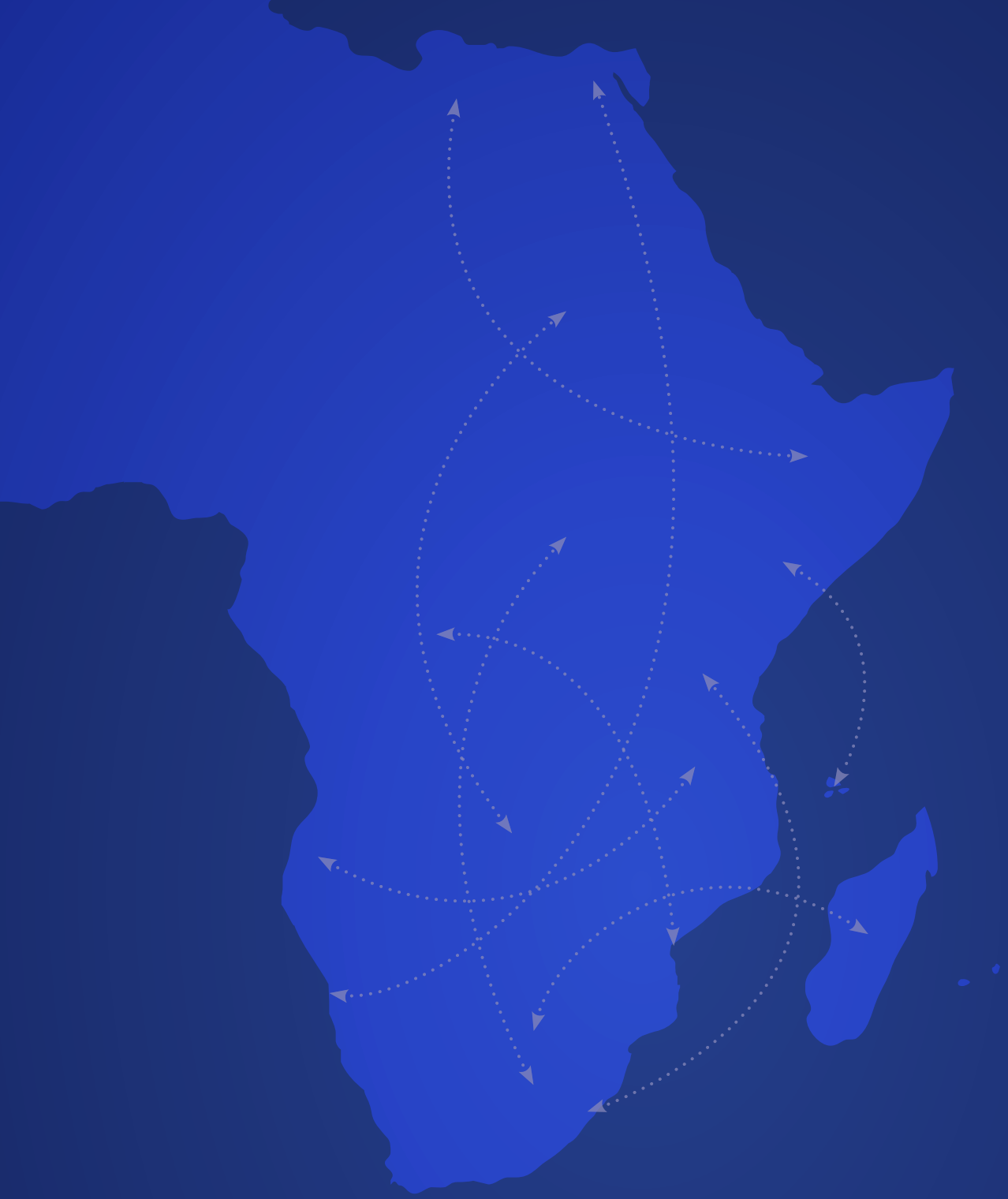

TRAINING MODULE
ON SAFEGUARDS

TMSA
TradeMark Southern Africa

NOTE

This Training Module is published under the auspices of TradeMark Southern Africa and addresses trade remedies in the context of the negotiating process aimed at shaping the Tripartite Free Trade Area (TFTA).

The Module is designed for educational and divulgation purposes only. As such, no claim can be made to the publisher regarding its legal content, which in no instance replaces or is a substitute for the official texts being reviewed.

The training exercise is intended to contribute to the negotiating capacity of the TFTA role-players, namely government officials, private sector and civil society representatives.

PREFACE

This Module concerns the safeguards measures as dealt with by the legal provisions of the Common Market for Eastern and Southern Africa (COMESA), the Eastern African Community (EAC), the Southern African Development Community (SADC), as well as the current Draft TFTA Text.

The legal provisions on trade remedies (anti-dumping, safeguards, subsidies and countervailing measures) of the three Regional Economic Communities (RECs) mirror and refer to the World Trade Organization (WTO) rules on trade remedies.

While examining the legal provisions of COMESA, EAC, SADC and the Draft TFTA Text, the Module presents the WTO's Agreement on Safeguards (SA). The SA remains the main reference source on the rights and obligations to conduct investigations and apply safeguards measures.

Throughout the Module, selected contents drawn from reports and judgements of the WTO's Panel and Appellate Body (AB) are provided, as are other leading cases and sources from the TFTA Region and its trading partners. This jurisprudence is instrumental to better understand the evolution of the safeguards discipline and its application in a multilateral regime.

The Module was drafted by Edwin Vermulst, Founding Partner of VVGB Advocaten, under the supervision of Stefano Inama, Trade Lawyer at the United Nations Conference on Trade and Development (UNCTAD). Special thanks are extended to Mwansa Musonda of the COMESA Secretariat, Geoffrey Osoro of the EAC Secretariat and Paul Kalenga of the SADC Secretariat for providing the relevant legal texts and advice during the drafting.

What you will learn

You will learn the following from this Training Module:

- The international discipline of safeguarding under the WTO, as mirrored in the COMESA, EAC and SADC legal provisions, as well as in the current formulation of the Draft TFTA Text;
- Master the terminology related to safeguards and understand the legal requirements pertaining to this trade remedy;
- Understand how to manage the legal process of imposing safeguards in compliance with existing legislation at multilateral, regional and national levels; and
- Become acquainted with the basic calculations and references to legal sources that will enable you to better understand these trade remedies and their administration in the light of their evolution in jurisprudence and negotiations.

You will also be able to:

- List the factors that need to be assessed to justify the application of a safeguard measure;
- Explain to what extent a safeguard measure can be challenged within the Dispute Settlement Understanding (DSU); and
- Describe the rules aimed at strengthening developing countries' positions with regards to the application of safeguards.

TABLE OF CONTENTS

PART I – SAFEGUARDS IN TFTA MEMBER STATES

Introduction

The traditional theory of the proponents of safeguard measures is that such measures are a necessary evil in the process of trade liberalisation to compensate for possible injury or losses during the process. While increased imports may promote productivity and give the consumer more choice at lower costs, the domestic producers of import-competing products may find that they can no longer compete in the market. Businesses may be forced to change their product lines or to go out of business entirely, workers may become unemployed, and communities that were heavily dependent on such businesses may find their tax bases eroded and their local economies in a shambles. The injured businesses and workers may argue that they have borne an undue proportion of the costs for society's general gains and that society, through government action, should help them 'adjust' to their new situation.[1]

Ultimately, if injured businesses and workers are not compensated, increasing pressure will be exerted on policymakers and free trade reforms will be more difficult to undertake.

This theory has to be adapted to the context of a Free Trade Area (FTA) where Members deliberately choose to further liberalise their trade to achieve greater economic growth and enhance regional cohesion. On the one hand, increased trade liberalisation at sub-regional level should be matched with increased competition in order to gain a comparative advantage. On the other, Members should be more sympathetic to the difficulties that trade liberalisation may create in some neighbouring countries, given the regional economic and development cohesion objectives usually embedded in an FTA.

The current WTO or FTA safeguard mechanisms require a number of procedural steps and requirements that may make the utilisation of this trade instrument unattractive, given the limited human and financial resources available in the administration of TFTA Member States. This has led to the introduction of Non-Tariff Measures (NTM) in a number of TFTA Countries, instead of following the safeguard measure procedures as per the COMESA, EAC and SADC treaties or protocols.

Against this background, some TFTA Member States may argue for a safeguard clause more tailored to their current level of economic development and administration capacity.

Other TFTA Member States may be of the opinion that any lessening of the substantive or procedural safeguards will open the door to abuse or excessive proliferation of safeguard measures, ultimately defeating the purpose of the TFTA.

Be this as it may, some TFTA Countries, especially least developed countries (LDCs), do not have legislation on trade remedies, or, if they do, they may not have the necessary human and financial capacity to operate it in a WTO-consistent manner. Obviously, a TFTA Member State may wish to establish a unit/team to operate trade remedies in a WTO-consistent manner. Should this be the case, a cost/benefit analysis should be carried out, taking into consideration a number of factors such as:

1. Cost to the government's budget for salaries and training of trade officials;
2. Number of expected cases that will be conducted by the Trade Unit; and
3. Capacity of domestic industry to lodge a complaint with sufficient and reliable data.

The following Section will conduct an analysis of the current safeguard provisions in the COMESA, EAC and SADC protocols and treaties, as well as the Draft TFTA Text.

[1] See Sykes, A. Protectionism as a safeguard.

1. The Current Safeguards and Related Provisions of the COMESA Trade Treaty and Remedies Regulation

Article 61 of the COMESA Treaty provides for a safeguard clause that is basically administered by the Council of the COMESA Members. Thus, the investigation procedure, causal link and injury analysis does not follow WTO standards, but is based on an initial self-assessment by the Member State wishing to adopt the safeguard measure. This initial assessment is subsequently validated by an investigation carried out by the COMESA Secretariat. This procedure was followed in the Kenyan sugar safeguard case described in Section 1.1 below.

As in the Kenyan sugar case, there is no provision for compensation for the Member States affected by the measure in the COMESA safeguard provision. However, provision for compensation was included at a later stage in Regulation 11 of the Trade Remedies Regulation.[2]

Article 61[3]
Safeguard Clause

"1. In the event of serious disturbances occurring in the economy of a Member State following the application of the provisions of this Chapter, the Member State concerned shall, after informing the Secretary-General and the other Member States, take necessary safeguard measures.

2. Safeguard measures taken under the provisions of paragraph 1 of this Article, shall remain in force for a period of one year and may be extended by the decision of the Council, provided that the Member State concerned shall furnish to the Council proof that it has taken the necessary and reasonable steps to overcome or correct imbalances for which safeguard measures are being applied, and that the measures applied are on the basis of non-discrimination.

3. The Council shall examine the method and effect of the application of existing safeguard measures and take a decision thereof."

1.1 The COMESA Trade Remedy Regulation

Besides the provisions contained in the COMESA FTA Treaty, the COMESA Council of Ministers adopted the Regulation on Trade Remedy Measures (hereinafter the Main Regulation) in November 2001 under Article 10(1) of the COMESA Treaty[4]. Since the Main Regulation is only applicable to cases after the entry into force of the Treaty, it did not apply to the only safeguard case raised so far in the COMESA context (see Section 1.2 below).

The purpose of having a set of trade remedy regulations is explicitly stated in Regulation 2 of the Main Regulation.

