-Wheat Gluten* some information used for the USITC's injury determination had been withheld from the public version of the USITC report. The European Community complained that the USITC's findings, which were based on undisclosed data, were unreviewable and unverifiable.²²⁷ The Panel concurred with the decision taken by the USITC not to disclose confidential information, and found that the provisions of Article 3.2 allowed national authorities a wide discretion in the determination of confidential information and its disclosure.²²⁸

3.12 Conclusion

Jackson comments that the SGA is a substantial achievement and a heroic statement of principle because it sets out reasonably specific and explicit rules on many aspects of safeguards.²²⁹ This is to a certain extent true of the SGA, and a substantial achievement for the elimination of grey areas. However, this is half the issue. Up to the present, despite the much praised Agreement, no Member country has been

²²⁶ Article 3.2 of the SGA provides: 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.

²²⁷ Panel Report, *United States-Wheat Gluten*, para 8.13.

²²⁸ Panel Report, *United States-Wheat Gluten*, para 8.20.

²²⁹ JH Jackson *The World Trading System: Law and Policy of International Economic Relations* (2 ed. 1997) 270.

successful in the imposition of a safeguard action when challenged at the WTO DSB. Do we point fingers at the Panel and Appellate Body for betraying the intention of the Uruguay Round? Opinions will differ. This thesis argues in favour of the Panel and Appellate Body as having done an acceptable job (given the legal framework) in rather difficult political circumstances. Sykes, however, disagrees, and argues that the incoherent textual preconditions for the application of safeguards, and a series of dubious Appellate Body rulings, have made it almost impossible for Members to apply safeguard measures with any hope of success.²³⁰

Sykes also argues that the Panel and Appellate Body have not been very helpful in clarifying the rules, but have added ambiguities and confusion to the interpretation and implementation of the rules on safeguards.²³¹ This criticism is perhaps overstated, particularly because the Panel and Appellate Body have clarified issues such as ‘unforeseen developments’, the precise meaning of ‘increase in imports’, injury determination and the burden of proof. Furthermore, the Panel and Appellate Body have maintained the underlying theory of safeguard measures and prevented “abuse”. Mueller rightly submits that free trade is better served through a strict interpretation; otherwise overabundant deference would be made to national values expressed in the imposition of a safeguard measure seeking protection against free trade.²³² Policy makers and legal scholars should realize that an easily satisfied Appellate Body or Panel, finding in favour of the conditions for a safeguard measure being met, is a blow to the whole system of international trade.

The application of a safeguard measure distorts the international equilibrium of competitiveness to the detriment of those who have a “comparative advantage” in producing the product at issue.²³³ Every safeguard measure must therefore comply with the rules, and a failure to do so should result in the measure being declared illegitimate. The sooner competent national authorities realize that the best approach to change in international market conditions is through adjustments and not

²³⁰ AO Sykes ‘The Safeguard Mess: A Critique of the WTO Jurisprudence’ (2003) 2 *World Trade Review* 83-91.

²³¹ *Ibid.*

²³² F Mueller ‘Is the General Agreement on Tariffs and Trade Article XIX “Unforeseen Development Clause” Still Effective Under the Agreement on Safeguards’ (2003) 6 *Journal of World Trade* 1151.

²³³ P Bernardi ‘The Great Escape’ (1998) 7 *Detroit College of Law Journal of International Law and Practice* 71.

protectionism, the better it will be for the multilateral system.²³⁴ In the event that the SGA measures are inadequately worded or ambiguous or do not meet the changing requirements of the Members from time to time, it is open for some Members to lobby and motivate for a change in the import and wording of the SGA. This may of course be easier said than done. To conclude, it is not the function of the Panel or Appellate Body to adapt an interpretation which is not justifiable in terms of the wording of the SGA.



²³⁴ AF Lowenfeld *International Economic Law* (2002) 94.

Chapter 4: SPECIAL AND DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES IN THE WTO AGREEMENT ON SAFEGUARD MEASURES

4.1 Existing Special and Differential Treatment

The scope of this work is not to encompass an analysis of each and every special and differential (S&D) treatment in the GATT and the WTO.²³⁵ This thesis is purposively limited to the S&D treatment provided for in the SGA only. Before embarking on this discussion it is necessary to explain what the concept S&D treatment means as a general statement of law. This analysis will be followed by an overview of the various S&D treatments granted to developing countries, which is central to the thrust of this thesis.

According to Bhala: “one way to define S&D treatment is in terms of the rules in the GATT itself that deal with developing countries. However, a thorough definition ought to include the special rules for developing countries and least developed countries contained in the WTO agreements negotiated during the Uruguay Round”.²³⁶

This writer respectively concurs with the observation of the learned commentator that the concept S&D treatment can be defined in several ways. In essence there can be no single definition attached to the concept S&D treatment. Inevitably a plausible definition of this concept must encapsulate the operative terms “developing” and “least developed” countries. For instance, Gibbs in his address to the G15 Symposium on S&D treatment, was of the view that S&D treatment is “the product of the coordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trading system by introducing preferential

²³⁵ For a full discussion of special and differential treatment see R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) Chapter 39; see also R Bhala *Trade, Development, and Social Justice* (2003) Chapter 11.

²³⁶ R Bhala *Trade, Development, and Social Justice* (2003) 183-184.

treatment in their favour across the spectrum of international economic relations”.²³⁷

Another commentator, Whalley, in his writings expounds a similar opinion in that:

The term special and differential treatment in the GATT evolved from debates in the 1960's as to how the growth and development of developing countries was best facilitated by trade rules. It referred to GATT rights and privileges given to developing countries, but not extended to developed countries, and reflected a long history of calls by developing countries for special treatment in global trade arrangements.²³⁸

What is apparent from the views of Bhala, Gibbs and Whalley is that the S&D treatments are intended to give special consideration to the needs of developing countries in the multilateral trading system. The underlying theory is to give reasonable flexibility to both developing and least developing countries to derogate from the general WTO principles, and in particular the MFN and non-discrimination concepts.²³⁹ Theoretically it is envisioned that when developing countries receive MFN preference the hardships which might be incurred from trade liberalization will be reasonable (i.e: reduced to acceptable levels). It is also hoped that developing countries, by being granted S&D preferential treatment, will improve their economies and benefit from the multilateral trading system. Whether developing countries do actually benefit from the general S&D treatment is beyond the scope of this thesis.²⁴⁰

At the heart of the multilateral trading system is the need to promote economic development in developing countries and the realization that the “poor countries” need special consideration. To this end the WTO Agreements contain a number of

²³⁷ M Gibbs *Special and Differential Treatment in the Context of Globalization* Key note address to the G15 Symposium on Special and Differential Treatment in the WTO Agreements New Delhi ,10 December 1998, UNCTAD. p 1.

²³⁸ J Whalley *Special and Differential Treatment in the Millennium Round* CSGR Working Paper No.30/99 May 1999.

²³⁹ The MFN and non-discrimination are perhaps the most important principles in the WTO. According to the MFN principle any advantage, favour, privilege or immunity granted by any contradicting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. This therefore means that S&D treatment is an exception to the MFN principle. From a pragmatic point of view, when a developed country extends special consideration to developing countries, it will not have an obligation to extend such a consideration to another developed country. It also means that developing countries benefit from both the MFN principle as well as the S&D treatment. As a matter of both logic and WTO rules when a developed country grants S&D treatment to a developing country, such consideration should extends to all developing countries.

²⁴⁰ For a detailed analysis see M Gibbs *Special and Differential Treatment in the Context of Globalization* Key note address to the G15 Symposium on Special and Differential Treatment in the WTO Agreements, New Delhi,10 December 1998, UNCTAD.

S&D treatments. The WTO Secretariat makes mention of the fact that the Uruguay Round provisions conferring S&D treatment can be grouped under five main headings:

The development dimension continues to be reflected in the WTO Agreement through provisions for special and differential treatment. These provisions can be classified in five main groups: (i) provisions aimed at increasing trade opportunities through market access; (ii) provisions requiring WTO Members to safeguard the interest of developing countries; (iii) provisions allowing flexibility to developing countries in rules and disciplines governing trade measures; (iv) provisions allowing longer transitional periods to developing countries; (v) and provisions for technical assistance.²⁴¹

All five categories of S&D treatment are not relevant to this discussion and this thesis will deal mainly with the provisions that require WTO Members to safeguard the interests of developing countries.²⁴² This is where the special provisions for developing countries in the SGA come into play.

4.1.2 Provisions that Require WTO Members to Safeguard the Interests of Developing Members With Special Emphasis on the Agreement on Safeguards

During the Tokyo Round the greatest issue for developing countries was the need for S&D treatment.²⁴³ Developing countries, such as Brazil, Nigeria and Pakistan, strongly argued that emergency measures should not be applied to imports from developing countries in the same manner as to imports from developed countries.²⁴⁴ After the failure of the Tokyo Round the Uruguay Round negotiations (in June 1989) adopted a draft proposal granting total exemption for least developed countries and

²⁴¹ WTO Secretariat *Developing Countries and the Multilateral Trading System: Past and Present*, Background document for the High Level Symposium on Trade and Development held in Geneva on 17-18 March 1999 18.

²⁴² It should be noted that the five categories identified by the WTO Secretariat are a synopsis of the different S&D treatments in the GATT-WTO Agreements. The GATT-WTO Agreements have more than five categories/headings of S&D treatment in favour of developing countries. For instance, Bhala identifies twelve GATT S&D treatment rules. Bhala opined that the majority of these S&D rules appear to fall into the category of merciful rules in favour of developing countries. For a detailed discussion see; R Bhala *Trade, Development, and Social Justice* (2003) 180-190.

²⁴³ TP Stewart *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1993) 1749.

²⁴⁴ *Differential Treatment for Developing Countries in the Field of Safeguards*, GATT Doc.NO.MTN/3D/5, dated 5 February 1975.

lenient rules for developing countries.²⁴⁵ This was later followed by the October/December 1990 Draft which excluded developing countries from certain compensation provisions.²⁴⁶ These ideas were not, however, adopted in the final SGA when the Uruguay Round negotiations were concluded. Two assumptions in this regard have been made: First, that these provisions once adopted would have the propensity to encourage abuse of the system; secondly, that broad exemption may become an economic disincentive for developing countries.²⁴⁷

Like many other WTO Agreements the SGA contains some special and more favourable rules for developing country Members. The significance of the special and differential treatment in the SGA is that it takes into consideration the economic development of developing countries. Article 9.1 provides:

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 the total imports of the product concerned.²⁴⁸

The footnote to Article 9.1 which is binding on Members makes it clear that in circumstances where a developed country applies a safeguard measure on imports from developing countries the developed country has an obligation to notify the Committee on Safeguards immediately.²⁴⁹ Footnote 2 to Article 9 is of paramount importance because it ensures compliance with the rules, at least as far as notification is concerned. Article 9.1 is supplemented by Article 9.2. Under this provision developing countries have the right to extend the application of a safeguard measure for a period of up to two years beyond the maximum period of eight years provided

²⁴⁵ TP Stewart *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1993) 1792.