"1. These regulations are a binding instrument on COMESA Member States in their conduct of trade remedy investigations. Its purpose is to ensure that there is uniformity among COMESA Member States in the conduct of trade remedy investigations and to ensure, to the extent possible, that such investigations are undertaken in harmony and within the framework of WTO Safeguard Agreement.

2. These regulations establish rules for the conduct of trade remedy investigations and the application of trade remedy measures."

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[2] See further 1.1 below. See also the Report on the Kenya Sugar Sector Safeguard Assessment Mission of the COMESA Secretariat, June 2007, paragraphs 104–108 which states: "A safeguard measure is not cost free. The COMESA Trade Remedies Regulation, 2001 and the WTO Agreement on Safeguards provide that a Member proposing to apply or extend a safeguard measure should not disadvantage other trading partners. The country seeking to apply or extend the safeguard should seek to maintain a level of concessions for its existing trading partners, substantially equivalent to those prevailing prior to the application or extension of the safeguard. Article 8 of the WTO Agreement on Safeguards and Regulation 13 of the COMESA Trade Remedies Regulations mention that if it is deemed that the safeguard measure may impair the market access or other concessions of any Member State, the country seeking to apply or extend the safeguard should agree with the country(ies) likely to be affected by the measure on adequate means of trade compensation to avert the adverse effects of the measure. In the case of the sugar safeguard, Kenya was fortunate in that no COMESA country requested any trade compensation for the application in 2002 and the extension of the safeguard in 2003 and 2004".

[3] Excerpt from the COMESA Treaty.

[4] Article 10 of the COMESA Treaty provides as follows: "regulations, directives, decisions, recommendations and opinions of Council: 1. The Council may, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions; 2. a regulation shall be binding on all the Member States in its entirety; 3. a directive shall be binding upon each Member State to which it is addressed as to the result to be achieved, but not as to the means of achieving it; 4. a decision shall be binding upon those to whom it is addressed; and 5. A recommendation and an opinion shall have no binding force".

Available at: http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/comesa/2COMESA_Treaty.pdf

Regulation 3 of the Main Regulation provides for the scope of application and its relationship with national legislation adopted to implement WTO agreements as follows:

> *"1. These regulations shall apply to investigations or reviews initiated under national legislation of COMESA Member States on or after the day of entry into force of this Regulation.*
>
> *2. These regulations are to be applied in conjunction with the existing national legislation for conducting trade remedy investigations and reviews in the individual COMESA Member States. The Member States of COMESA recognise that most of them are also signatories in the WTO and may have national legislation, which is consistent with the WTO Agreement. All COMESA Member States recognise that these Member States have the right to apply their national legislation, without amendment, in conducting all trade remedy investigations from the date that this Regulation comes into force, as their national legislation complies with both the WTO Agreement and this Regulation.*
>
> *3. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products from only COMESA Countries, the provisions to be applied are the COMESA trade remedy regulations.*
>
> *4. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products from only non-COMESA WTO Member Countries, the provisions to be applied is the WTO Agreement on Safeguards.*
>
> *5. If an investigation initiated by a COMESA Member State finds that the industry under investigation includes imported products from both COMESA and non-COMESA WTO Member Countries, the provisions to be applied are the WTO Agreement, and where not otherwise provided for by WTO, the provisions of the COMESA trade remedy regulations.*
>
> *6. In the case of Part III on Anti-dumping only if an investigation is initiated by a COMESA Member State against fellow COMESA Members, the provisions of Part III of this Regulation shall apply. If an investigation is initiated by a COMESA Member State against non-COMESA WTO Member Countries, the provisions of the WTO Agreement shall apply. In cases where an investigation under Part III has been initiated by a COMESA Member State against fellow COMESA Members and non-COMESA WTO Member States, both this Regulation and the WTO Agreement will be applied in this investigation."*

When reading Regulation 3, as mentioned above, the complementary nature of the COMESA Main Regulation on trade remedies in respect of the WTO agreements becomes clear.

National laws implementing the WTO Trade Remedies Agreement will prevail in investigations concerning non-COMESA Countries and when non-COMESA Countries and COMESA Countries are concerned.

COMESA trade remedies regulations under the Main Regulation will only apply when an investigation is initiated against other COMESA Countries. However, even in this case, the second paragraph of Regulation 3 provides a caveat stating that COMESA–WTO Member States that have adopted trade remedy legislation have the right to apply it without amendments.

> *"The Member States of COMESA recognise that most of them are also signatories in the WTO and may have national legislation, which is consistent with the WTO Agreement. All COMESA Member States recognise that these Member States have the right to apply their national legislation* ***without amendment*** *[emphasis added] in conducting all trade remedy investigations from the date that this Regulation comes into force, as their national legislation complies with both the WTO Agreement and this Regulation."*

It should be noted that, in various cases, the trade remedy regulations of the COMESA Main Regulation draw verbatim from the existing WTO agreements. Hence, the risk of potential conflict between national legislation of COMESA–WTO Members and the COMESA Main Regulation appears remote.

The main purpose, for the adoption by COMESA of the Main Regulation on Trade Remedies, is to put in place a common regional platform that could be used by COMESA non-WTO and WTO Members alike. It also aims at providing a forum for consultation and amicable solution-finding through COMESA organs in case of intraregional investigations on trade remedies as contained in Part IV of the Main Regulation.

When compared to those contained in the COMESA Treaty, the provisions concerning safeguards in the Trade Remedy Regulation are similar, if not identical, to those of the SA. For example, paragraph 1 of Regulation 7 is practically identical to Article 2.1 of the SA, with the exception of the addition of "within COMESA" in paragraph 2. This addition seems to indicate a willingness by the drafters to strictly apply the non-discrimination principle in the application of safeguard measures within COMESA Member States.

Part II: Safeguard Measures
Regulation 7 Conditions

"1. 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.

2. Safeguard measures shall be applied to a product being imported, irrespective of its source within COMESA."

Regulation 10 is also almost identical to Article 5 of the SA. The main difference between the two documents relates to the replacement in the COMESA text of the WTO Committee on Safeguard with the Committee on Trade Remedies established by Article 49 of the Regulation.[5]

Regulation 10
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.

A Member may depart from the provision in sub-paragraph (a), provided that consultations under paragraph 3 of Regulation 15 are conducted under the auspices of the Committee on Trade Remedies provided for in paragraph 1 of Regulation 15 and that clear demonstration is provided to the Committee that:

1. 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;

2. The reasons for the departure from the provisions in sub-paragraph (a) are justified; and

3. 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 Regulation 12. The departure referred to above shall not be permitted in the case of threat of serious injury."

Other key provisions of the Safeguards Regulation are Regulations 11–14 that, with some minor differences, mirror the respective provisions of the SA. A major difference is the role played by the COMESA Secretary-General in Regulation 13 regarding the level of concessions and other obligations. In this case, the COMESA Secretary-General replaces the role played by the WTO Council of Trade in Goods. Regulation 12 curtails the possibility of reintroducing a safeguard by deleting paragraph 6 of Article 7 of the SA.[6]

[5] Article 49 of the Regulation provides for the establishment of a COMESA Group of Experts on Trade Remedies (referred to in this Regulation as the "Group on Trade Remedies"), composed of representatives of each of the Member States. It only mentions the Trade Remedies Committee in paragraphs 49.4 and 49.5, but does not expressly clarify its composition or its relationship with the Group on Trade Remedies.

[6] Paragraph 6 of Article 7 of the SA provides as follows: "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."

Regulation 11
Provisional Safeguard Measures

"In critical circumstances where delay would cause damage, which 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 Regulations 2 through 12 and 15 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 1 of Regulation 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 Regulation 12."

Regulation 12
Duration and Review of Safeguard Measures

"1. A Member shall apply safeguard measures only 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 investigating authority of the importing Member has determined, in conformity with the procedures set out in Regulations 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 Regulations 13 and 15 are observed. A Member, in consultation with the private sector, should agree to a sequence of actions that it will take to adjust to the situation.

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 Regulation 15, is over one year, the Member applying the measure shall progressively liberalise 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 during the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation. 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 liberalised.

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 this Safeguard Regulation, 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."

Regulation 13
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 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Regulation 15. 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 Regulation 15, 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 Secretary-General, the application of substantially equivalent concessions or other obligations to the trade of the Member applying the safeguard measure, the suspension of which the Secretary-General 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 Regulation."

One of the major differences between the Regulation and the SA relates to the monitoring role in the elimination of voluntary export restraints and Orderly Market Arrangements where the role of the WTO Safeguards Committee has been replaced by the Committee on Trade Remedies. There are no available records on how the monitoring of the Committee on Trade Remedies must be carried out.

Regulation 14
Prohibition and Elimination of Certain Measures

"1. 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[7]. An import quota applied as a safeguard measure, in conformity with the relevant provisions of this Regulation, may, by mutual agreement, be administered by the exporting Member. 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 this Regulation shall be brought into conformity with this Regulation or phased out in accordance with paragraph 2.

2. The phasing out of measures referred to in paragraph I shall be carried out according to timetables to be presented to the Committee on Trade Remedies by the Members concerned not later than 180 days after the date of entry into force of this Regulation. These timetables shall provide for all measures referred to in paragraph 1 to be phased out, or brought into conformity with this Regulation, within a period not exceeding one year after the date of entry into force of this Regulation. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Trade Remedies for its review and acceptance within 90 days of the entry into force of this Regulation.

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."

1.2 The Kenya Sugar Case[8]

1.2.1 Background

Following the launch of the COMESA FTA on 31 October 2000, Kenya argued that its sugar sector might not be able to compete with sugar from other COMESA FTA Countries. Kenya invoked the adoption of a safeguard under Article 61 of the COMESA Treaty so that sugar exports from COMESA to Kenya are subject to customs duties.

After consultation with the COMESA Secretariat, Kenya was allowed to impose a safeguard based on an import quota of 89,000 tonnes of domestic and 111,000 tonnes of industrial sugar, for an initial period of 12 months from February 2002, as provided for under Article 61. The safeguard was extended by a Decision of Council in 2003 for a further 12 months and was again extended from March 2004 for a period of four years. The safeguard provision was predicated upon the key objective of restructuring the domestic sugar industry to make it regionally competitive.

Pending expiry of the safeguard provision in 2008, the Kenya government informed the COMESA Secretariat in May 2007 that the restructuring efforts under implementation had not fully realised the intended objective of making the sugar sector regionally competitive and requested an independent evaluation.

1.2.2 The Initial Assessment of the Safeguard Clause (2001–2008) and the Conclusion of the Comesa Report

In 2000, the ex factory price of one metric tonne of sugar from Kenya's then seven main operating mills ranged from Ksh38,500 to Ksh53,500 (US$535–US$740), with an average of Ksh42,680 (US$593)[9].

In the same year, the landed cost of one tonne of sugar from COMESA FTA Countries, including Swaziland and other third-world countries, ranged from Ksh17,501 to Ksh22,084 (US$243–US$306) with an annual average of Ksh19,904 (US$276).

In terms of import volumes, Kenya imported an average of 6,500 metric tonnes of sugar from COMESA Countries between 1997 and 2000, the highest quantity being 17,844 metric tonnes in 1997. In 2000, Kenya imported 3,135 metric tonnes from other COMESA Countries. There were only three COMESA Members supplying sugar to Kenya between 1997 and 2000, namely Sudan, Zimbabwe and Malawi.

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

[8] Commented excerpts from the Report on the Kenya Sugar Sector Safeguard Assessment Mission of the COMESA Secretariat, June 2007.

[9] Average exchange rate US$1 = Ksh72.

Following the launch of the FTA, Kenya imported 120,881 metric tonnes of sugar from five COMESA Countries in 2001, and imports from any one of these five countries was more than the average for the period 1997–2000.

Total sugar imports from all over the world, including COMESA, between 1997 and 2000 ranged from a peak of 186,516 metric tonnes (1998) to a low of 52,372 metric tonnes (1997). The average import volume was 103,650 metric tonnes.

In 2001, total imports of sugar from all over the world amounted to 249,336 metric tonnes, with COMESA accounting for 48.5% of the imports. Compared to an average share of less than 10% for the period 1997 to 2000, COMESA exporters certainly became more dominant suppliers to the Kenya economy.

The COMESA report found that the rise in import volumes from an annual average of 6,500 metric tonnes over a four-year period to a volume of 120,881 metric tonnes in 2001 clearly represented a surge in sugar imports from COMESA Countries.

With a local (ex factory) price at about twice the landed cost of imported sugar in 2000 and 2001, Kenyan sugar was far from competitive. Local sugar sales fell drastically in 2001, and the share of imported sugar on the market rose from an average of 17% over the period 1997–2000 to 42% in 2001. The COMESA sugar share on the domestic market rose from an annual average of just over 1% over the period 1997 to 2000 to 48% in 2005.

Chapters 4 to 8 of the report examined a series of factors such as Kenya's role in COMESA, the role of sugar in the Kenyan economy, the performance of the Kenyan sugar industry in 2000–2006, cane production, factory performance, research and development, investment and plant refurbishments, impact of the safeguard on stakeholders, impact of the safeguard on cane farmers, impact of the safeguard on sugar cane factories, impact of the safeguard on consumers, the sugar safeguard and potential trans-shipment, as well as government policy and the sugar industry. The Report issued the following recommendations:

a) Extension and nature of the safeguard

i. The safeguard is extended, on the terms and conditions stipulated below, for a further period of four years. This recommendation may appear to counter the provisions of the COMESA Trade Remedies Regulation, which provide for a maximum of eight years for the application of a safeguard under the COMESA trade regime. However, it is proposed that paragraph 3 of Regulation 12 of the COMESA Trade Remedies Regulation be amended to bring it in line with the WTO Agreement on Safeguards which provides for a total of ten years for developing countries.

ii. The safeguard continues to operate as a Tariff Rate Quota (TRQ).

iii. The TRQ should be consolidated to apply to all sugar under harmonised system (HS) Heading 1701, without distinction between white sugar intended for industrial use and brown sugar intended for domestic use.

b) Modalities for the safeguard

iv. The quota under the safeguard is inflated in each successive year of application, and the tariff applied on import quantities above the quotas should be reduced in each successive year of application of the safeguard as follows:

Year	Size of quota (metric tonnes)	Tariff rate on above-quota imports (%)
2008/2009	220,000	100
2009/2010	260,000	70
2010/2011	300,000	40
2011/2012	340,000	10
1 March 2012	No quota	0

2. The Current Safeguard and Related Provisions of the EAC[10]

Article 19[11]
Safeguard Measures

"1. The Partner States agree to apply safeguard measures to situations where there is a sudden surge of a product imported into a Partner State, under conditions which cause or threaten to cause serious injury to domestic producers in the territory of like or directly competing products within the territory.

2. (a) During a transitional period of five years, after the coming into force of the Protocol, where a Partner State demonstrates that its economy will suffer serious injury as a result of the imposition of the common external tariff on industrial inputs and raw materials, the Partner State concerned shall inform the Council and the other Partner States through the Secretary-General on the measures it proposes to take.

(b) The Council shall examine the merits of the case and the proposed measures and take appropriate decisions.

3. The implementation of this Article shall be in accordance with the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol."

Article 20
Cooperation in the Investigation of Dumping, Subsidies and Application of Safeguard Measures

"1. The Partner States shall cooperate in the detection and investigation of dumping, subsidies and a sudden surge in imports and in the imposition of agreed measures to curb such practices.

2. Where there is evidence of any sudden surge in imports, dumping, or export of subsidised goods by a foreign country into any of the Partner States that threatens or distorts competition within the Community, the affected Partner State may request the Partner State in whose territory there is a sudden surge in imports, or goods are dumped or subsidised, to impose anti-dumping duties or countervailing duties or safeguard measures on such goods.

3. If the Partner State to which the request is made does not act within thirty days of notification of the request, the requesting Partner State shall report to the appropriate customs union authority which shall take the necessary action."

Chapter 11 on Cooperation in Trade Liberalisation and Development of the Treaty for the Establishment of East African Community (As amended on 14 December 2006 and 20 August 2007) contains the following provision:

Article 78[12]
Safeguard Clause

"1. In the event of serious injury occurring to the economy of a Partner State following the application of the provisions of this Chapter, the Partner State concerned shall, after informing the Council through the Secretary-General and the other Partner States, take necessary safeguard measures.

2. The Council shall examine the method and effect of the application of existing safeguard measures and take decisions thereon."

The most detailed disciplines concerning safeguards are contained in Annex VI to the Protocol Establishing the East African Community Customs Union. As in the case of other RECs, the provisions contained in Annex VI (hereinafter the Regulations) mirror, to large extent, the safeguard provision of the WTO, albeit with some modifications. Paragraph 3 of the Regulation provides for the scope and conditions for the application of a safeguard clause as follows:

[10] As contained in the Protocol on the Establishment of the EAC (2 March 2004) and the Treaty for the Establishment of the EAC (As amended on 14 December 2006 and 20 August 2007).

[11] As contained in the Protocol on the Establishment of the EAC (2004). Available at: http://www.customs.eac.int/index.php?option=com_docman&task=doc_view&gid=1&tmpl=component&format=raw&Itemid=164

[12] As contained in the Treaty for the Establishment of the EAC (As amended on 14 December 2006 and 20 August, 2007).

Regulation 4
Conditions for Applying Safeguard Measures

"1. Safeguard measures shall be applied to any product imported into the territory of a Partner State, irrespective of its source.

2. A Partner State may, after causing investigations, apply safeguard measures where that Partner State has determined that a product is imported into the territory of that Partner State in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

According to paragraph 1 of Regulation 4, safeguards are applicable among EAC Member States "'irrespective of its source".

Paragraph 2 of the Regulation emphasises the need for conducting an investigation prior to the imposition of safeguard measures. In this paragraph "causing investigations" is probably a typographical error for "conducting investigations".

The above-mentioned obligation is reiterated in paragraph 1 of Regulation 5, which provides that "A Partner State may apply safeguard measures only following an investigation by the investigating authority of that Partner State".

With respect to the provisions contained in the SA, there are two major differences. The first concerns the application of safeguards. Regulation 7 differs from the SA in that it does not allow for selectivity in the application of safeguard measures, while paragraph 2 clearly states that safeguard measures shall be non-discriminatory.

Regulation 7
Application of Safeguard Measures

"1. A Partner State shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

2. Safeguard measures shall be non-discriminatory.

3. Where 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.

4. Where a quota is allocated among supplying countries, the Partner State applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Partner States with substantial interest in supplying the product concerned. Where this method is not reasonably practicable, the Partner State concerned shall allot shares to the Partner States with substantial interest in supplying the product, based upon the proportions supplied by such Partner States during a previous representative period of the total quantity or value of imports of the product, and in such cases due account shall be taken of any special factors which may have affected or may be affecting trade in the product."

The other major difference between the Regulation and the SA is the duration of safeguard measures. Paragraphs 2 and 3 of Regulation 9 provide, albeit in a rather unclear manner, a maximum duration of three years for a safeguard measure. The SA provides eight years as the maximum duration of a safeguard provisions[13].

Regulation 9
Duration and Review of Safeguard Measures

"2. The safeguard measures taken under paragraph 1 of this Regulation shall remain in force for a period of one year, but may be extended annually for three years by a decision of the Council where the Partner State concerned proves that the safeguard measures continue to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.

3. The total period of application of a safeguard measure, including the period of application of any provisional safeguard measure, the period of initial application and any extension of any of these records, shall not exceed three years."

[13] See paragraph 3 of Article 7 of the SA.

3. The Current Safeguard and Related Provisions of the SADC Trade Protocol

Article 20 of the SADC Trade Protocol is composed of six paragraphs containing a series of requirements imposed on Member States wishing to enforce safeguard measures. The Article is modelled on and inspired by the SA and explicit references are made to it.

Paragraph 1 of Article 20 reproduces Article 2 of the SA exactly:

> *"1. A Member State may apply a safeguard measure to a product only if that Member State has determined that such product is being imported to 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."*

The second paragraph of Article 20 makes an explicit reference to Article 4 of the SA concerning the determination of serious injury or threat thereof:

> *"2. A serious injury shall be determined in accordance with Article 4 of the WTO Agreement on Safeguards."*

From reading these first two paragraphs, it is clear that the drafters of the SADC Trade Protocol wished to make sure that the imposition of safeguard measures was subject to the requirements of the SA.

Paragraphs 3 and 4 of Article 20 mirror paragraph 2 of Article 2 of the SA:

> *"3. Safeguard measures shall be applied to a product being imported irrespective of its source within the Region.*
>
> *4. In applying measures in accordance with paragraph 1 of this Article, a Member State shall give like treatment to all imports of originating goods."*

Both paragraphs suggest that when a SADC Member is applying a safeguard measure, no selectivity or discrimination is allowed. Moreover, there is no trace of a corresponding paragraph (b) of Article 5 of the SA representing the compromise achieved during the Uruguay Round negotiation on the issue of selectivity. Thus, it is not possible to limit a safeguard measure to imports from one SADC country, even if imports from this country are the only ones actually causing the injury.

Paragraph 2 of Article 2 of the SA states that "safeguard measures shall be applied to a product being imported, irrespective of its source". However, Article 4 of the SA provides that the "allocation of shares" in any quota system may be worked out "by agreement" with nations having a "substantial interest" in the matter. When agreement is not "practicable", shares are to be allocated based on the shares of trading partners of the importing nation "during a previous representative period", with due account taken of any "special factors" that may have been affecting trade during that period. Likewise, an importing nation may depart from these principles in allocating shares after prior consultations with the Committee on Safeguards, and showing that departure is justified because imports from certain nations have "increased in disproportionate percentage", and that departure from the principles above is "justified and equitable".

In short, the SA leaves considerable room for quantitative measures that are more restrictive for imports from nations that have recently increased their market shares.

Presumably, the drafters of Article 20 of the SADC Trade Protocol felt that selectivity would have generated a muddle of safeguard measures on a one-to-one basis, with consequent counteraction and escalation scenarios. However, it could also be argued that, in practice, most of the import increases may come from one or a few trading partners and that selective restraints against growing and prosperous exporters may create less political fallout than most favoured nation (MFN) restraints.

This may hold especially true when one considers that during tariff negotiations, differentiation criteria were adopted in the SADC Trade Protocol. As agreed by the Trade Negotiating Forum (TNF), SADC Member States are entitled to make a tariff offer applicable to all SADC Member States except South Africa, and a second tariff offer applicable to South Africa.