²⁴⁶ TP Stewart *The GATT Uruguay Round: A Negotiating History (1986-1992)* (1993) 1793.

²⁴⁷ *Ibid.*

²⁴⁸ Article 9.1 can be referred to as a *de minimis* rule in favour of developing countries. The *de minimis* rule in Article 9.1 seeks to balance the need for favorable treatment and the need to protect infant industries in developing countries. The *de minimis* is multifaceted, it encompasses the prohibition to apply safeguard measures on imports from a developing country importing less than three per cent as well as offers MFN treatment to all developing countries provided collectively the total amount of imports are less than nine per cent.

²⁴⁹ Footnote 2 to Article 9.1.

for in Article 7.3.²⁵⁰ In addition developing countries have a right to apply a safeguard measure to the same product again after the elapse of a period equal to half of the duration of the previous measure, provided that the period of non-application is at least two years.²⁵¹

A careful reading of Article 9 illustrates two propositions: First, imports from a developing country are given a “green light” when a safeguard measure is imposed by an importing developed country. The only limitation is that such imports must not exceed three per cent, and the aggregate imports from developing countries must not exceed nine per cent, threshold; secondly, when a developing country imposes a safeguard measure, it will have the right to extend the measure for up to ten years.

By way of a brief illustration. Suppose that the US experiences a serious surge in imports of maize, and the farmers petition the US government to apply a safeguard measure. Because it is close to election time, the Bush Administration, in a bid to win the votes of the maize farmers, decides to impose a safeguard measure so as to protect domestic farmers from the stiff competition. Suppose that the biggest exporters are South Africa, Brazil, Kenya, the European Union (EU), China, and Japan. In this example, because of Article 9, the developing countries (South Africa, Brazil and Kenya) will be given preferential treatment because their total imports do not exceed nine per cent. In principle, even if the angry maize farmers complain about the stiff competition from developing countries, such a cry will be futile. However, the safeguard action will be imposed on maize imports from the EU, China and Japan because, these are developed countries, and they do not benefit from the preferential treatment provided by Article 9.

There has been considerable debate by the Panel and Appellate Body about the contextual interpretation of Article 9.1. The subject of this debate has been on how a developed country can comply with its obligation in Article 9.1. The leading case relative to Article 9 is *United States-Line Pipe*. In this case the US imposed a quota on

²⁵⁰ Article 7.3 limits the maximum period of a safeguard measure to eight years. In effect, therefore, developed countries can apply a safeguard measure for a maximum of eight years while developing countries can apply a safeguard measure for a maximum of 10 years. The time frame given to developing countries is generally reasonable but that is not the problem. The actual problem lies in the requirements to impose a safeguard measure which, as we have seen in Chapter 3, are strict.

²⁵¹ Article 9.2 of the SGA.

all countries that import 9,000 tons of products into the US irrespective of the source of origin. Some of the arguments the US raised included the following; Article 9.1 does not obligate Members to provide specifically for the non-application of a safeguard measure and the text only requires Members not to apply a safeguard measure against developing countries having less than three per cent of imports.²⁵² Furthermore, the US contended that it complied with the Article 9 requirement by establishing a mechanism of a 9,000 short tons exception under which the safeguard duty on imports could not possibly apply to any developing country accounting for less than three per cent of total imports.²⁵³

On the issue whether Article 9.1 requires an express exclusion of those developing countries exporting below *de minimis* levels the Panel rejected the US submissions. According to the Panel, if a measure is not to apply to certain countries, it is fairly reasonable to expect an express exclusion of those countries from the measure.²⁵⁴

The Panel was of the view that the documents submitted did not contain any express exclusion and in the absence of any other relevant documentation the (line measure) applied to those developing countries with *de minimis* imports.²⁵⁵ The next consideration was whether, despite this inclusion, the US measure was crafted in such a way as to ensure that it would not be applied against products originating in developing countries whose level of imports is below the *de minimis* levels provided in Article 9.1. The US acknowledged (before the Panel) that the 9,000 short tons exemption from the supplemental duty represented only 2.7 per cent of the total imports in 1998. The US argued that at any rate the total volume of imports would decrease as a result of the measure and any country reaching the 9,000 short ton limit of the exemption would in fact account for more than three per cent of total imports in 2000 and thereafter. Reacting to this submission, the Panel noted that the line pipe

²⁵² Panel Report, *United States- Line Pipe*, para 7.172.

²⁵³ Appellate Body Report, *United States- Line Pipe*, para 86. Korea argued before the Panel that the line pipe measure is inconsistent with Article 9.1 because it treats developing countries the same as all other suppliers and allocates to each of the developing countries, irrespective of their previous import levels, the same quota of 9,000 short tons that had been allocated to all other exporters. According to Korea the US did not fulfil this requirement because Article 9.1 requires a Member imposing a safeguard measure to “determine which developing countries are to be exempted from the measure”.

²⁵⁴ Panel Report, *United States-Line Pipe*, para 7.175.

²⁵⁵ The Panel examined the notification by the United States to the WTO Committee on Safeguards as well as three internal US documents relating to the implementation of the measure. The notification to the Committee on Safeguards did not specify the developing countries excluded from the measure.

measure did not set an overall limit on the quality of imports of line pipe and, that, therefore, if importers are willing to pay the duty for over-quota imports, there is no restriction on the total volume of line pipe imports that may enter the US from any one country. According to the Panel, since Canada and Mexico were completely excluded from the measure, there is no impediment to an increase in imports from those countries. To this extent there was no assurance in the line pipe measure that the total volume of imports would decrease, or that the three-per cent threshold would be exceeded.²⁵⁶

On appeal, the Appellate Body reversed the Panel decision on the need for a list. The Appellate Body agreed with the US that it is possible to comply with Article 9 without providing a specific list of the Members that are either included in, or excluded from, the measure.²⁵⁷ The Appellate Body concurred with the Panel that the US did not comply with its obligation under Article 9.1 because the over-duty of 9,000 short tons exemption applied on all imports of all countries irrespective of their origin. According to the Appellate Body, the US should have taken additional measures to exclude developing countries exporting less than the *de minimis* levels of Article 9.1.²⁵⁸

In conclusion, the following can be summarized from the approach adopted by the Appellate Body and Panel. Although Article 9.1 does not require a list indicating developing countries that have been excluded, it is in the interests of Members to provide such a list for purposes of transparency. However, Article 9.1 cannot be construed as requiring Members to provide a list. So, when a developed country imposes a safeguard measure through the use of quotas or any other form of import restriction, special consideration should be given to the interests of developing countries. In other words, the *de minimis rule* in Article 9.1 comes into play after the import restriction on developed countries has been taken and not before.

²⁵⁶ Panel Report, *United States -Line Pipe*, para 7.181. The Panel was also of the view that Article 9.1 contains an obligation not to apply a measure, and found that the line pipe measure applies to all developing countries in principle, even though it may not have any impact in practice. It thus found the United States had not fulfilled its obligation under Article 9.1 of the SGA.

²⁵⁷ Appellate Body Report, *United States- Line Pipe*, para 128. The Appellate Body considered such a list to be useful and helpful in providing transparency for the benefit of all Members concerned. However, Members do not have an obligation to provide such a list.

²⁵⁸ Appellate Body Report, *United States- Line Pipe*, para 132.

4.2 Problems with the Existing Treatment

As we have seen above, the SGA has S&D treatment in favour of developing countries.²⁵⁹ The appropriate question to ask is whether the S&D treatment in Article 9 of the SGA is sufficient to meet the interests of developing countries? This question is followed by an inquiry into the actual problems existing in the S&D treatment. In the writing of this thesis a cross-section of African International Trade Law students, a doctorate candidate and a distinguished International Trade lecturer Law were interviewed (hereafter referred to as scholars).²⁶⁰ Amongst all these scholars there was consensus that Article 9 is insufficient to meet the interests of developing countries. This objective concern was in the light of the strict approach that the Appellate Body and Panel have taken in interpreting the SGA. Most of the learned scholars argued that the SGA should contain clauses that cover situations when a developing country imposes a safeguard measure. In other words, there should be a contextual interpretation of the requirements for imposing a safeguard measure when it comes to developing countries.

Most of the interviewees castigated the notion of “serious injury” as being particularly inconsiderate to the interests of developing countries. It was opined that the content of “serious injury” should be reduced when dealing with issues of developing countries.²⁶¹ The essence of the argument was that in developing countries any injury, whether slight or serious, will have an adverse effect. In sum, the African scholars interviewed argue that there should be a lower standard when interpreting “serious

²⁵⁹ It must be stressed that Article XIX does not have S&D treatment in favour of developing countries. S&D treatment caused a heated debate in the negotiations of the SGA. Some negotiators, especially in the developed countries, were against granting special consideration to developing countries. Others argued that countries should be treated on an MFN basis.

²⁶⁰ The International Trade Law students are considered to be representing the *best legal minds in Africa*. Most of them have an affinity with trade issues in their home countries. The International Trade Law students interviewed come from Uganda, Kenya, Tanzania, South Africa, Zimbabwe, Rwanda, Cameroon, and Ethiopia. These students are specialising in International Trade and Investment Law in Africa a Masters course at the University of the Western Cape in collaboration with University of Pretoria. The distinguished Trade Lecturer has vast experience in the areas of International Trade and Investment Law. The distinguished Trade Lecturer is also an Advocate of the High Court of South Africa. She is based at the University of the Western Cape Faculty of Law. This thesis also benefited from an interview with a doctorate candidate in International Trade Law at the University of the Western Cape Law Faculty. I am deeply indebted to all the interviewees. See Annexure D which contains the questions to which the interviewees had to respond.

²⁶¹ This proposal was considered during the Uruguay Round negotiations but was rejected by Developed countries. In light of the Appellate Body and Panel rulings it would be almost impossible for developing countries to succeed in imposing a safeguard measure if the injury standard is not lowered. See TP Stewart *The GATT Uruguay Round, A Negotiating History (1986-1992)* (1993)1778.

injury” so that for developing countries any injury can be interpreted as “serious injury” depending on the situation.