This differentiation was introduced with the hope of making substantive progress in tariff negotiations. It recognised the fact that, for the majority of the SADC Member States, import competition arising from tariff liberalisation was likely to originate from South African goods rather than goods from other SADC Member States. Accordingly, a more liberal tariff offer was possible towards other SADC Member States than South Africa.

Paragraphs 5 and 6 of Article 20 of the SADC Trade Protocol mirror Article 7 of the SA:

> *"5. A Member State shall apply safeguard measures only to the extent and for such period of time necessary to prevent or remedy serious injury and to facilitate adjustment. In accordance with Article 7 of the WTO Agreement on Safeguards, the period shall not exceed four years, unless the competent authorities of the importing Member State have determined that the safeguard measures continue to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.*
>
> *6. Notwithstanding the provision of paragraph 5 of this Article, the total period of application of a safeguard measure shall not exceed eight years."*

These two paragraphs reproduce the first three paragraphs of Article 7 of the SA. However, the drafters of the SADC Trade Protocol have substantially shortened Article 7 of the SA. Moreover, it appears that they have somewhat lessened the requirements imposed on Members wishing to extend the application of a safeguard action. In fact, Article 7.2 of the SA makes explicit reference to the fact that the extension of the safeguard measures beyond the original four years is possible:

> *"… Provided that the competent authorities of importing Members 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."*

Thus, according to paragraph 2 of Article 7 of the SA, extension beyond the original safeguard period is subject to a new investigation and has to be carried out with the necessary substantive and procedural requirements contained in the respective articles of the SA.

The deletion of reference to Articles 2, 3, 4 and 5 and the pertinent provisions of Articles 8 and 12 of the SA suggest that extension of a safeguard measure beyond the original safeguard is possible without carrying out an investigation as stipulated by the above-mentioned Articles. Since such a line of action would be, with little doubt, inconsistent with the WTO regulations, recourse to this possibility will have to be reserved for safeguard measures adopted in the context of the SADC Trade Protocol.

Ultimately, the absence of the last three paragraphs[14] of Article 7 of the SA appears to indicate that SADC safeguard measures are not subject to liberalisation in the course of their application, or limitations on back-to-back applications of safeguard measures.

Another conspicuous absence in Article 20 of the SADC Trade Protocol is that there is no reference to compensation. Since safeguard action is perceived to be taken against fair trade, compensation is provided for in the SA and other FTAs. Lastly, Article 20 does not provide for any special or differential treatment for developing countries as contained in Article 9 of the SA. This may simply be because all SADC Countries are considered to be developing countries according to the UN classification.

From this brief analysis of Article 20, it generally appears that the drafters of the SADC Trade Protocol were concerned by the possible abuse of safeguards not taken in conformity with the SA. The prohibition of selectivity indicates a rather conservative view aimed at imparting restraint on the use of safeguard measures and discouraging the possible temptations of 'targeted' protection. On the other hand, the omission of certain paragraphs of Article 7 indicates a more flexible reading of the SA.

It is not entirely clear from Article 20 if this provision was to apply to global safeguard measures, i.e. to safeguard measures to be applied irrespective of the import sources, or if it was designed as an 'escape clause'

[14] The last three paragraphs of Article 7 of the SA provide that: "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 liberalise it at regular intervals during the period of applications. 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 liberalisation. 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 liberalised. 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."

to be applied solely in the context of SADC trade. The general context of the Protocol and the departure in paragraph 5 of Article 20 from the SA provisions, work in favour of the application of Article 20 to SADC trade only. Member States desiring to apply a WTO-consistent safeguard measure will eventually utilise their WTO-consistent domestic legislation. This is the safest course of action, because it minimises violations of the WTO Rules.

If Article 20 has to be revised in the near future, SADC Member States could gain legal certainty from such clarification. Experience could be drawn from the North American Free Trade Agreement (NAFTA) model where there is clearly a distinction between bilateral action applied in the context of NAFTA and global action taken pursuant to the SA. The same is true for the Europe Agreements.

Moreover, a provision similar to Article 18 of the SADC Trade Protocol could be of assistance.

"Nothing in this Protocol shall prevent any Member State from applying anti-dumping measures which are in conformity with WTO provisions."

Article 20 of the SADC Trade Protocol is not the only provision to deal with trade remedies or temporary suspension of the obligations under the SADC Trade Protocol. Following a proposal from Mozambique in 2006, an additional Article 20*bis* on provisional safeguard measures was added to the SADC Protocol on Trade.

Article 20*bis*
Provisional Safeguard Measures

"1. Where a Member State is of the opinion that any product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products in its territory, that Member State shall be entitled, subject to paragraph 2, to impose a provisional safeguard measure to the extent necessary to prevent or remedy the injury. In no circumstances shall a measure be imposed for a period exceeding 200 days.

2. A Member State shall provide the Executive Secretary with a written notification of its intention to impose a measure in terms of paragraph 1 prior to taking such a measure. Such notification shall contain the following information:

a) The product subject to the proposed measure;

b) The proposed safeguard measure;

c) The proposed date of introduction of the provisional safeguard measure;

d) The expected duration of the provisional safeguard, if any decision on the duration of the measure has been made; and

e) The basis:

i. Making a preliminary determination, that increased imports have caused or are threatening to cause serious injury; and

ii. Determining that there are critical circumstances where delay would cause damage which would be difficult to repair.

3. The Executive Secretary shall call an urgent meeting of the Committee of Ministers of Trade (CMT) to take place within a period of 20 days from the date of receipt of the notification to decide on the proposed imposition of the provisional safeguard measure.

4. Unless the CMT decides by consensus to disapprove the imposition of such measure, the notifying Member State may proceed with the imposition of the measure. The CMT may only disapprove the measure if the notifying Member State fails to provide the basis for such measure as contemplated in paragraph 2(e).

5. In the event that the CMT fails to make a decision regarding the approval of the proposed imposition of the provisional safeguard measure within 30 days from the date of notification, the notifying Member State shall be entitled to proceed with the imposition of the provisional safeguard measure in accordance with the information provided in the said notification.

6. The CMT may request additional information as it considers necessary from the notifying Member State.

7. A provisional safeguard measure shall not be applied against a product originating in a Member State as long as its share of imports of the product concerned in the notifying Member State does not exceed 7%, provided that Member States with less than 7% import share collectively account for not more than 15% of total imports of the product concerned.

8. A provisional safeguard measure shall take the form of tariff increases only.

9. Any duties collected as a result of the imposition of a provisional safeguard measure shall be promptly refunded if no subsequent investigation referred to in Article 20 is proceeded with after the imposition of the provisional safeguard measure, or if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry."

Article 21 on the protection of infant industries introduces a rather unusual component in Part IV of the SADC Trade Protocol titled Trade Laws. Article 21 provides the following:

Article 21
Protection of Infant Industries

"1. Notwithstanding the provisions of Article 4 of this Protocol, upon the application by a Member State, the CMT may as a temporary measure in order to promote an infant industry, and subject to WTO provisions, authorise a Member State to suspend certain obligations of this Protocol in respect of like goods imported from the other Member States.

2. The CMT may, in taking decisions under paragraph 1 of this Article, impose terms and conditions to which such authorisation shall be subject, for the purposes of preventing or minimising excessive disadvantages as those which may result in trade imbalances.

3. The CMT shall regularly review the protection of infant industries by Member States applied in accordance with paragraph 1 of this Article."

Article 4 of the SADC Trade Protocol entitled Elimination of Import Duties sets disciplines and guidelines, together with Article 3 on the Elimination of the Barriers to Intra-SADC Trade, for the phasing out of tariffs. Article 4 provides the following:

"1. There shall be a phased reduction and eventual elimination of import duties, in accordance with Article 3 of this Protocol, on goods originating in Member States.

2. The process should be accompanied by an industrialisation strategy to improve the competitiveness of Member States.

3. The CMT shall adopt such measures as may be necessary to facilitate adjustment arising from the application of this Article. The CMT shall review such measures from time to time.

4. Pursuant to paragraph 1, Member States shall not raise import duties beyond those in existence at the time of entry into force of this Protocol.

5. Nothing in paragraph 4 of this Article shall be construed as preventing the imposition of across the board internal charges.

6. This Article shall not apply to fees and similar charges commensurate with costs of any services rendered."

The joint reading of Article 21 and Article 4 of the SADC Trade Protocol suggests that Article 21 actually aims at providing a framework and mechanism to implement the provision made in paragraph 3 of Article 4.

From these two articles, it appears that the drafters of the SADC Trade Protocol were aware that the phased reduction of duties according to Article 4 could generate situations where adjustments or temporary measures outside the scope of Article 20 were necessary and justified. This legitimate concern of the drafters is reflected in Article 21. This provision is now briefly examined to consider to what extent it could be of use in the context of this Module.

Article 21 is titled Protection of Infant Industries, and paragraph 2 expressly refers to "temporary measures in order to promote an infant industry". According to Article 4, the requirements that a Member State has to fulfil in order to invoke such measures seem to be:

a) The existence of infant industries; and

b) The need to protect these industries, as contained in the title of Article 21 and reiterated in paragraph 3 of the same Article, and/or to "promote an infant industry" as contained in paragraph 1.

Such need to protect or promote this industry is necessary, according to paragraph 1 of Article 21, "in respect of like goods imported from other Member States". Article 21 was probably designed to cover such instances where the effects of tariff liberalisation and import competition from other SADC Countries were threatening the establishment of infant industries. In these cases, and given the intentions of the drafters, specific measures to take into account these specific concerns were considered necessary, in addition to the safeguard provisions contained in Article 20.

However, some practical difficulties may arise for a SADC Member State wishing to invoke Article 21. For example, there is no definition of 'infant industry'. Given the current level of industrial development in the region, with the exception of South Africa, one may argue that all existing industries in SADC are infant industries. Others may argue that only industries recently established may be considered infant industries.

Moreover, paragraph 1 of Article 21 states that measures taken under Article 21 are "subject to WTO provisions". It is not clear if measures taken pursuant to Article 21 should be consistent with WTO provisions, or if they should be taken in compliance with WTO provisions.

In the first case, where measures taken to protect infant industries are, for instance, the temporary re-introduction of duties, Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994 provides the legal umbrella to take these measures. In the second case, and given the fact that at present there are no specific WTO provisions for the protection of infant industries, the only measures that the CMT could authorise would be the trade remedies contained in the WTO Agreement, i.e., safeguard action.

In practical terms, while recognising that Article 21 may be responding to some genuine and legitimate consensus of the drafters of the SADC Trade Protocol, its practical application and use need some clarification and improvement. From the information available, no SADC Member State has ever invoked Article 21.

4. Safeguard Measures in the Draft TFTA Text

Article 19 of the Draft TFTA Text makes an explicit reference to the WTO Agreement on Safeguard and Annex 2 of the Draft TFTA Text.

Article 19
Safeguard Measures

"1. A Tripartite Member State may apply a safeguard measure to a product only after determining that such product is being imported into its territory:

a) In such increased quantities, absolute or relative to domestic production; and

b) Under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

In applying this Article, Tripartite Member States shall be guided by provisions of the WTO Agreement on Safeguard Measures and Annex 2 to this Agreement."

Article 2 of Annex 2 on Trade Remedies establishes some principles in applying trade remedies, such as the requirement to carry out an investigation before imposing a trade remedy, and entrusting the Sub-committee on Trade Remedies with the responsibility to conduct such investigation. It recommends the adoption of trade remedies as follows:

"1. Trade remedies relating to the trade of the Tripartite Member States with third countries and within the Free Trade Area may only be adopted after an investigation in accordance with the rules of natural justice and this Annex.

2. The Sub-committee on Trade Remedies shall have the authority to initiate and conduct the investigations and recommend the adoption of trade remedies, which shall be applied in accordance with the mechanisms on border measures relating to imports.

3. Notwithstanding paragraph (1) of this Article and paragraph (2) of Article 4, where a Tripartite Member State has entered other trade arrangements, the Sub-committee on Trade Remedies may recommend the trade remedies provided for in the instruments regulating those arrangements."

The relationship of the Sub-committee on Trade Remedies with the national investigation authorities of those TFTA Member States that have established such authorities, is dealt with in Article 8 of Annex 2.

"With respect to Tripartite Member States that are members of the World Trade Organization, the notification of the Sub-committee on Trade Remedies as the investigating authority or competent authority to the WTO is hereby authorised, as well as any other notifications that may be made as and when may be necessary or required."

This Article seems to suggest that those TFTA Countries that are Members of the WTO, and which have adopted anti-dumping legislation and have established a national investigating authority, must indicate to the WTO that the Sub-committee on Trade Remedies will take up the duties and tasks previously exercised by the national investigating authorities. It remains to be seen whether TFTA Member States that have invested substantially in setting up a national investigating authority are willing to accept such a move.

Article 3 of Annex 2 provides for the initiation of investigations:

"1. Applications seeking trade remedies shall be made to the Sub-committee on Trade Remedies.

2. Applications under this Article may be made by:

a) An industry, or a national, or regional business association;

b) A Tripartite Member State on behalf of a domestic or regional industry; or

c) Consumer organisation registered in a Tripartite Member State.

3. When the Sub-committee on Trade Remedies is satisfied that investigations are necessary for the application of trade remedies, it may direct the initiation of the investigations and adopt the modalities, including constitution of a Panel from among its Members to undertake the designated tasks."

As examined further below, Article 3 is the only provision in Annex 2 that hints at the composition of an organ, in this case a Panel, which actually will carry out the investigation. However no further details are provided on the composition of the Panel.

Article 4 of Annex 2 provides for the kind of Trade Remedy Measures that the Sub-committee may recommend:

> *"1. When it is established after an investigation that domestic or regional industries producing like, or directly competitive products, have suffered injury, or are threatened with injury, or establishment of a domestic industry has been curtailed within the meaning of this Annex, the Sub-committee on Trade Remedies may recommend a measure in accordance with sub-paragraph (2) of this Article.*
>
> *2. Provided that the measures shall be necessary and appropriate to deal with the injury to the domestic or regional industries, the measures may include:*
>
> *a) Safeguard action in the form of higher than otherwise applicable customs duties, or imposition of quotas allocated out among suppliers, or exporters to the Tripartite Member States on the basis of performance for a representative period;*
>
> *b) Anti-dumping duties not exceeding the margin of dumping;*
>
> *c) Countervailing duties to offset the subsidies;*
>
> *d) Price undertakings to appropriately raise the price of imported products, undertaken by the exporters and suppliers to the Tripartite Member States if accepted by the Sub-committee on Trade Remedies;*
>
> *e) Orders to enterprises doing business or having a presence in, or directly affecting the trade and industries in the Tripartite region, to ensure and maintain conditions for fair competition and for sustainable human development; or*
>
> *f) Any other measures in the public interest, consistent with the appropriate protection of a domestic or regional industry.*

As can be seen from the above-mentioned Article, the Sub-committee has ample discretion on the trade remedies that could be used. However, it is neither clear, nor specified elsewhere in Annex 2 nor the Draft TFTA Text, to whom the Sub-committee recommends the adoption of a trade remedy measure.

Article 38[15] of the Draft TFTA Text provides for the establishment of Tripartite Committees on Trade and Customs, but does not expressly make any reference to a Sub-committee on Trade Remedies. The composition of the Sub-committee on Trade Remedies is neither contained in Annex 2, nor in the Draft TFTA Text.

The establishment of a Sub-committee on Trade Remedies, with extensive powers on initiation of investigations and recommendations, does not have a precedent in FTAs. Normally matters related to trade remedies are left to national authorities. Many FTAs contain provisions for previous consultations and notification of trade remedy investigations through the joint organs and consultation mechanisms established by the FTA.

[15] Paragraph 2 of Article 38 of the Draft TFTA Text provides that: "The functions of the Ministerial Committee on Trade and Customs shall be to: (a) regularly review the status of the TFTA and make appropriate recommendations; (b) initiate policy analyses on key issues affecting the TFTA; (c) receive and consider reports on trade, trade related and customs issues under this Agreement; (d) resolve, through consultation trade, trade related and customs matters referred to it by Tripartite Member States; (e) implement and closely monitor measures taken to promote trade within the TFTA; (f) decide on new annexes and regulations that may be required to facilitate the implementation of this Agreement; (g) amend existing annexes and regulations required to facilitate the implementation of this Agreement; and (h) discharge any other functions as may be required by the Tripartite Council or Tripartite Summit as established by the Tripartite".

5. State of Safeguard Legislation of TFTA Member States in the WTO

The following table is excerpted from the latest notifications reported to the WTO Committee on Safeguards and depicts the status of legislation on safeguards in TFTA Member States.

Safeguards legislative notifications (As at 26 October 2011).

Member	Notification provided
Angola	None
Botswana	G/SG/N/1/BWA/1 (*)
Burundi	G/SG/N/1/BUR/1 (*)
Democratic Republic of the Congo	None
Djibouti	None
Egypt	G/SG/N/1/EGY/2 and Suppl.1
Kenya	G/SG/N/1/KEN/1 (*)
Lesotho	G/SG/N/1/LSO/1 (*)
Madagascar	G/SG/N/1/MDG/1 (*)
Malawi	G/SG/N/1/MWI/1 (*)
Mauritius	G/SG/N/1/MUS/1 (*)
Mozambique	None
Namibia	G/SG/N/1/NAM/2 (*)
Rwanda	None
South Africa	G/SG/N/1/ZAF/1+ZAF/2
Swaziland	None
Tanzania	None
Uganda	G/SG/N/1/UGA/1 (*)
Zambia	G/SG/N/1/ZMB/2
Zimbabwe	G/SG/N/1/ZWE/2 (*)

- Notification accompanied with the mark (*) is a 'nil' notification.
- 'None' means that no notification has been submitted.

PART II – THE MULTILATERAL REGIME OF SAFEGUARDS: FROM ARTICLE XIX OF THE GATT 1947 TO THE WTO AGREEMENT ON SAFEGUARDS

Evolution of the Safeguards Discipline

The WTO Agreement[16], like all trade agreements, is meant to promote international trade and therefore is also expected to increase import flows by mutually advantageous concessions. It might therefore appear astonishing and somewhat contradictory that the same Agreement allows WTO Members to 'back-pedal' and place restrictions on imports in the form of safeguard measures if those imports increase.

While an increase in imports is the natural effect of trade liberalisation, it is generally recognised in trade treaty practice that there are certain circumstances in which import liberalisation may become difficult to sustain, to the point of straining the very functioning of those agreements. Reasons of political economy may temporarily override pure economic considerations. This is why, prior to the GATT 1947, bilateral trade agreements usually provided for a 'safety valve' in the form of safeguard measures to avoid circumstances where the contracting parties, faced with the dilemma of either having their domestic market heavily disrupted or withdrawing from their agreements, choose the latter option, thus ultimately reducing the overall level of liberalisation.

The GATT 1947 contained a special provision on 'emergency action' in Article XIX. However, recognising the potential for trade-restrictive application of such provision, it prescribed in some detail the conditions under which safeguard measures may be imposed.

Article XIX, which has remained unchanged in GATT 1994, summarises such conditions in paragraph 1 which provides that:

> *"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."*
>
> **Emergency Action on Imports of Particular Products, Article XIX:1, GATT 1994**

Unlike anti-dumping measures, for example, safeguard measures do not address a specific pricing behaviour of exporting companies, but a more general increase in imports taking place under certain special circumstances. In addition, it is generally considered that safeguard measures address so-called 'fair trade', that is exports occurring under normal competitive conditions. In view of this, the Appellate Body has concluded that:

> *"The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."*[17]
>
> **Appellate Body Report, Argentina – Footwear (EC)**

Although the basic Article XIX provision was never supplemented in GATT 1947, this does not mean that the matter of safeguards did not grab the attention of the GATT Contracting Parties. One of the very first dispute settlement cases, the Hatters' Fur or Fur Felt Hats case[18], concerned a measure taken by the US against imports of women's fur felt hats and hat bodies, challenged by Czechoslovakia.

Under the GATT 1947, Contracting Parties were officially notified about approximately 150 safeguard measures.[19] Over the time, however, it became clear that certain Contracting Parties resorted to measures

[16] In this Module, the term WTO Agreement is used to refer collectively to the Results of the Uruguay Round Multilateral Trade Negotiations.

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

[18] Report on the Withdrawal by the US of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade (Hatters' Fur), 27 March 1951, CP 106, adopted October 1951.

[19] See *Analytical Index to the GATT*, 1995, Vol. I, pp. 539 ff.

other than Article XIX safeguard measures to address injurious import surges. These were soon called 'grey area' measures and included Voluntary Export Restraints (VERs), Voluntary Restraint Arrangements (VRAs) and Orderly Marketing Arrangements (OMAs). These measures, instead of being formally adopted by the importing country as safeguard measures, were taken by the exporting country or negotiated by exporting companies with the importing country.

The reasons for shifting to these types of measures typically were to get around the compensation and non-discrimination requirements of Article XIX. In the 1980s, the use of VERs and OMAs became quite popular.[20] However, WTO Members are no longer allowed to take or maintain such measures by virtue of Article 11.1(b) of the WTO Agreement on Safeguards (SA). The prohibition of VERs is regarded as improving the national welfare of Members in the WTO system.[21]

Attempts to enact supplementary safeguard rules during the Tokyo Round of Multilateral Trade Negotiations (1979) to, *inter alia*, contain this phenomenon did not succeed, and no Safeguards Code existed until the establishment of the WTO. The SA thus represents the first supplementary safeguard discipline since 1947.

Given the issues arising in the application of safeguards under the GATT 1947, an Agreement on Safeguards was negotiated during the Uruguay Round with the following objectives[22]:

- Improve and strengthen GATT 1994;
- Clarify and reinforce GATT 1994, and specifically Article XIX (Emergency Action on Imports of Particular Products);
- Re-establish multilateral control over safeguards and eliminate measures that escape such control; and
- Enhance rather than limit competition on international markets.

Article XIX of GATT 1994 and the SA therefore apply together as clarified by the Appellate Body:

> *"… The ordinary meaning of the language in Article 11.1(a) – "unless such action conforms with the provisions of that Article applied in accordance with this Agreement" – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994, as well as with the provisions of the Agreement on Safeguards. Thus, any safeguard measure* imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994*[23].
>
> **With the exception of special safeguard measures taken pursuant to Article 5 of the Agreement on Agriculture or Article 6 of the Agreement on Textiles and Clothing (expired in 2005)."*
>
> **Appellate Body Report, Korea – Dairy**

Overview of the SA

The SA is a rather short text, partly confirming or building on the provisions of Article XIX of the GATT 1994[24] and partly developing entirely new rules[25].