Another issue of concern is Article 4.2 which requires competent national authorities to evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the particular industry in question.²⁶² There was consensus among the interviewees that in developing countries it would in practice be difficult for the competent authorities to obtain the relevant data. In developing countries it is usually difficult to obtain relevant data because of lack of technical expertise. Therefore, without any data, it would be difficult for developing countries to meet the requirements of Article 4.2(a). The requirement of causation was found to be too difficult for developing countries to prove.²⁶³ In both developing and least developed countries an increase in imports is not only caused by serious injury but other factors as well. In these countries it is usually difficult to tell whether the injury has been caused by serious injury or other factors such as a lack of competitiveness. Causation requires highly advanced expertise which is non-existent in most of the developing and least developed countries. It therefore defeats logic to expect a similar causation standard for developed and developing countries.

Bhala argues that developing countries should worry about the word “originating” in Article 9.1 of the SGA because depending on how strict the applicable rules of origin are in a Member seeking to impose a safeguard measure, a product from a developing country may not benefit from the *de minimis* exception.²⁶⁴ Bhala is correct: because most products manufactured in a developing country do not entirely originate in that developing country. In most cases, the products from a developing country have an added value from another country.

²⁶² See Chapter 2.3 and Chapter 3.5 *supra* for the relevant discussion.

²⁶³ See Chapter 3.8 *supra* for the relevant discussion.

²⁶⁴ R Bhala *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 954.

4.3 The Record of Developing Countries in Safeguard Cases

The experience of Argentina in safeguard cases can be summarized as being unsuccessful. It should be stressed that, before the implementation of the Uruguay Round agreements, Argentina could restrict imports at will, and no safeguard regulations were necessary.²⁶⁵ This was done to facilitate adjustments of domestic industries such as footwear, textiles and clothing.²⁶⁶ The unfettered discretion came to an end when the SGA took effect in 1995, and successive adverse WTO Appellate and Panel rulings, which reduced the margins for using safeguard measures. Argentina has so far adopted three safeguard measures, two of which were taken to the WTO DSB. The three cases relate to footwear, canned peaches, and small-motorcycles. In the two cases (footwear and canned peaches) Argentina was given “a red card” for not complying with the rules of the SGA and Article XIX.

Of all three cases, Argentina suffered most in the *Argentina-Footwear* case.²⁶⁷ In this case Argentina initiated a safeguard investigation and adopted Resolution 226/97 which imposed provisional measures in the form of minimum specific duties on imports of footwear. On 1 September 1997 Argentina notified the Committee on Safeguards of its intention to impose a definitive safeguard measure. Subsequently Argentina imposed a definitive safeguard measure in the form of minimum specific duties on certain imports of footwear. The fundamental issue was whether Argentina had complied with Articles 2 and 4 of the SGA. In the view of the Panel and Appellate Body Argentina had not complied with the provisions of the SGA. The Appellate Body agreed with the Panel that Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular “end-points” of the investigation period.²⁶⁸ In its submissions Argentina was of the view that Article 4.2(c) of the SGA requires only a demonstration of the relevance of the factors examined, rather than an examination of all the factors listed as relevant.²⁶⁹

²⁶⁵ JJ Nogues & E Baracat ‘Political Economy of Antidumping and Safeguards in Argentina’ in *Safeguards & Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire* JM Finger & JJ Nogues (eds) (2005) 68.

²⁶⁶ *Ibid.*

²⁶⁷ For a full discussion and other related cases, see Chapter 3.

²⁶⁸ Appellate Body Report, *Argentina-Footwear*, para 129.

²⁶⁹ Appellate Body Report, *Argentina-Footwear*, para 135.

However, Argentina's view was rejected. The Appellate Body agreed with the Panel's interpretation that Article 4.2(a) of the SGA requires a demonstration that the competent authorities evaluated, as a minimum, each of the factors listed in Article 4.2(a), as well as all other factors that are relevant to the situation of the industry concerned.²⁷⁰ According to the Appellate Body and Panel, although Argentina considered some factors, it did not evaluate all of the listed factors, in particular, capacity utilization and productivity.

Commenting on the experience of Argentina in safeguard cases, Nogues and Baracat are of the view that the Argentina government tried to operate safeguards as an "economic instrument" to facilitate the adjustment of the industries damaged by increased imports. However, the successive defeats in the WTO has made safeguards a meaningless trade barrier in Argentina.²⁷¹ It should be stressed that this frustration is being experienced not only in Argentina but also in other developing countries. The high standard required by the WTO may in the long run have adverse effects upon trade liberalization especially in developing countries. This defeats the inclusive purpose of the multilateral trading system.

Just like Argentina, the experience of Chile in safeguard cases can be described as being unsuccessful. In a recent case, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, the WTO DSB found Chile's measures inconsistent with the rules of Article XIX and provisions of the SGA. This case deals with two distinct matters: (i) Chile's Price Band System (PBS), and (ii) Chile's provisional and definitive safeguards measures on imports of wheat, wheat flour and edible vegetable oils, as well as the extension of those measures.²⁷² Before the Panel Argentina claimed that Chile's PBS was inconsistent with Article II:1(b) of the GATT and Article 4.2 of the Agreement on Agriculture.²⁷³ Argentina further claimed that the safeguard measure imposed by Chile constitutes a violation of Article

²⁷⁰ Appellate Body Report, *Argentina-Footwear*, para 136.

²⁷¹ JJ Nogues & E Baracat 'Political Economy of Antidumping and Safeguards in Argentina' in *Safeguards & Antidumping in Latin American Trade Liberalization: Fighting Fire with Fire* JM Finger & JJ Nogues (eds) (2005) 68.

²⁷² See also *supra* Chapter 3.

²⁷³ Appellate Body Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 2.

XIX:1(a) of the GATT, as well as the provisions of the SGA.²⁷⁴ It should be stressed that Chile determined its additional duty using the difference between the general tariff added to the *ad valorem* tariff resulting from the PBS and the tariff binding on these products. According to this system, whenever the combination of the PBS duty and the 8% applied tariff exceeded the 31.5% bound rate, the excess duty was considered as a safeguard.²⁷⁵ This is a unique case because Chile's safeguard measures had already expired or were about to be withdrawn during the proceedings. Nevertheless the Panel decided to make findings on the measures because previous WTO jurisprudence had shown that Panels can indeed adjudicate on expired measures.²⁷⁶ It should be stressed that on appeal the Appellate Body did not deal with the safeguard issue. However, the Appellate Body did not reverse the Panel's findings on the safeguard measure. To this end, it is interesting to discuss the Panel's decision.

The Panel found that Chile had violated several procedural and substantive obligations regarding the imposition of safeguard measures under Article XIX and the SGA. According to the Panel, Chile's investigation report did not discuss or offer any explanation as to why the reported "sizeable and rapid decrease in international prices" could be regarded as an unforeseen development. The failure to set forth findings and reasoned conclusions in its report regarding unforeseen developments means that Chile's measures are inconsistent with Article 3.1.²⁷⁷ The Panel also found that Chile had failed to identify the product that was like, or directly competitive with, each imported product, implying therefore that it failed to identify the affected domestic industries. According to the Panel, although Chile identified the tariff lines of the imported products to which the safeguard measures applied, it did not stipulate whether the domestic products were like, or directly competitive with, the relevant imported products.²⁷⁸

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ The Panel was of the view that this approach is consistent with the approach in *US – Certain EC Products* and the findings in other WTO Disputes.

²⁷⁷ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.193.

²⁷⁸ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.143.

The Panel further found that Chile failed to demonstrate the existence of increased imports. This is because Chile failed to demonstrate that the products concerned were being imported in such increased quantities, absolute or relative to domestic production, and under such conditions, as to cause injury.²⁷⁹ On the issue of wheat flour, Chile failed to identify a discernable upward trend in the growth of these imports. In sum, the absence of this discernable trend shows the inability of Chile to demonstrate the existence of an increase in imports of wheat flour recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury. Because of this failure the Panel held that Chile had not evaluated the increase in imports in relation to domestic products for all of the products covered by the safeguard measures.²⁸⁰ On the question of causation, the Panel opined that, since Chile had failed to establish both increased imports and a threat of serious injury, there could be no causal link between serious injury and increased imports.²⁸¹

4.4 South Africa and Safeguards

After returning to the international community the South African Government started an ambitious process of reducing tariff rates and non-tariff measures. This was done so as to facilitate rapid trade liberalization, develop competitive domestic industries, increase trade and development, and comply with WTO rules. In order to open up its markets, South Africa (hereafter SA) has since 1994 reformed and simplified its tariff structure. It has reduced tariff rates from an import-weighted average tariff rate of more than 20 per cent to 7 per cent.²⁸² In addition, the average MFN tariff rates for all goods fell from over 14% in 1996 to 8% in 2001; the MFN rates for industrial goods also fell by 50% and 55% for textiles and clothing respectively over the same period. The weighted average MFN tariff rate came down from a level of 8.6% in 1996 to 5%

²⁷⁹ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.143

²⁸⁰ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.157.

²⁸¹ Panel Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para 7.176.

²⁸² Foreign-Trade barriers

http://www.ustr.gov/assets/Document_Library/Reports_Publications/2002/2002_NTE_Report/asset_upload_file717_6433.pdf?ht= (accessed 13 September 2006).

in 2001.²⁸³ However, some of these measures have left domestic firms facing increased competition from both fair and unfair traded merchandise.²⁸⁴ According to the WTO Secretariat SA's imports in recent years have grown faster than exports.²⁸⁵ The WTO Secretariat highlights that SA's exports include machinery, motor vehicles and fertilizers to African countries, and minerals and agricultural products to developed markets, mainly Germany, Italy, Japan, the United Kingdom and the US. On the other hand, SA's main suppliers of imports are Germany, Japan, the United Kingdom and the US.²⁸⁶

The increase in imports can be attributed to the general drive to promote free trade in the multilateral trading system. Furthermore, SA, as a Member of the WTO, cannot just impose a safeguard measure, because of its obligation under XVI: 4 of the WTO. According to this Article Members must ensure conformity of their laws, regulations and administrative procedures, including their national safeguard rules, with the GATT/WTO rules.²⁸⁷ Particularly, Article 12.6 of the SGA requires Members to notify the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures, as well as any modifications made to them.²⁸⁸ Although SA must comply with the SGA, its safeguard laws must not necessarily be identical to the text of the SGA for it to comply with the WTO/GATT rules. However, for SA to impose a safeguard measure it should also ensure conformity with the requirements of the SGA and Article XIX of the GATT.²⁸⁹

Before enacting its own national safeguard laws, SA was using WTO guidelines to protect domestic industries from a surge in imports. As a Member of the WTO SA has an obligation to publish and implement WTO rules as part of its own domestic regulations. In line with this commitment South Africa has published its own national Safeguard Regulations in Government Gazette No. 26715 of 27 August 2004

²⁸³ N Joubert 'Managing the Challenge of WTO Participation: Reform of South Africa's Anti-Dumping Regime' http://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm#fntext12 (accessed 20 September 2006).