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[20] Lee, Y.S. and Mah, J.S. *Reflections on the Agreement on Safeguards in the WTO*, p.27. The authors argue that VERs can be very costly, both to the country imposing safeguards and to the world economy as a whole. For the imposing country, VERs can be more costly than formal safeguards. Like other import restrictions, VERs result in welfare losses for domestic consumers (who pay higher prices and consequently consume less) and losses for some producers (as production is shifted from the more efficient producers in the exporting country to the less efficient ones in the importing country).

[21] See note 20.

[22] Preamble to the SA.

[23] Korea – Dairy Appellate Body Report, para. 77.

[24] In this Module, Article XIX and the Agreement on Safeguards are understood as a single text.

[25] Compared to Article XIX of GATT 1994, the SA provides the first elaboration on the substantive requirements for the adoption of safeguard measures, and on the requirements that the domestic authorities have to comply with. It further sets out procedural obligations (both concerning domestic proceedings and at the WTO level) that WTO Members wishing to take safeguard action must comply with. It also contains specific obligations that Members have to respect in case safeguard action is taken against imports from developing countries. However, the Agreement is silent on special procedures for developing countries wishing to take safeguard actions.

It covers the following core areas: Together with Article XIX:1 of GATT 1994, Articles 2 and 4 lay down the substantive requirements that must be met in order to adopt a safeguard measure. The fulfilment of such requirements must be assessed through an investigation carried out by the authorities of the country seeking to impose a measure. Furthermore, this investigation must be accounted for in a written document issued by the authorities at the end of the process. Both aspects are addressed by Article 3. Articles 5 to 9 give various conditions relating to the measures that may be taken to prevent or remedy serious injury or threat thereof. These conditions must be applied together with Article XIII of the GATT 1994. In addition, Article 8 provides for mutually agreed trade compensation by the WTO Member taking the measure to those affected by the measure. Article 12 sets out the procedural requirements that must be complied with by WTO Members seeking to take safeguard measures. Article 13 establishes multilateral surveillance over the implementation of the Agreement by setting up a Committee on Safeguards under the authority of the Council for Trade in Goods.

Thus, compared to other trade defence rules (anti-dumping and countervailing duty rules), which have been supplemented since the late 1960s, safeguard rules are understandably less sophisticated. Some osmosis between the various trade defence rules has nonetheless resulted from dispute settlement interpretation under the WTO.

Scope of the safeguard regime

Article XIX of the GATT 1947 applies to all goods, but this is not always possible in practice. For example, trade in textile and agricultural products is at times restrained (in the case of the latter by the bilateral agreements under the Multi-fibre Arrangement), therefore the need for action under Article XIX is somehow reduced.

In the WTO system, GATT 1994, as strengthened and modified by the SA, remains the generally applicable safeguard regime. However, special regimes are provided for in the WTO Agreement, notably in:

> *"Article 5 of the AA provides for a special transitional regime for certain agricultural products. This regime will eventually expire once the reform of support and protective measures to agricultural products referred to in Article 20 of the AA is completed. This regime is applicable to the agricultural imports covered by the AA, for which the restraining WTO Member has 'tariffied' (i.e. converted into tariffs written in its schedule) certain restrictive measures (referred to in Article 4.2 of the AA)* ***and*** *for which the mentioned 'SSG' is included in its tariff schedule next to the other import and production conditions. For such products, a special safeguard measure (SSG) 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. The measure may only take the form of a tariff duty, to be applied until the end of the year in which it has been imposed.*
>
> *Imports which have not been designated as 'SSG' can still be restrained under the Agreement on Safeguards if the relevant conditions are met."*
>
> **Agreement on Agriculture (AA)**

> *"China's Accession Protocol provides for a transitional safeguard clause that other WTO Members can rely upon to limit imports from China. This clause is applicable for twelve years after China's accession."*
>
> **Protocol of Accession of the People's Republic of China**[26]

According to the above Protocol, a transitional safeguard measure may be imposed if imports from China increase in quantity or enter in such conditions as to cause or threaten to cause disruption to the domestic market of like or directly competitive products. When an individual WTO Member implements a safeguard measure under this clause, other WTO Members can in turn restrict imports of Chinese origin if they show that such a safeguard measure, taken by the first WTO Member, causes or threatens to cause significant diversions of trade into their markets.

> *"Obviously, services are not covered by either the GATT 1994 or the SA, which both form part of the goods regime in the WTO Agreement."*
>
> **General Agreement in Trade in Services (GATS)**

[26] WT/ACC/CHN/49, Section 16, Protocol of Accession, p. 80. A safeguard-type mechanism for textile products subject to the ATC regime is also provided for in the same document (Section 11,Working Party Report, p. 45).

Since the entry into force of the SA in 1995, eight disputes concerning the application of safeguard measures have been referred to WTO Panels[27], and all except one were appealed. These add to the rare Panel reports addressing safeguard measures under the GATT 1947.[28] It is estimated that a quarter of safeguard measures imposed have been disputed in Panel proceedings and were subsequently found inconsistent with the WTO rules on safeguards.[29] In contrast, less than 2% of anti-dumping measures were ever disputed in the WTO. The high rate of safeguard disputes and successful challenges either signifies the apparent inability of Members to comply with the current rules, or that the Panels and Appellate Body may have made and interpreted the rules in such a way as to make it difficult for Members to comply with them.

Either way, the continuing failure of Members to observe the rules requires careful analysis of Panel and Appellate Body reports, as these offer very important clarifications of key provisions of the Agreement. As a matter of fact, national authorities should constantly refer to the findings and opinions of the Panels and Appellate Body on controversial or sensitive issues, such as the adequacy of reasoning and proper scope of data supporting their conclusions on unforeseen developments, increased imports, injury and causation.

In order to shed some light on the requirements and necessary proceedings to apply safeguard measures, the findings of the above-mentioned reports will be highlighted throughout this Module.

General Conditions to Invoke Safeguard Measures

Preliminary issue: standard of review

The defensibility of a disputed safeguard measure may be affected significantly by the degree of scrutiny the Panels and AB apply to the findings and conclusions of the national investigating authorities. If the Panel completely defers to the national authorities' findings, there will be no significant review of the disputed safeguard measure. If, however, little or no deference is given, the measure will be subject to close examination by the Panel. The SA is silent on the standard of the review[30].

The Panel in Korea – Dairy Products ruled that, in the absence of a provision on the standard of review in the SA, Article 11 of the DSU applies.[31] This Article provides that "A Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

The Panel found that in order to make an objective assessment as required under Article 11, it would examine the reasoning of national investigating authorities to justify their conclusions, as well as the proper scope

[27] Korea Definitive Safeguard Measure on Imports of Certain Dairy Products Panel Report (Korea – Dairy), WT/DS98/R, adopted 12 January 2000; Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000; Argentina Safeguard Measures on Imports of Footwear Panel Report (Argentina – Footwear (EC)), WT/DS121/R, adopted 12 January 2000; Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000; US Definitive Safeguard Measures on Import of Wheat Gluten from the European Communities Panel Report (US – Wheat Gluten), WT/DS/166/R, adopted 19 January 2001; Appellate Body Report, WT/DS166/AB/R, adopted 19 January 2001; US Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia Panel Report (US – Lamb), WT/DS177/R, WT/DS178/R, adopted 16 May 2001; Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001; US Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea Panel Report (US – Line Pipe), WT/DS202/R, adopted 8 March 2002; Appellate Body Report, WT/DS202/AB/R, WT/DS178/AB/R, adopted 8 March 2002; Chile Price Band System and Safeguard Measures Relating to certain Agricultural Products Panel Report (Chile – Price Band), WT/DS207/R adopted 3 May 2002, and appealed 24 June 2002; US Definitive Safeguard Measures on Imports of Certain Steel Products Panel Report, WT/DS259/R, adopted 11 July 2003 and appealed 10 November 2003; Dominican Republic Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric Panel Report WT/DS415/R of 31/01/2012, not appealed.

[28] In the GATT's 50 years of existence there were only two challenges in dispute settlement: Working Party on Withdrawal by the US of a Tariff Concession under Article XIX of the General Agreement, GATT/CP.6/SR19 (adopted 22 October 1951) and Norway Restrictions on Imports of Certain Textile Products, BISD 27S/119 (adopted 18 June 1980). This indicates that the generally termed provisions of the Article made it difficult for contracting parties to effectively challenge illegitimate safeguard measures.

[29] See WTO Committee on Safeguards Report (2000), G/L/209 (23 November 2000) and the Committee on Safeguards Report (2001), G/L/494 (31 October 2001).

[30] See also Lee, Y.S. 1999. *Review of the First WTO Panel Case on the Agreement on Safeguards: Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*. 33 J.W.T. 6, pp.33–34.

[31] WTO document WT/DS98/R, para. 7.26. The Panel followed the Appellate Body decision in EC Measures Concerning Meat and Meat Products (EC – Hormones) that the provisions of Article 11 of the DSU apply if the WTO Multilateral Trade Agreement does not provide for a specific standard of review.

of facts considered by them.[32] The Panel also emphasised that it would not engage in *de novo* reviews of the national investigating authorities' investigations, since it did not consider its review a substitute for the proceedings conducted by the national investigating authorities.[33] The Panel's position does not give complete deference to the national authorities' decisions, but does not deny their discretion to make determinations, either, as long as reasonable explanations are given.

One issue which remains is what exactly constitutes 'adequate reasoning'. The determination of adequate reasoning requires subjective judgment calls, as clear, objective criteria seems difficult to provide. In addition, the Appellate Body in US – Lamb ruled that "A Panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[34]

This ruling presents a particular difficulty for national authorities. For instance, it is possible to draw two different conclusions from the same set of facts by employing different yet proper reasoning. Therefore the conclusion drawn from one set of reasoning might not seem adequate in the light of another that leads to a different conclusion. Should this conclusion then be denied simply because the other set of reasoning does not support it? The decision seems to indicate that national authorities should examine their conclusion in the light of all alternative reasoning and defend it where necessary in their investigation report.[35]

The scope of the facts considered by national authorities is also subject to review by the Panel. According to the Korea – Dairy Products Panel, authorities are required to examine all facts in their possession, whether or not those facts support their conclusion.[36] The question then arises as to whether or not national authorities are then obliged to examine the facts not submitted by the parties involved. The US – Wheat Gluten Panel did not believe that they should.[37] However, the Appellate Body disagreed and subsequently found that it is not sufficient for the national authorities to rely only on the information submitted by the parties. It ruled that they have an affirmative duty to seek out pertinent information necessary to assess the injury to the domestic industry.[38]

But how should national authorities conduct their investigation if the pertinent data are simply not available?[39] The Korea – Dairy Panel considered this issue and subsequently found that national authorities should make a reasonable estimate where actual data are not available.[40] It is not clear whether such estimation would be feasible in every case where relevant data could not be found. If an estimation could be made, its accuracy and reliability would also likely be an issue.