²⁸⁴ *Ibid.*

²⁸⁵ Press Release 16 April 1996, Trade Policy Reviews of SACU Member States - Botswana, Lesotho, Namibia, South Africa and Swaziland, http://www.wto.org/English/tratop_e/tpr_e/tp72_e.htm (accessed 22 September 2006).

²⁸⁶ *Ibid.*

²⁸⁷ Article XVI.4 of the Marrakesh Agreement Establishing the WTO.

²⁸⁸ Article 12.6 of the SGA.

²⁸⁹ See *Supra* Chapters 2 and 3 for the relevant discussion.

(hereafter Safeguard Regulation). The body mandated with implementing safeguard measures is the International Trade Commission of South Africa (ITAC). The Safeguard Regulation contains 21 sections.²⁹⁰ Most parts of the Safeguard Regulations are similar to Article XIX of the GATT, and the SGA. Section (a) of the Preamble reminds parties about pertinent issues relating to safeguard measures. The Preamble provides that:

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. (emphases added)²⁹¹

This provision is essentially similar to Article XIX because it makes unforeseen development an express condition that interested parties must establish before a safeguard measure is imposed. Section (a) of the Preamble is also similar to Article 2.1 of the SGA. In brief, the Safeguard Regulation provides for the following conditions to be met before a safeguard measure can be imposed: unforeseen development; serious injury or threat thereof; increased imports; and a causal link.²⁹² What now follows is a brief overview of the Safeguard Regulation.

The interested parties must prove serious injury in order for a safeguard measure to be applied. Section 8.1 defines serious injury as “a significant overall impairment in the position of the Southern African Customs Union (SACU) industry”. The definition of serious injury is similar to that in Article 4.1 (a). In determining whether there has been serious injury or a threat thereof, ITAC must consider:

²⁹⁰ It should be stressed that the safeguard regulation does not apply to agricultural goods in respect of which SA has reserved its right to apply a special safeguard measure contemplated in Article 5 of the WTO Agreement on Agriculture.

²⁹¹ According to the SGA 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 shall be based on 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 determination of serious injury or threat thereof shall be based on conditions existing in that member State and the measure shall be limited to that member State. The Southern African Customs Union (SACU) was established in 1910 with the aim of promoting trade between member States. SACU members are South Africa, Namibia, Lesotho, Swaziland, and Botswana. The Secretariat is based in Windhoek (Namibia). The South African Safeguard Regulation applies to all SACU members.

²⁹² These are the substantive requirements; the other requirements, such as the nature of the investigation are procedural.

The rate and volume of the increase in imports of the product concerned (i) in absolute terms; or (ii) relative to the production and demand in the SACU; and whether there have been significant changes in the performance of the SACU industry in respect of the following potential injury factors: (i) sales volume; (ii) profit and loss; (iii) output; (iv) market share; (v) productivity; (vi) capacity utilization; (vii) employment; and (viii) any other relevant factors placed before the Commission.²⁹³

The injury assessment in section 8(a) and (b) incorporates all the injury factors listed in Article 4.2(a) of the SGA, but also adds additional requirements. The levels of output and sales volume are not explicitly mentioned in Article 4.2(a). When determining a threat of serious injury the same requirements are considered, although for a threat the circumstances which would create a situation in which serious injury occurs must be clearly imminent.²⁹⁴ Section 9 adds that a determination of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. This section is identical to Article 4.1(c) of the SGA.

It should also be stressed that serious injury, or the threat thereof is the starting point to request an investigation. Section 12 requires the interested party to submit information of a *prima facie* nature before the Commission²⁹⁵ initiates an investigation. The failure to establish a *prima facie* case will result in no investigation and thus no safeguard measure.

Another pertinent issue is the need for a causal link between the increase in imports and the injury caused. Section 10.2 makes mention of the fact that injury caused by other factors shall not be attributed to increased imports. Section 10.1 further provides:

In considering whether there is a causal link between the imports of the product concerned and the serious injury the Commission shall consider all relevant factors including factors other than the imports of the product concerned that may have contributed to the SACU industry's injury, provided that a participating interested party has submitted, or the Commission otherwise has, information on such factor or factors.

²⁹³ Section 8.3(a) and (b) of the Safeguard Regulation. The Safeguard Regulation is an example of a national and regional legal instrument dealing with safeguard measures. See Annexure E for the detailed Safeguard Regulation.

²⁹⁴ Section 9 of the Safeguard Regulation.

²⁹⁵ The Commission referred to is the International Trade Commission of South Africa.

Although the Commission duly considers other factors, the most important principle is for those factors not to be attributed to increased imports. Section 10.1 and 10.2 are in principle identical to Article 4.2(b) of the SGA.

Before the Commission arrives at a conclusion to apply a safeguard measure, it must carry out an investigation. The Safeguard Regulation provides that even before the investigation starts there must be a *prima facie* case, established by either the Commission or interested parties, demonstrating the existence of the factors listed in section 8.²⁹⁶ During the investigation proceedings, all interested parties may request an oral hearing provided reasons are shown why the Commission should not rely on written submissions. However, the Commission may refuse an oral hearing it will unduly delay the investigation.²⁹⁷ During the investigation process there is an inherent duty on the Commission to provide for consultations with the representative countries that have a substantial interest in a safeguard investigation.²⁹⁸ The consultations must take place 30 days prior to the application for, or extension of, a definitive safeguard measure, with a view to, *inter alia*:

- (a) reviewing the information relating to (i) evidence of serious injury or threat thereof caused by increased imports; (ii) the precise description of the product involved; (iii) the proposed measure; (iv) the proposed date of introduction; (v) the expected duration of the measure; and (vi) the timetable for progressive liberalization; (b) exchanging views on the measure; and (c) discussing ways to maintain a substantially equivalent level of concessions and other obligations vis-a-vis that country.²⁹⁹

The investigation required by section 6.3 is in principle similar to the investigation in terms of Article 3.1 of the SGA. It is reasonable to expect the Commission, after the investigation and consultation, to publish a report setting out its findings and reasoned

²⁹⁶ Section 4.1 and 4.2 should be read to mean that an investigation can be requested by either interested parties, SACU Member States or the Commission at its own initiation. The *operative word* is a *prima facie* case established before the investigation. The *prima facie* case must comply with the requirements in Article 8.1 of the Safeguard Regulation.

²⁹⁷ This provision is reasonable precisely because safeguard measures are emergency measures and a delay may amount to adverse irreparable injury to the domestic industry.

²⁹⁸ Section 6.1 of the Safeguard Regulations. The consultation must be within 14 days after the imposition of the provisional safeguard measure. Section 6.2 states that the consultation shall normally be concluded within 30 days after the publication of the Commission's preliminary report.

²⁹⁹ Section 6.3 of the Safeguard Regulation.

conclusion reached on all pertinent issues of fact ad law. The core of section 6 is to ensure that before the Commission applies a safeguard measure such a decision or application must be thoughtful and properly done. In other words, the Commission must ensure the safeguard measure complies with both the substantive and procedural requirements.

The Safeguard Regulation makes a distinction between a provisional and a definitive safeguard measure. The former is taken after preliminary inquiries show that there are critical circumstances where a delay would cause damage that would be difficult to repair, and there is clear evidence that increased imports have caused or are threatening to cause serious injury.³⁰⁰ The maximum period for which such a measure may exist is 200 days; this will also contribute to the total duration for which a safeguard measure has been in force.³⁰¹ During the period of the provisional measure the Commission should provide an opportunity for consultations with the participating interested parties as well as affected countries.³⁰² These requirements are in line with Article 6 of the SGA regulating provisional measures. The only shortcoming of the Safeguard Regulation is that it does not specify the form that provisional safeguard measures will take. Article 6 of the SGA requires provisional safeguard measures to take the form of tariff increases which shall be refunded if the investigation does not reveal the need to apply safeguard measures.

The Safeguard Regulation states that definitive safeguard measures shall apply (a) only to the extent necessary to prevent or remedy serious injury or the threat thereof; and (b) to facilitate adjustment of the relevant SACU industry.³⁰³ The definitive safeguard measure can take the form of (a) a customs duty; (b) a quantitative restriction; or (c) a combination of both these measures.³⁰⁴ The safeguard measure

³⁰⁰ Section 17.1 of the Safeguard Regulation.

³⁰¹ Section 17.2 read with section 17.3 of the Safeguard Regulation.

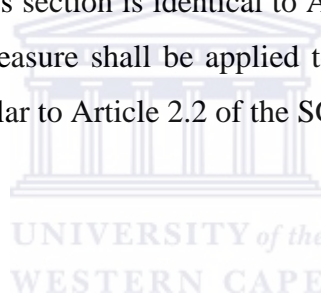
³⁰² Section 17.3 of the Safeguard Regulation. According to section 18.1 the Commission must also make available a public report within seven days of the publication of its preliminary findings. This report must be made available to all interested parties unless the number of participating interested parties makes this impractical. Interested parties are given this report so that they can make comments and also submit rebuttals. The circulation of this report may help to determine whether the safeguard measure is in the public interest.

³⁰³ Section 21.1 of the Safeguard Regulation. Section 21.2 requires a SACU industry to submit a plan indicating how it will adjust to increase its competitiveness. This is a clear indication that the safeguard measure is applied only in *bona fide* instances and not as a political foul play.

³⁰⁴ Section 21.5 of the Safeguard Regulation.

may remain in place for a period of four years but may be extended for a maximum period of six years. In principle, this means that a safeguard measure can be in place for a maximum period of ten years. However, once a safeguard measure has been applied, it may not be applied again to the import of a product that has been subject to a safeguard measure unless a period of time equal to half that during which such a measure had been previously applied, has lapsed, provided that the period of non-application is at least two years.³⁰⁵ It should be stressed that the conditions for extension as well as the duration of a safeguard measure are consistent with the SGA.³⁰⁶

The Safeguard Regulation provides a *de minimis* rule in favour of developing countries. According to section 21.18 a developing country is exempted from a safeguard measure as long as its share of imports is less than three per cent, and developing countries collectively account for less than nine per cent of total imports of the product concerned.³⁰⁷ This section is identical to Article 9 of the SGA. Section 21.19 states that a safeguard measure shall be applied to all imports irrespective of their source. This section is similar to Article 2.2 of the SGA.



³⁰⁵ Section 21.16 of the Safeguard Regulation. Section 21.16 must be read with section 21.17 which provides: 'A safeguard measure with a duration of 180 days or less may be applied again to the 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 been applied on the same product more than twice in the five- year period immediately preceding the date of introduction of the measure', It should be noted that this provision is identical to Article 7.6 of the SGA.

³⁰⁶ Section 21.7 of the Safeguard Regulation provides: 'A definitive measure may be extended by a period of up to six years where the Commission finds that 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.' This is identical to Article 7.2 of the SGA. As a developing country, South Africa can indeed have a safeguard measure for a maximum of ten years because of the S&D treatment in favour of developing countries.

³⁰⁷ Section 21.18 must be read with section 21.20. According to this section an exempted developing country will be subject to a safeguard measure if, subsequent to the imposition of the safeguard measure, its share of imports increases to a level that exceeds three per cent of the total import volume in the original investigation. Although, there is no equivalent provision in the SGA, it cannot be said that this provision is inconsistent with the SGA. A careful reading of Article 9 of the SGA would mean the same thing.

4.4.1 Evaluation

Having looked at the fundamental provisions of SA's Safeguard Regulation the following submissions can be made. There is no inconsistency between SA's Safeguard Regulation and the SGA. To my mind, SA has duly complied with its obligations to incorporate the SGA and GATT Article XIX as part of its domestic law. Notwithstanding this fact, the Safeguard Regulation does not explicitly prohibit grey-area measures, as mentioned in Article 11 of the SGA. However, the omission of Article 11 does not imply that SA will apply grey-area measures. A careful reading of the Preamble and the subsequent provisions shows that the spirit and purport of the Safeguard Regulation is to comply with the SGA. However, despite its Safeguard Regulation being consistent with the SGA, to date SA has not applied a safeguard measure.

In the recent past there has been mounting pressure on the government to impose safeguard measures to protect domestic industries.³⁰⁸ In SA advocates of protectionist measures have mainly been trade unionists who argue that such measures will in no way contravene WTO/GATT rules.³⁰⁹ However, the government has been very reluctant to impose safeguard measures. In the view of the present writer, the reluctance may perhaps be because of two reasons: First, political considerations to appease trading partners such as China, US and UK; secondly and most importantly, the government may have realized how stringent the DSB interprets safeguard measures and the disappointing record of developing countries with regard thereto. In addition, the standards are very high and it may be difficult to prove some of the provisions in the SGA.³¹⁰ It would be a meaningless exercise and wastage of tax payers' money for the government to impose a safeguard measure without a single hope of success at the DSB. Furthermore, as we have seen, the S&D treatment in favour of developing countries does not provide any shield to cover the needs of developing countries.³¹¹ The contentious issue becomes: what should be done to ensure that safeguard measures become a usable remedy for developing and least

³⁰⁸ K Brown 'ANC Summit Calls on Government to Institute 'Safeguard' Measures to Prevent More Job Losses' http://www.tralac.org/scripts/content.php?id=3586_ (accessed on 15 September 2006).

³⁰⁹ *Ibid.*

³¹⁰ *Supra*, 4.2 and Chapter 3.

³¹¹ *Supra* Chapter 4.2.

developed countries? This will be discussed in Chapter 5: Conclusion and Recommendations.



Chapter 5: CONCLUSION AND RECOMMENDATIONS

As has been explained throughout this thesis, safeguards are probably the most controversial of all trade remedies because safeguards are contrary to fair foreign trade.³¹² Presently, no Member country has successfully imposed a safeguard measure. This is mainly because Member countries do not comply with the agreed upon obligations. It is the view of this writer that the Panel or Appellate Body will continue to find safeguard measures illegitimate unless Member countries comply with Article XIX and the SGA.³¹³ But again, one would question whether the Panel and Appellate Body have interpreted the provisions correctly? As has been noted in this work, there is considerable debate among scholars about the approach adopted by the Panel and Appellate Body.³¹⁴ Remarkably, Sykes is pessimistic about the strict approach used by the Appellate Body, mainly because it does not demonstrate precisely what is required to impose safeguard measures.³¹⁵ Similar feelings have been expressed by Lee who argues that the Appellate Body and Panel have imported into the SGA requirements that do not form part of the present regime.³¹⁶

Sykes and Lee are overly critical of the approach adopted by the Panel and Appellate Body. A careful reading of the cases so far adjudicated illustrates the following realities. First, competent national authorities have been reluctant to follow both the substantive and procedural requirements envisaged in Article XIX and SGA. It can be argued that this is the reason why Member countries have been unsuccessful in their application of safeguards and in safeguard cases. Secondly, competent national authorities must come to terms with requirements such as serious injury or threat thereof, causation and the nature of investigation.³¹⁷ Thirdly, the Panel and Appellate Body have taken a cautious approach when interpreting the rules. This perhaps explains why the Panel and Appellate Body deliver detailed legal decisions

³¹² See Chapters 3.2 to 3.12.

³¹³ For a detailed discussion on all issues surrounding the interpretation of the provisions of SGA, see Chapter 3.

³¹⁴ The most contentious issues relate to unforeseen developments, causation, serious injury or threat thereof, and the nature of the investigation. See Chapter 3 for a critical discussion of these issues.

³¹⁵ AO Sykes 'The Safeguard mess: A Critique of the WTO Jurisprudence' (2003) 2 *World Trade Review* 262; See also Chapter 3.12.

³¹⁶ See Chapters 3.2 and 3.3 for the relevant discussion.

³¹⁷ A detailed discussion of Panel and Appellate body decisions is in Chapter 3.2 to 3.11

demonstrating the factors which competent national authorities have failed to address and are unable to justify upon juridical scrutiny.³¹⁸ Lastly, the SGA is very strict and competent national authorities have as yet not fully appreciated this aspect of the relevant law. Most importantly, competent national authorities need to realize that a successful safeguard measure must comply with the letter of Article XIX and the SGA. In order for competent national authorities to impose successfully, safeguard measures all the detailed provisions of Article XIX and the SGA must be followed. In addition, safeguard measures should be applied *only* in emergency situations and should not be used as tool to appease domestic producers.³¹⁹

In my view the approach of the Appellate Body can be described as a progressive realization of the conditions in GATT Article XIX and the SGA. In essence, by enforcing GATT Article XIX and the SGA strictly the Appellate Body has acted as the true guardian of free trade against “protectionist abuse” of safeguard measures. As was stated in Chapter 3.12, it is not the function of the Panel or Appellate Body to give an interpretation which is not justifiable in terms of the wording of the SGA. The Panel and Appellate Body are only mandated to interpret the requirements of GATT Article XIX and the SGA. Member countries can perhaps lobby or negotiate for a modification of the rules. This route is less likely because the SGA is clear, and unsubstantiated claims/interpretation by Member countries cannot be a sufficient reason for amendment. There is therefore a need for the Panel and Appellate Body to be strict, because if the rules are relaxed we could have a situation similar to that of the *United States-Steel* case.³²⁰ This could lead to wide scale abuse of safeguard measures. In my opinion, if Member countries properly apply the conditions in GATT Article XIX and the SGA then there can be reasonable promise and hope for success. It is therefore unjustifiable to expect the Panel or Appellate Body to rule in favour of Member countries despite a failure on their part to comply with the rules.

³¹⁸ See Chapters 3.2 to 3.11.

³¹⁹ *United States-Steel Products*, a recent case, is an example where safeguards were motivated by political considerations. See Chapter 3.4.

³²⁰ See Chapter 3.4.

5.1 Circumstances of Developing and Least Developed Countries

In principle, although the general legal trend is to restrict the use of safeguards and this is properly so to prevent abuse, there must be an exception for poor countries so that, as a practical matter, safeguards as applied to these countries is a usable remedy.³²¹ It is my submission that the circumstances of developing and least developed countries must be considered when interpreting the SGA. The rationale for this submission is premised on the fact that the record of developing countries has not been impressive and will remain so unless a purposive approach is used.³²² A purposive approach is justifiable in terms of Article 21.8 of the DSU. Article 21.8 of the DSU provides that:-

If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

A careful reading of Article 21.8 suggests that when a dispute is brought by a developing country the Panel and Appellate Body should consider the impact of their decision on the economy of the developing country concerned. Article 21.8 not only advances a purposive approach but also complements the general purposes of the multilateral trading system, which *inter alia* includes uplifting the economies of developing countries.³²³ In addition, a purposive approach is justifiable in view of the fact that the SGA provides for S&D treatment. By analogy therefore, the S&D treatment should encompass the substantive and procedural conditions stated in the SGA.

It should be stressed that the standard used for determining serious injury is without doubt too high for developing countries. In developing countries, whether it is an instance of an alleged serious injury or threat thereof, the consequences will be immeasurably high. In addition, the requirement of causation is too onerous to be

³²¹ For a detailed discussion of some of the problems in the existing treatment, see Chapter 4.2.

³²² For the relevant discussion, see Chapter 4.3.

³²³ Article XXXVI of the General Agreement on Tariffs and Trade 1947.

achieved in developing countries. Developing countries should either lobby for a modification of the requirements of serious injury and causation, or hope that the Appellate Body and Panel will interpret the SGA purposively. The following important amendments of “serious injury” or “threat thereof” and “causation” are proposed as points of departure for the negotiated amendments of the SGA.

5.2 Proposed Reform for Article 4(a)

Article 4.1(a) provides that: “serious injury shall be understood to mean a significant overall impairment in the position of the domestic industry”.

Article 4.1(a) could be modified to read: “serious injury shall be understood to mean a *reasonable* overall impairment in the position of the domestic industry”.

5.3 Proposed Reforms for Article 4(b)

Article 4.1(b) provides that; “threat of serious injury shall be understood to mean serious injury that is clearly imminent...”.

Article 4.1(b) could be modified to read: “a threat of serious injury shall be understood to mean serious injury that is *objectively* imminent...”.

Article 4.2(b) provides that: “...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”.