The Appellate Body was mindful of the practical difficulty of collecting relevant data and acknowledged that the collection of data that include all domestic producers may not be practical in many instances.[41] It considered that the data before the competent authorities are acceptable if they are sufficiently representative

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[32] The Korea – Dairy Panel considered that the requirement in Article 11 for the objective assessment of the national authority's review would entail an examination of "whether the KTC [Korea's investigating authority] had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards, whether adequate explanations had been provided as to how the facts as a whole supported the determination made and, consequently, whether the determination made was consistent with the international obligation of Korea". WT/DS98/R, para. 7.30. This Panel position was subsequently reiterated by the US—Lamb Appellate Body. It stated that "a Panel's application of the appropriate standard of review of the competent authorities' determination has two aspects. Firstly, a Panel must review whether the competent authorities have, as a formal matter, evaluated all relevant factors and, secondly, a Panel must review whether those authorities have, as a substantive matter, provided a reasoned and adequate explanation of how the facts support their determinations". WT/DS17/AB/R, WT/DS178/AB/R, para. 141.

[33] Korea – Dairy, WT/DS98/R, para. 7.30, and Argentina – Footwear, WT/DS121/R, para. 8.124. Subsequent Panels also followed this approach, see US – Wheat Gluten, WT/DS166/R, para. 8.5, and US – Lamb, WT/DS177/R, WT/DS178/R, para. 7.3.

[34] US – Lamb, WT/DS17/AB/R, WT/DS178/AB/R, para. 106.

[35] The national authority's explanations and reasoning for their conclusions would not be accepted unless they are already included in the original investigation report. Korea – Dairy, WT/DS98/R, para. 7.72.

[36] Korea – Dairy, WT/DS98/R, para. 7.30.

[37] The Panel stated that "It is not our role to collect new data or to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not". US – Wheat Gluten, WT/DS166/R, para. 8.6.

[38] US – Wheat Gluten, WT/DS166/AB/R, para. 53–55.

[39] The lack of pertinent industrial data would be more apparent in developing countries where available statistics are limited.

[40] Korea – Dairy, WT/DS98/R, para. 7.82.

[41] US – Lamb, WT/DS17/AB/R, WT/DS178/ABR, para. 132.

to give a true picture of the domestic industry, and that what is sufficient in any given case would depend on the 'particulars' of the domestic industry at issue. Therefore, national authorities should present a statistically valid sample where data on all of its domestic producers could not be produced. Otherwise, they should be prepared to explain how the partial data collected and considered would be representative of the industry.

The issue of the standard of review is complex. Competent national authorities should be aware that there is a degree of subjectivity in Panel reviews on the 'adequacy' of their reasoning. Although the Panels have repeatedly expressed that they do not intend to substitute proceedings by the national authorities with their review, they have nevertheless judged the adequacy of the national authorities' determinations and investigations in-depth. They have done so by examining the proper scope of the data that the national authorities should have considered and by assessing their explanations for their determinations. Therefore, national authorities should constantly refer to the findings and opinions of the Panels and Appellate Body on the issues of adequacy of reasoning and the proper scope of data as an essential guide to their investigations.

6. The Determination of 'Increased Imports'

The determination of whether imports have increased in accordance with Article XIX of the GATT 1994 and Article 2.1. of the SA are reviewed below.

In order to determine 'increased imports' to justify safeguard measures under the WTO safeguard regime, not just any import increase is sufficient. The provisions set out two main conditions which must be met for the increased imports to justify the imposition of safeguard measures. Firstly, such increase must have occurred "as a result of unforeseen developments and of the effect of the obligations incurred by" a WTO Member. Secondly, imports should enter the importing country "in such increased quantities and under such conditions" as to cause or threaten serious injury to the domestic industry.

6.1 Overview of Article 2.1, SA and Article XIX, GATT 1994

The characteristics that import trends must possess to justify a safeguard measure are described in Article 2.1 of the SA.

> *"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…"*
>
> **Article 2.1, SA**

Article 2.1 must be read together with Article 4.2 of the SA, which sets out the operational requirements for determining whether the conditions identified in Article 2.1 exist. Article 4.2(a) requires 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 (…) 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 import …"*
>
> **Article 4.2, SA**

Two requirements must be fulfilled under Article 2.1. The first one is a quantitative requirement, while the second is more generally related to the conditions under which foreign products come into the territory of the Member seeking to take a safeguard measure.

The link with Article 4.2(a) suggests that to be relevant under Article 2.1, import increases must have such characteristics as to cause or threaten to cause serious injury.[42]

Article 2.1 of the SA essentially reproduces and confirms Article XIX:1 of the GATT 1994. There is one notable exception, namely the clause in Article XIX:1(a) requiring that the increase in imports occurs as a result of "unforeseen developments" and "of the effect of the obligations incurred by a contracting party":

> *"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…"*
>
> **Article XIX:1(a), GATT 1994**

6.2 Determination of Unforeseen Developments

Increased imports (and similarly increased exports) are the normal and indeed expected consequence of the trade liberalisation of, for example, tariff reductions. Accordingly, it is not any increase in imports, but only increases in imports qualified by certain conditions and circumstances, that authorise the adoption of

[42] See Appellate Body Report, Argentina – Footwear (EC), para. 131.

import safeguards. The first condition is set out in Article XIX:1 of the GATT 1994, providing that the increase in imports must result from "unforeseen developments".

This clause is, however not further defined or illustrated by examples in either Article XIX or in the SA. It is presumably meant to cover a wide range of unexpected circumstances, which by definition is difficult to anticipate precisely. The clause was first interpreted in the US – Hatters' Fur case in which the Working Party observed that:

> *"… The term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated…"*[43]
>
> **Working Party, US – Hatters' Fur**

In the WTO era, the Appellate Body has also interpreted the clause on several occasions. As a general matter, it considered that:

> *"… The ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments which 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'."*[44]
>
> **Appellate Body Report, Korea – Dairy**

> *"… These circumstances … must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994..."*[45]
>
> **Appellate Body Report, Argentina – Footwear (EC)**

In addition, in the US – Lamb case, the Appellate Body clarified that competent domestic authorities must provide a 'demonstration' before taking the measure. This means that the measure itself must contain an express finding to this effect; otherwise its legal basis is flawed[46]. This finding was reiterated in the Appellate Body Report on US – Certain Steel Products:

> *"... Indeed, to enable a Panel to determine whether there was compliance with the prerequisites that must be demonstrated before the application of a safeguard measure, the competent authority must provide a "reasoned and adequate explanation" of how the facts support its determination for those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994."*[47]
>
> **Appellate Body Report, US – Certain Steel Products**

In this case, these facts must be substantiated, as a mere "explanation of how the Asian and Russian financial crises, together with the strong United States Dollar and economy, resulted in increased imports into the United States"[48] is not sufficient. In particular, "the complexity of the unforeseen developments pointed out by United States International Trade Commission (USITC) called for a more elaborate demonstration and supporting data than that provided by the USITC".[49]

What does this requirement mean in practice? So far, the only case where the 'unforeseen developments' requirement was held to have been met is the US – Hatters' Fur case. The US argued that the change in hat fashion, which led to an increase in imports of felt hats and hat bodies, was unforeseen, particularly in view of its magnitude. The Working Party agreed with the US:

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[43] Working Party Report, US – Hatters' Fur, p. 10, para. 9.

[44] Appellate Body Reports for Korea – Dairy, para. 84 and Argentina – Footwear (EC), para. 91.

[45] Appellate Body Reports for Korea – Dairy, para. 85 and Argentina – Footwear (EC), para. 92.

[46] Appellate Body Report, US – Lamb, para. 72 & 76.

[47] Appellate Body Report, US – Certain Steel Products, para. 279.

[48] Panel Reports WT/DS248/R, US – Definitive Safeguard Measures on Imports of Certain Steel Products, para. 10.122, upheld by the AB.

[49] Panel Report WT/DS248/R, US – Certain Steel Products, para. 10.145, upheld by the AB.

"… The fact that hat styles had changed did not constitute an 'unforeseen development' within the meaning of Article XIX.[50]

… The effects of the circumstances indicated in the above, and particularly the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities in 1947."[51]

Working Party, US – Hatters' Fur

In all other cases in which non-compliance with the 'unforeseen developments' statement has been claimed, the total lack of any prior demonstration or explanation on this point has been sufficient to uphold such claims without any in-depth evaluation. The coming into force of other FTA agreements and the accession of China to WTO rules cannot be claimed as unforeseen developments:

"… Neither the resolutions, nor the technical reports on which they are based, nor the final public notice to which the Dominican Republic has referred, contain a reasoned and adequate explanation by the competent authority of how the entry of China into the WTO and the effect that had on international trade or the process of tariff reduction that followed the entry into force of the DR–CAFTA and Central America–Dominican Republic FTAs constituted an unforeseen development within the meaning of Article XIX:1(a) of the GATT 1994."[52]

Panel Report, Dominican Republic – Polypropylene Bags

Further, the analysis of unforeseen developments has to be made for each of the products:

"For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products, even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for each product subject to a safeguard measure."[53]

Appellate Body Report, US – Certain Steel Products

The Appellate Body also had the chance to make a statement on the phrase "as a result … of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions"[54]. It considered that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions.

6.3 The Investigation Period

The analysis of increased imports by domestic authorities assumes that such authorities select a so-called reference or investigation period (IP) – a time period prior to the determination which import trends will be studied. The SA contains no indication as to how the reference period should be selected. Therefore, the WTO Members remain, in principle, free to select whatever period they deem appropriate, notwithstanding the importance of the issue. Accordingly, the only guidance so far is provided in Panel and Appellate Body reports.

When considering that the increase relevant under Article 2.1 must be 'recent' and 'sudden', it may be argued that the IP should not go too far back, but should rather be one for which the most recent import data are available.

It may also be noted that, in practice, the IP for the examination of import trends tends to coincide with that for 'serious injury' to the domestic industry producing like or directly competitive products. This contrasts with the practice in anti-dumping investigations, where the two reference periods are clearly distinct.

[50] Working Party Report, US – Hatters' Fur, para. 11.

[51] Working Party Report, US – Hatters' Fur, para. 12.

[52] Panel Report, Dominican Republic – Polypropylene Bags, para. 7.144, not appealed.

[53] Appellate Body Report, US – Certain Steel Products, para. 319.

[54] Appellate Body Reports for Korea – Dairy, para. 84 and Argentina – Footwear (EC), para. 91.

6.4 Assessment of the Increase in Imports

The increase in imports, which is relevant under Article 2.1 of the SA, may be assessed either in absolute terms (for example, an increase by tons or units of imported products) or in its magnitude relative to domestic production of like/directly competitive products. A determination of increased imports raises several questions:

- How much must imports have increased?
- Besides an increase in quantity, is an increase in value also relevant?
- Over which time span?

Each of these questions is addressed below.

6.4.1 The Absolute or Relative Nature of the Increase

Absolute and relative increases are two different situations and do not necessarily co-exist. For example, it may happen that an exporting WTO Member's domestic production increases, or simply a larger share of the production becomes available for export. This may result in a higher quantity of imports into another WTO Member State, without simultaneously leading to a relative increase.

Conversely, there may be cases where the quantity of imports actually entering the borders remains constant, but because domestic production shrinks, the ratio between imports and domestic production results in a higher figure. Assume for example that in 1999 imports into X amounted to 100 MT and domestic production amounted to 200 MT. The import-to-domestic-production ratio is therefore 1:2 or 0.5. If in 2000 imports remained at 100 MT, but domestic production fell to 150 MT, the ratio is 1:1.5, or 0.66. There was therefore an increase in imports relative to domestic production. Depending on the magnitude of the change in ratio, this type of development may be sufficient to fulfil the 'increased imports' requirement under Article 2.1 of the SA.