Article 4.2(b) could be modified to read: “...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 *unless a developing country can prove that other factors have an impact on the domestic industry as a whole*”.

Alternatively Article 4.2(b) could be modified to read: “In a case where a safeguard measure is imposed by a developing country the other factors which may cause injury

to the domestic industry at the same time, *shall not be taken into consideration unless those factors taken together amount to at least 50 percent of the injury to the domestic industry*”.

The suggested modification of Article 4.2(b) is necessary because a causal link may be hard to establish in developing countries. In developing countries serious injury is usually a combination of other factors, which might actually play a more pivotal role than the increase in imports. More importantly, to establish serious injury and causation developing countries need to make a thorough investigation. However, such investigation may not be feasible in developing countries because of the lack of data. Without such data, developing countries may find it difficult to establish serious injury and causation. In my view, a plausible approach would be to lower the standards of serious injury and causation so that the special circumstances in which developing countries find themselves are considered.

5.4 Final Remarks

In Chapter 4.4, the thesis highlighted the disappointing record of developing countries in safeguard cases. In addition, the thesis showed the inadequacy of the S&D treatment in the SGA. In sum, the applicability of safeguard measures in developing countries will remain an illusion unless a modification of the substantive requirements is considered. Developing countries should consider lobbying for a modification of the substantive requirements as suggested above, or the Panel and Appellate Body should interpret the SGA purposively. In the view of the present writer the multilateral trading system is presently facing tremendous setbacks. Therefore a re-negotiation of the SGA may not be the best route to take. However, the Panel and Appellate Body, as the interpreters of the SGA, should consider a purposive approach in interpreting serious injury and causation. In this way safeguard measures will not only be a useable remedy for developing countries but also serve the intended purpose of the SGA.

In sum, if modifications are not made, the reality is that governments will impose safeguard measures and, if challenged the Member may assert its rights to have the

matter heard at the DSB, and it should be apparent that such dispute may take up to 3 years to decide and implement. During this time the developing country, or least developed country, will have the ability to protect its domestic industry. It should be stressed that if African states implement safeguard measures, it will be worthless in reality, for a developed country to go to the trouble to challenge the measure, given the small market the imports from African states represent in the global economy.



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www.wto.org

Word count: 29,500 excluding bibliography and Annexures



ANNEXURE A

List of Developing Countries:

Sub-Saharan Africa (48)

Angola
Benin
Botswana
Burkina Faso
Burundi
Cameroon
Cape Verde
Central African Republic
Chad
Comoros
Congo, Dem. Rep.
Congo, Rep
Cote d'Ivoire
Equatorial Guinea
Eritrea Ethiopia
Gabon
Gambia, The
Ghana
Guinea
Guinea-Bissau
Kenya
Lesotho
Liberia
Madagascar
Malawi
Mali
Mauritania
Mauritius



Mayotte
Mozambique
Namibia
Niger
Nigeria
Rwanda
Sao Tome and Principe
Senegal
Seychelles
Sierra Leone
Somalia
South Africa
Sudan
Swaziland
Tanzania
Togo
Uganda
Zambia
Zimbabwe



East Asia and Pacific (20)

Cambodia
China
Fiji
Indonesia
Kiribati
Lao PDR
Malaysia
Marshall Islands
Micronesia, Fed. Sts
Mongolia
Palau
Papua New Guinea

Philippines
Samoa
Solomon Islands
Thailand
Timor-Leste
Tonga
Vanuatu
Vietnam

Europe and Central Asia (27)

Armenia
Azerbaijan
Belarus
Bosnia and Herzegovina
Bulgaria
Croatia
Georgia
Hungary
Kazakhstan
Kosovo
Kyrgyz Republic
Latvia
Macedonia, FYR
Moldova
Poland
Romania
Russian Federation
Serbia and Montenegro
Slovak Republic
Tajikistan
Turkey
Turkmenistan
Ukraine
Uzbekistan



Latin America and the Caribbean (31)

Antigua and Barbuda

Argentina

Barbados

Belize

Bolivia

Brazil

Chile

Colombia

Costa Rica

Dominica

Dominican Republic

Ecuador

El Salvador

Grenada

Guatemala

Guyana

Haiti

Honduras

Jamaica

Mexico

Nicaragua

Panama

Paraguay

Peru

St. Kitts and Nevis

St. Lucia

St. Vincent and the Grenadines

Suriname

Trinidad and Tobago

Uruguay

Venezuela, RB



Middle East and North Africa (14)

Algeria

Djibouti

Egypt, Arab Rep.

Iran, Islamic Rep.

Iraq

Jordan

Lebanon

Libya

Morocco

Oman

Syrian Arab Republic

Tunisia

West Bank and Gaza

Yemen, Rep.

South Asia (8)

Afghanistan

Bangladesh

Bhutan

India

Maldives

Nepal

Pakistan

Sri Lanka



Source: World Bank Website at:

[http://web.worldbank.org/WBSITE/EXTERNAL/OPPORTUNITIES/GRANTS/DEV
MARKTPLACE/0,,contentMDK:20666605~pagePK:180691~piPK:174492~theSiteP
K:205098,00.html](http://web.worldbank.org/WBSITE/EXTERNAL/OPPORTUNITIES/GRANTS/DEV_MARKTPLACE/0,,contentMDK:20666605~pagePK:180691~piPK:174492~theSitePK:205098,00.html)

ANNEXURE B

GATT 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 sub-paragraph (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 effected 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 CONTRACTING PARTIES, 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 the provisions of sub-paragraph (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.

ANNEXURE C

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 Member³²⁴ 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

³²⁴ 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

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 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.

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 prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

Article 4

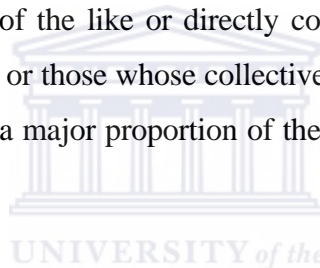
Determination of Serious Injury or Threat Thereof

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.³²⁵

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.

³²⁵ A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

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.^{326,327} 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.

(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.

³²⁶ 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.

³²⁷ 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.

2. 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 Member³²⁸, 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.

3. 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.



1. A Member shall immediately notify the Committee on Safeguards upon:

(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,

³²⁸The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

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

ANNEXURE D

Dear Scholar.

Questionnaire on Safeguard Measures in WTO with emphasis on the experience of developing countries.

Greetings. I am writing a thesis on International Trade Law focusing on safeguard measures under the World Trade Organization (WTO). The thesis is titled: *Safeguard Dilemmas: The need for Practical Special and Differential Treatment for Developing Countries.*

As you may already know, no country has so far succeeded in imposing a safeguard measure.³²⁹ This may be good or bad depending upon your point of view. Good because it purports to promote free trade, bad because domestic industries may be adversely affected by a surge in imports. What I have found particularly interesting is that some developing countries like Argentina have attempted to impose safeguard measures but have been unsuccessful.³³⁰ In the mind of the WTO Appellate Body, Argentina did not comply with the rules of the Agreement on Safeguards and neither has any country complied with the rules. The strict interpretation taken by the Appellate Body is affecting equally both Developed countries and Developing countries.

In light of the foregoing, I would be very grateful if you kindly respond to some of the issues raised below.

1. What is your opinion on the approach taken by the Appellate Body?

³²⁹ From 1994-2006 the Appellate Body has dealt with 12 cases and found all of them did not meet the requirements of Article XIX and the Agreement on Safeguards. To date therefore, no country has successfully imposed a safeguard measure.

³³⁰ In *Argentina- Footwear*, the Appellate Body found that Argentina did not comply with the conditions in the Agreement on Safeguards.

2. The Agreement on Safeguard measures contains special and differential treatment for developing countries. Considering the strict approach taken by the Appellate Body, do you think the provisions of the S&D treatment in the Agreement on Safeguards adequately cover developing countries?

3. To your knowledge, has your country experienced an import surge and if so did your government consider taking safeguard measures?

4. Do you have any comments as to the experience of your country relative to safeguard measures?



6. In your opinion, what should be done for developing countries so that to them safeguards become a usable remedy?

Optional.

Name of Scholar.....

Country of Scholar.....

Thank you for your time and co-operation.

Sincerely,

Richard Karugarama (LLM Student).

ANNEXURE E

South Africa Safeguard Regulation

**Government Gazette REPUBLIC OF SOUTH AFRICA Vol. 470 Pretoria 27
August 2004 No. 26715**

AIDS HELPLINE: 0800-0123-22 Prevention is the cure

STAATSKOERANT, 27 AUGUSTUS 2004 No. 26715 3

GENERAL NOTICE

~ ~ ~

NOTICE 1808 OF 2004

I, Mandisi Mpahlwa, in my capacity as Minister of Trade and Industry, acting under the powers vested in me by section 59 of the International Trade Administration Act (Act 71 of 2002) hereby prescribe that -

REPUBLIC OF SOUTH AFRICA THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION SAFEGUARD REGULATIONS

4 No. 26715 GOVERNMENT GAZETTE, 27 AUGUST 2004

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PREAMBLE

Parties are reminded of the following basic characteristics of safeguard measures: **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; **A** safeguard measure may be applied as a customs duty and/or a quantitative import restriction; If a quantitative import restriction is used, it should not normally reduce imports below a level lower than the average during the preceding three years; Safeguard measures are normally applied to imports from all countries even if the imports, which cause serious harm, originate mainly or only from one country; **A** safeguard measure must be progressively liberalized at regular intervals throughout its period of validity; **A** safeguard measure can only be in place for a period not exceeding **4** years, but the application thereof may be extended by up to 6 years under certain conditions, including that there must be a further liberalization of the measure; Any safeguard measure imposed for a period exceeding **3** years must be reviewed at its halfway term. **A** safeguard measure may not be re-imposed for a certain period after a safeguard measure had been in place on the same product; If **SACU** introduces a safeguard measure its may be forced to compensate its trading partners affected by such measure; The investigation of the merits of a safeguard measure and the implementation of a safeguard measure are subject to prescribed notifications and consultations between SACU, its trading partners and the World Trade Organization.

Application' of regulations

Safeguard investigations are conducted in terms of section 16 and 26 of the

A definitive safeguard measure may be applied only where:

Main Act.

The Commission finds that the product under investigation is being imported into the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products, and as a result of unforeseen developments and of the effect of the obligations incurred by the Republic (or SACU) under the World Trade Organization; such measures are required to facilitate adjustment in the SACU industry; and the SACU industry (i) has submitted a detailed plan indicating how it plans to adjust to meet import competition; or (ii) has submitted proof of restructuring that is being undertaken. The Commission, in considering the recommendation of a definitive safeguard measure, may take into consideration the requirement of compensation to countries whose exports will be substantially affected by any safeguard measure. Nothing in these regulations shall preclude the Commission from taking safeguard action provided for in terms of a free trade agreement concluded between the Republic or the SACU and any other country or customs territory. Any safeguard action so taken shall be taken in line with the terms and conditions agreed upon in such free trade agreement. Nothing in these regulations shall preclude the Commission from taking special safeguard action in terms of any country's Protocol of Accession to the World Trade Organization. Any safeguard action so taken shall be taken in line with the terms and conditions stated in the Protocol of Accession.

These regulations do not apply to agricultural goods in terms of which the Republic (or SACU) has reserved its right to apply a special safeguard measure contemplated in Article 5 of the WTO Agreement on Agriculture.

Definitions

“Commission” means the International Trade Administration Commission of South Africa established in terms of section 7 of the International Trade Administration Act, 2002 (Act No. 71 of 2002);

“Deadlines” shall be interpreted as the final date for submissions, responses, Comments and requests and the like as envisaged by the different sections of

These Regulations, and shall be deemed to be at 15h00 South African standard Time on the deadline indicated, unless expressly otherwise indicated;

“Directly competitive product” means a product, other than a like product, That competes directly with the product under investigation;

“Facts available” means the information that is available to the Commission At the time of making a determination, whether preliminary or final provided That all requirements regarding non-confidentiality and timely submission have Been met;

“Good cause” relates to an occurrence outside the control of the participating Interested party or the Commission and does not include merely citing Insufficient time to submit information to the Commission;

“Investigation period for injury” is the period for which it is assessed Whether the SACU industry experienced serious injury. The investigation Period for injury shall be clearly indicated in the initiation notice published in The *Government Gazette*. Information relating to a period subsequent to the Investigation period shall not normally be taken into consideration;

“Like product” means:

- (a) A product which is identical, i.e. alike in all respects to the product Under consideration; or
- (b) In the absence of such a product, another product which, although not Alike in all respects, has characteristics closely resembling those of That product under consideration.

“Main Act” refers to the International Trade Administration Act, 2002 (Act No. 71 of 2002);

“Participating interested parties” shall mean those parties that have Indicated their interest in participating in an investigation;

“Related parties” are parties deemed to be related for purposes of a safeguard Investigation if:

- (a) One directly or indirectly owns, controls or holds five per cent or more of The equity shares of the other;
- (b) One has the power to directly or indirectly nominate or appoint a director To the board of the other;
- (c) one is an officer or director of the other’s business;
- (d) They are legally recognized partners in business;

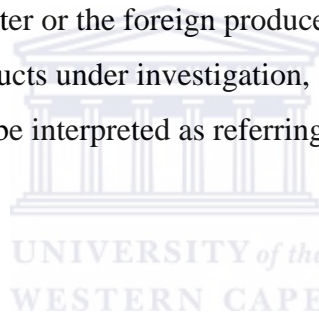
- (e) One is employed by the other;
- (f) They are both directly or indirectly controlled by a third person;
- (g) Together they directly or indirectly control a third person;
- (h) They appear to be related by virtue of their conduct;
- (I) they are blood relatives or are related by marriage, common-law Partnership or adoption; or
- (j) If their relationship is otherwise of such a nature that trade between them cannot be regarded to be at arm's length.

“SACU” means the Southern African Customs Union;

“SACU industry” means the domestic producers in the SACU as a whole of the like or directly competitive products or those of them whose collective output of the like or directly competitive products constitutes a major proportion of the total SACU production of those products.

Where a SACU producer is

- (a) related to the importer, exporter or the foreign producer; or
 - (b) itself an importer of the products under investigation,
- the term “SACU industry” may be interpreted as referring to the rest of the SACU producers;



3. Confidentiality

3.1 Interested parties providing confidential information in any correspondence shall be required to furnish non-confidential summaries thereof. These summaries shall

- (a) indicate in each instance where confidential information has been omitted;
- (b) indicate in each instance the reasons for confidentiality; and
- (c) be in sufficient detail to permit other interested parties a reasonable understanding of the substance of the information submitted in confidence.

3.2 Non-confidential information supplied by interested parties, as set out in section 3.1, and all non-confidential correspondence between the Commission and participating interested parties during the investigation shall be kept in a public file.

Interested parties that have made themselves known may upon request inspect

the public file and may comment thereon within 7 days after such information has been placed on the public file. The Commission will consider all substantiated comments.

Where information does not permit summarisation, reasons should be provided why the information cannot be summarised.

The following list indicates “information that is by nature confidential” as contemplated in section 33(1)(a) of the *Main Act*, read with section 36 of the *Promotion of Access to Information Act, 2000* (Act 2 of 2000):

- (a) management accounts;
- (b) financial accounts of a private company;
- (c) actual and individual sales prices;
- (d) actual costs, including cost of production and importation cost;
- (e) actual sales volumes;
- (f) individual sales prices;
- (g) information, the release of which could have serious consequences for the person that provided such information; and
- (h) information that would be of significant competitive advantage to a competitor; provided that the party submitting such information indicates it to be confidential.

All correspondence not clearly indicated to be confidential shall be treated as non-confidential.

The Commission may disregard any information indicated to be confidential that is not accompanied by a proper non-confidential version and may return such information to the party submitting same, if the non-confidential version remains deficient after such party had the opportunity to restrict any deficiencies.

The Commission will disregard any information indicated to be confidential that is not accepted as confidential by the Commission under section 34(1) of the *Main Act*.

4 Investigations

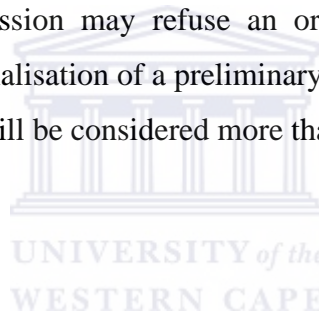
Except as provided for in subsection 2, a safeguard investigation shall only be initiated upon acceptance of a written application by or on behalf of the SACU industry, that contains sufficient evidence to establish a *prima facie* case that the product under investigation is being imported into the Republic or the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury

to the SACU industry that produces like or directly competitive products. The Commission may initiate a safeguard investigation without having received a written application from the SACU industry. In such cases the Commission shall proceed only if it has sufficient evidence to establish a *prima facie* case that the product under investigation is being imported into the Republic or the Common Customs Area of SACU in such increased quantities, absolute or relative to SACU production, and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products. A non-confidential version of the information the Commission relies on shall be made available to all participating interested parties.

5 Oral hearings

Any participating interested party may request an oral hearing during the investigation, provided the party indicates reasons for not relying on written submissions only. The Commission may refuse an oral hearing if granting such hearing will unduly delay the finalisation of a preliminary or final determination.

No request for an oral hearing will be considered more than **60** days after the initiation of the investigation.



6 Consultations

The Commission shall provide for consultations with the representatives of countries that have a substantial interest in a safeguard investigation within 14 days after the imposition of a provisional payment. Consultations entered into in terms of subsection **1** shall normally be concluded within **30** days after the publication of the Commission's preliminary report. The Commission shall provide representatives of countries that have a substantial interest in a safeguard investigation 30 days for consultations prior to the application or extension of a definitive safeguard measure with a view to, *inter alia*,

- (a) reviewing the information relating to
 - (i) evidence of serious injury or threat thereof caused by increased imports;
 - (ii) the precise description of the product involved;
 - (i i i) the proposed measure;
 - (iv) the proposed date of introduction;

- (v) the expected duration of the measure; and
- (vi) the timetable for progressive liberalization;
- (b) exchanging views on the measure; and
- (c) discussing ways to maintain a substantially equivalent level of concessions and other obligations vis-a-vis that country. In cases where it is proposed that a safeguard measure be extended, the Commission shall, in addition to the factors contemplated under subsection 3, also provide evidence that the relevant SACU industry is adjusting.

7 SACU industry

Other than investigations initiated in terms of section 4.2, any application for safeguard action shall be brought by or on behalf of the SACU industry. An application shall be regarded as brought by or on behalf of the SACU industry if

- (a) at least 25 per cent of the SACU producers by domestic production volume support the application; and
- (b) of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application. In the case of industries involving an exceptionally large number of producers, the Commission may determine support and opposition by reference to the largest number of producers that can reasonably be included in the investigation or by using statistically valid sampling techniques based on the information available to the Commission at the time of its finding.

7.4 If a SACU producer withdraws the application or its support thereof after the investigation has been initiated, the Commission may

- (a) terminate the investigation; or
- (b) disregard the withdrawal of support and continue with its investigation as if all requirements in subsections 1,2 and 3 have been met.

8. Serious injury

8.1 Serious injury shall be understood to mean a significant overall impairment in the position of the SACU industry.

8.2 In evaluating serious injury the Commission shall consider injury information pertaining to a major portion of the SACU industry.

8.3 In determining serious injury or a threat thereof to the SACU industry the

Commission shall consider:

- (a) the rate and volume of the increase in imports of the product concerned
 - (i) in absolute terms; or
 - (ii) relative to the production and demand in SACU; and
- (b) whether there have been significant changes in the performance of the SACU industry in respect of the following potential injury factors:
 - (i) sales volume;
 - (ii) profit and loss;
 - (iii) output;
 - (iv) market share;
 - (v) productivity;
 - (vi) capacity utilisation;
 - (vii) employment; and
 - (viii) any other relevant factors placed before the Commission.

8.4 The Commission may require any additional information on injury from any participating interested party at any stage during an investigation.

8.5 Each of the factors mentioned in subsection 3 shall be considered for the like and directly competitive products only or, where such analysis is not possible, for the narrowest group of products for which such analysis can be made.

9. Threat of serious injury

A determination of threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances that would create a situation in which serious injury would be caused must be clearly imminent.

10. Causality

10.1 In considering whether there is a causal link between the imports of the product concerned and the serious injury the Commission shall consider all relevant factors including factors other than the imports of the product concerned that may have contributed to the SACU industry's injury, provided that a participating interested party has submitted, or the Commission otherwise has, information on such factor or factors.

10.2 The injury caused by other factors shall not be attributed to the increased imports.

11. Properly documented application

11.1 Written complaints shall be made by or on behalf of the SACU industry in the required format.

11.2 In determining whether a complaint submitted in terms of subsection 1 constitutes a properly documented application, the Commission shall determine whether

- (a) the application includes such information as is reasonably available to the applicant on the issues contemplated in subsection 3; and
- (b) a proper non-confidential version has been submitted.

11.3 The application shall contain the following information:

- (a) complete description of the imported product;
- (b) complete description of the SACU like and directly competitive product;
- (c) industry standing;
- (d) a summary of the factors on which the allegation of serious injury or threat thereof is based;
- (e) the unforeseen developments that led to the increased imports;
- (f) relief sought;
- (g) efforts taken or planned to compete with the imports;
- (h) any other information required by the Commission.

11.4 The Commission will return all applications that do not contain sufficient information, as required under subsection 3, to the applicant, unless such deficiencies are properly addressed within 7 days after the issue of a deficiency letter. This shall in no way prejudice the right of the SACU industry to submit a new application.

12. Serious injury standard for initiation purposes

In determining serious injury to a SACU industry the Commission shall consider whether the information submitted in this regard and relating to the factors listed in section 8 establishes a *prima facie* case of serious injury or threat thereof.

13. Merit Assessment

13.1 In its merit assessment the Commission shall determine whether there is sufficient information to establish a *prima facie* case that the SACU industry is experiencing serious injury, or a threat of serious injury, as a result of an unforeseen surge of imports.

13.2 In the event that the Commission decides not to initiate an investigation it shall inform the applicant concerned accordingly and supply it with a full set of reasons for its decision.

14. Initiation and notification

14.1 An investigation shall be formally initiated through publication of an initiation notice in the Government Gazette.

14.2 The initiation notice shall contain at least the following information:

- (a) the identity of the applicant;
- (b) a detailed description of the product under investigation, including the tariff subheading applicable to the product;
- (c) a detailed description of the like or directly competitive SACU product;
- (d) a summary of the factors on which the allegation of serious injury or threat thereof is based;
- (e) the unforeseen developments that led to the increased imports;
- (f) the address to which representations by interested parties should be directed; and
- (g) the time frame for responses by participating interested parties.

14.3 If the Commission, during its investigation, finds that the subject product imported under a tariff subheading not initially indicated to be in the scope of the investigation, it may include the imports of such subject product in its investigation.

14.4 Within 7 days after initiation the Commission shall

- (a) notify the representative of each country of origin and of export that may be significantly affected by a safeguard measure of the initiation of the investigation; and
- (b) supply each country contemplated in paragraph (a) with a copy of the non confidential version of the application.

15. Responses by interested parties

15.1 All interested parties will receive 20 days from the initiation of an investigation to comment on the application.

15.2 The Commission may grant an extension for the submission of comments on good cause shown.

15.3 The Commission may prescribe the format in which submissions should be made.

15.4 **All** submissions shall be made in both hard copy and in electronic format, unless the Commission has agreed otherwise in writing. Failure to comply with this provision may result in the submission being regarded as deficient.

15.5 The Commission may request any additional information from any participating interested party at any stage of the investigation, and may prescribe a reasonable deadline for the submission of such information.

16. Non-cooperation

In the event that parties that could have been participating interested parties do not cooperate in the investigation, the Commission may rely on the facts available.

17. Provisional measures

17.1 The Commission may request the Commissioner for the South African Revenue Service, in terms of section 57A of the Customs and Excise Act, 91 of 1964, to impose a provisional payment as soon as the Commission has made a preliminary determination that

- (a) there are critical circumstances where a delay would cause damage that would be difficult to repair; and
- (b) there is clear evidence that increased imports have caused or are threatening serious injury.

17.2 Provisional payments may be imposed for a maximum period of 200 days.

17.3 The period for which provisional measures are in force shall be regarded as part of the total duration for which safeguard measures are in force.

17.4 The Commission will provide an opportunity for consultations with participating interested parties following the imposition of provisional measures.

18. Preliminary report

18.1 In the event that the Commission requests the imposition of a provisional safeguard measure, as contemplated in section 17, the Commission shall make available a public report within seven days of the publication of its preliminary finding.

18.2 The preliminary report shall contain at least the following information:

- (a) identity of the applicant;
- (b) a full description of the product under investigation, as well as the

- directly competitive products, including the tariff classifications;
- (c) date of the Commission's decision to initiate the investigation;
 - (d) initiation date and notice number;
 - (e) date of the Commission's preliminary determination;
 - (f) an evaluation of the injury factors considered;
 - (g) an evaluation of the causality factors considered;
 - (h) the unforeseen developments that lead to the increased imports;
 - (i) the Commission's finding, including the preliminary safeguard measure requested;
- and
- (j) while preserving the requirements of confidentiality, all relevant issues of fact and law considered by the Commission in reaching its preliminary determination.

18.3 The Commission shall forward the preliminary report direct to all participating interested parties unless the number of participating interested parties makes this impracticable.

19. Comments on preliminary report

19.1 **All** participating interested parties shall receive **14** days, from the date a preliminary report is made available, to comment in writing.

19.2 The Commission may grant participating interested parties an extension on good cause shown.

20. Final determination

20.1 In its final determination the Commission shall consider whether

- (a) the **SACU** industry is experiencing serious injury or threat of serious injury, as contemplated in sections **8** and **9**;
 - (b) there were increased imports;
 - (c) any increase in imports can be attributed to unforeseen developments;
 - (d) the increased imports resulted in serious injury or threat thereof to the **SACU** industry;
 - (e) other factors contributed significantly to the serious injury; and
- (f) the imposition of a safeguard measure would be in the public interest.

20.2 In determining whether a safeguard measure would be in the public interest the need to take note of the trade distorting effect of the surge in imports and the need to restore effective competition shall be given special consideration.

20.3 The Commission shall issue a public report indicating the reasons for its final determination within seven days of the publication of the final determination.

20.4 The public report referred to in subsection 3 shall reflect

- (a) all issues contemplated under section 8.2;
- (b) unforeseen developments;
- (c) public interest; and
- (d) the basis of its recommendation for
 - (i) a definitive safeguard measure; or
 - (ii) terminating the investigation.

21 Definitive safeguard measures

A safeguard measure shall be applied only -

- (a) to the extent necessary to prevent or remedy serious injury or threat thereof; and
- (b) to facilitate adjustment of the SACU industry.

The SACU industry shall be required to submit a plan indicating how it will adjust to increase its competitiveness. Such adjustment plan should reach the Commission no later than **60** days after initiation of the investigation in the *Government Gazette*.

The Commission may grant an extension for the submission of an adjustment plan on good cause shown. If the Commission proposes applying or extending a safeguard measure it shall provide the representatives of countries having a substantial interest **as** exporters of the product under investigation 30 days for consultations with a view to, *inter alia*

- (a) reviewing the information relating to the existence of serious injury or the threat thereof caused by increased imports, the precise description of the product involved, the proposed measure, the proposed date of introduction, the expected duration of the measure and the timetable for progressive liberalisation;
- (b) exchanging views on the measure; and
- (c) reaching an understanding on ways to maintain a substantially equivalent level of concessions and other obligations to that existing under GAIT **1994** between SACU and the exporting countries which would be affected by such a measure.

The Commission may recommend a definitive safeguard measure in the form of

- (a) a customs duty;
- (b) a quantitative restriction; or

(c) a combination of the measures contemplated under paragraphs (a) and (b). A definitive measure may remain in place for a period not exceeding four years, unless extended in terms of subsection 7. A definitive measure may be extended by a period of up to six years where the Commission finds that

(a) the lapse of the safeguard measure imposed in terms of subsection 6 is likely to lead to the recurrence of serious injury; and

(b) there is evidence that the SACU industry is adjusting. Where a definitive safeguard measure is imposed for a period exceeding one year the Commission shall recommend how the measure should be liberalised at regular intervals over the period that the measure is applied. Where the application of a safeguard measure is extended in terms of subsection **the** safeguard shall continue to be further liberalised over the period of its application. Where a definitive safeguard measure is imposed for a period exceeding three years, the Commission shall self-initiate a review of the measure at the halfway mark of the application of the safeguard measure to determine whether -

(a) the continued application of the safeguard measure is required;

(b) the safeguard measure cannot be liberalised at an increased pace; and

(c) the SACU industry is implementing its adjustment programme.

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. In cases in which a quota **is** allocated among supplying countries, the Commission may seek agreement with respect to the allocation of shares in the quota with all such countries having a substantial interest in supplying the product concerned. In cases in which the method contemplated in subsection **is** not reasonably practicable, the Commission shall allot to exporting countries having a substantial interest in supplying the product shares based upon the proportions supplied by such exporting countries 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.

2 1.1 The Commission may depart from the provisions of subsection 13 provided that

(a) the Commission finds the presence of serious injury and not only a threat of serious injury;

- (b) consultations are conducted with such exporting countries;
- (c) clear demonstration is provided to the Commission that imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period;
- (d) the reasons for the departure from the provisions in subsection 13 are justified; and
- (e) (i) the conditions of such departure are equitable to all suppliers of the product concerned; or
- (ii) the suppliers failed to cooperate in the investigation.

21.2 A safeguard measure imposed in terms of subsection 14 may not be extended beyond the initial period for which it was imposed.

2 1.16 A safeguard measure may not be applied again to the import of a product that has been subject to a safeguard measure unless a period of time equal to half that during which such a measure had been previously applied, has lapsed, provided that the period of non-application is at least two years.

21.3 Notwithstanding the provisions of subsection 16, 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.

21.4 Safeguard measures shall not be applied against a product originating in a developing country **as** long as its share of imports of the product concerned in **SACU** does not exceed three per cent, provided that developing countries with less than three per cent import share collectively account for not more than nine per cent of total imports of the product concerned.

2 1.5 Other than as contemplated in subsection **18** a safeguard measure shall be applied to all imports of the subject product irrespective of its source.

21.6 A developing country exempted from the application of a safeguard measure in terms of subsection **18** may become subject to such safeguard measure without a new investigation being conducted if, subsequent to the imposition of the safeguard measure: its share of the imports increases to a level that exceeds three percent of the total import volume in the original investigation period.

Judicial reviews of preliminary decisions

Participating interested parties may challenge preliminary decisions or the Commission's procedures prior to the finalisation of an investigation in cases where it can be demonstrated that

- (a) the Commission has acted contrary to the provisions of the
 - (b) *Main Act* or these regulations;
- (b) the Commission's action or omission has resulted in serious prejudice to the complaining party; and
- (c) such prejudice cannot be made undone by the Commission's future final decision.