In order to meet the 'increased imports' requirement, it is sufficient that one form of increase has occurred. For example, the US – Line Pipe Panel considered that even if it had found that imports of line pipe into the US had not increased in absolute terms, its conclusion that there had been 'increased imports' consistent with the SA was supported by the fact that imports had increased relative to domestic production.[55]

It should be noted that while the presence of absolute or relative increases is equally relevant to meet Article 2.1 requirements, a difference in the application of Article 8.3 of the SA may result, depending on the type of increase.

The Argentina – Footwear European Communities (EC) Panel considered that, since the wording of Article 2.1 of the SA refers to quantity, the analysis of domestic authorities and Panel reviews must focus on quantities rather than value.[56]

6.4.2 Substantive Requirements: Quantity and Duration of the Increase

Two main questions arise in connection with the requirements for increased imports. The first is how much the imports have increased (i.e. volume) and the duration or time period of the increase. A general response to both questions was provided by the Appellate Body in Argentina – Footwear:

> *"… The increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."*[57]
>
> **Appellate Body Report, Argentina – Footwear (EC)**

An answer to the question of relevant quantity is indirectly provided by the Appellate Body's clarification in Argentina – Footwear (EC). The AB determined that the increase must be 'sharp', a term confirming that the

[55] Panel Report, US – Line Pipe, WT/DS202/R, para. 7.211.

[56] Panel Report, Argentina – Footwear (EC), WT/DS121/R, para. 8.152.

[57] Appellate Body Report, Argentina – Footwear (EC), para. 131.

magnitude of the increase is important to an increased imports determination. In addition, the term 'sudden' suggests that the relevant increase must take place over a relatively short time span.

No method to assess the increase in imports is set out in the SA. Panel and AB reports so far have clarified that both the rate and amount of the increase in imports (in absolute and relative terms) must be evaluated. This further entails that the competent authorities are required to consider import trends over the period of investigation, rather than just comparing the situation of imports at the beginning and at the end of the reference period (the so-called 'end points' of the period).[58]

As a practical example, a Panel found that the 'recent, sudden and sharp' increase requirement was met in a case where (1) imports had risen (in absolute terms) from 124 million to 177 million pounds, with the highest increase occurring towards the end of the reference period, and (2) the ratio of imports to production had risen from 100.6% to 145.4% at the end of the reference period.[59]

With regards to the second question on the duration of the increase, some guidance is indirectly provided by the Appellate Body's recognition that the increase must be recent and sudden.

The requirement that the increase in imports must be sudden and recent is understandable if it is borne in mind that the adoption of safeguard measures is supposed to respond to an emergency situation in the importing WTO Member State.[60] When a trend in increased imports is observed over a period of time, it can hardly be termed as 'sudden'. In such a case, it is legitimate to infer that the problem is in fact a structural one, not one arising from an unexpected emergency situation. It is therefore not suitable for such a situation to be redressed by an emergency measure.[61] On the other hand, if the increase in imports stopped well before the initiation of the investigation, the emergency is likely to have disappeared. It may further be inferred that the domestic industry has had time to adjust to the new market situation, and thus temporary safeguard relief is not warranted.

As noted above, the fact that historical import trends must be assessed assumes the selection of an appropriate IP. WTO Members have discretion as to the choice of IP, providing that the selected period complies with the general indications given by the AB as to the recent and sudden character of the increase. However, the choice of IP, and in particular, the choice of the beginning of the period (the 'base year') may be decisive as to whether the determination of 'increased imports' over the entire IP will be affirmative or negative.[62]

Assume the following example: The Argentina – Footwear Panel, while noting that the trends in the data on import values generally confirmed those on import quantities, emphasised that "the Agreement is clear that it is the data on import quantities both in absolute terms and relative to (the quantity of) domestic production that are relevant"[63]. The data[64] on the absolute levels of imports as relied upon by Argentina in its investigation and by both parties in their arguments before the Panel, are shown in the table below[65]:

Total footwear imports into Argentina, 1991–1996

Year	Quantity (million pairs)	Value (US$ millions)
1991	8.86	44.41
1992	16.63	110.87
1993	21.78	128.76
1994	19.84	141.48
1995	15.07	114.22
1996	13.47	116.61

[58] See Appellate Body Report, Argentina – Footwear (EC), para. 126.

[59] Panel Report, US – Wheat Gluten, para. 8.32, not appealed.

[60] Appellate Body Reports for Korea – Dairy, para. 86 and Argentina – Footwear (EC), para. 93.

[61] See also Panel Report, Argentina – Footwear (EC), para. 8.162.

[62] This has important implications for national authorities conducting investigations to establish an increase in imports under the terms of the SA, in view of the fact that the eventual evaluation by the Panel will focus on the data on import quantities.

[63] Panel Report, Argentina – Footwear, para. 1.38.

[64] For detailed statistics on the import and contesting arguments of the parties, see WTO document WT/DS121/R, para. 5.144–5.166.

[65] Both parties accepted the accuracy of this data.

The import data above show mixed trends. On the one hand, if one looks at the end points of the IP, the overall 1991–1996 period shows an increase in quantity (13.47 > 8.86). On the other hand, within the period selected, the increase only occurs in the first two years (between 1991 and 1992, and between 1992 and 1993), while the last three years (the most 'recent' period) show a decline.

However, the choice of the base year (1991) has an influence on whether the end-point-to-end-point comparison shows an increase or decrease. If, for example, 1992 rather than 1991 was taken as the base year, the total imports declined, based on an end-point-to-end-point comparison (13.47 < 16.63). Thus, an absolute increase in total import volume can be found only if 1991 is taken as the base year[66].

Therefore, observing whether an affirmative determination would be 'sensitive' to the change in the years used as the end points is quite important, as it might confirm or reverse the apparent initial conclusion. If changing the starting and/or end point of the investigation period by just one year entails that the comparison between end points shows a decline in imports rather than an increase, this calls into question the conclusion that there are increased imports.

If an increase in imports really exists, this should be evident both in an end-point-to-end-point comparison and in an analysis of intervening trends over the period, as the two analyses should be mutually reinforcing. Where, as in the example, their results diverge, this raises doubts as to whether imports have increased in the sense of Article 2.1[67].

Assuming that a change in the base year does not affect the determination, an additional question arises concerning the relative importance of trends at the end of the reference period compared to opposite trends during the reference period. In other words, what if imports decreased towards the end of the reference period, but show an overall increase at the end of the period when compared to the beginning of it?

Here again, there is no single definitive answer, and a case-by-case examination appears necessary. The general decisive criterion appears to be whether the countertrend, which is visible at the end of the reference period, is merely temporary, or if it is sufficiently long term within the selected reference period to cast doubts as to the reality of the increase. This was the opinion of the Panel in Argentina – Footwear (EC):

> *"We also believe that the question of whether any decline in imports is 'temporary' is relevant in assessing whether the 'increased imports' requirement of Article 2.1 has been met. In this context, we recall Article 4.2(a)'s requirement that 'the rate and amount of the increase in imports' be evaluated.* In our view this constitutes a requirement that the intervening trends of imports over the period of investigation be analysed. We note that the term 'rate' connotes both speed and direction, and thus intervening trends (up or down) must be fully taken into consideration. Where these trends are mixed over a period of investigation, this may be decisive in determining whether an increase in imports in the sense of Article 2.1 has occurred."*[68]
>
> ** We recognise that Article 4.2(a) makes this reference in the specific context of the causation analysis, which in our view is inseparable from the requirement of imports in '**such** increased quantities' [emphasis added]. Thus, we consider that in the context of both the requirement that imports have increased, and the analysis to determine whether these imports have caused or threaten to cause serious injury, the Agreement requires consideration not just of data for the end points of an investigation period, but for the entirety of that period."*
>
> **Panel Report, Argentina – Footwear (EC)**

How is this general statement (which was upheld by the Appellate Body) applied in practice?

In the Argentina – Footwear (EC) case, the Panel noted that a 38% import decline observed over the last three years of a five-year reference period was of such a magnitude as to be considered a long-term rather than a 'temporary' reversal of the increasing trend.

Another Panel considered that the Article 2.1 requirement was met, notwithstanding the fact that towards the very end of the reference period (the last year of a five-and-a-half-year IP) imports had clearly decreased.[69] This finding was not reviewed by the Appellate Body.

It must be borne in mind that according to the Appellate Body, the increase in imports must be 'recent' and 'sudden' to be relevant under Article 2.1. Therefore, for example, the Appellate Body considered a five-year

[66] Panel Report, Argentina – Footwear (EC), para. 8.154.

[67] Appellate Body Report, Argentina – Footwear (EC), para. 129.

[68] Panel Report, Argentina – Footwear (EC), para. 8.159.

[69] Panel Report, US – Line Pipe, para. 7.214.

reference period to be too long, particularly as import trends were analysed over that entire period, without special focus on the end of that period, i.e. the most recent import trends. It considered that:

> *"… The use of the present tense of the verb phrase 'is being imported' in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports and not simply trends in imports during the past five years – or, for that matter, during any other period of several years. * In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent.*[70]
>
> ** The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognises that the present tense is being used, which it states "would seem to indicate that, whatever the starting point of an investigation period, it has to **end** no later than the very recent past" [emphasis added]. Here, we disagree with the Panel. We believe that the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past."*
>
> **Appellate Body Report, Argentina – Footwear (EC)**

On the other hand, the Appellate Body recognised that, for the purposes of assessing 'serious injury', the reference period should be sufficiently long to allow for the drawing of appropriate conclusions on the state of the domestic industry.[71] Otherwise, for example, temporary or cyclical downturns in the domestic industry's performance may risk being incorrectly taken to indicate a situation of serious injury.[72]

> *"We agree with the United States that Article 2.1 does not require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase 'is being imported in such increased quantities' suggests merely that imports must have increased, and that the relevant products continue 'being imported' in [such] increased quantities. We also do not believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'.*
>
> *We do not agree, however, with the United States' assertion that the Panel's conclusion that there were no 'increased imports' of [Certain Carbon Flat-rolled Steel (CCFRS)], for purposes of Article 2.1, is a result of the Panel giving 'dispositive weight' to the decrease in imports that took place from interim 2000 to interim 2001. As we understand it, the Panel's conclusion was based on the Panel's finding that the USITC had not provided a reasoned and adequate explanation of how the facts supported its determination that CCFRS "is being imported in … such increased quantities". The reason why the Panel did not find the USITC's explanation to be "reasoned and adequate" was the magnitude of the decrease that occurred between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons). In the words of the Panel, the USITC "did not seem to focus on, or at least account for, [that decrease] … in concluding that imports are still significantly higher … than at the beginning of the period".*[73] *In the absence of a reasoned and adequate explanation in the USITC report relating to the decrease in imports that occurred at the end of the period of investigation, the USITC could not be said to have adequately explained the existence of 'such increased quantities' within the meaning of Article 2.1."*
>
> **Appellate Body Report, US – Certain Steel Products**

6.4.3 Supplementary Characteristics under Such Conditions

Article 2.1 of the SA also contains the wording "and under such conditions", but the exact meaning of this requirement has not been entirely clarified. In US – Wheat Gluten, the Appellate Body interpreted the phrase 'under such conditions' (in the context of the provisions of Article 4.2 of the SA on causation). The Appellate Body considered that the Article 2.1 reference to the conditions under which imports enter a country is, in fact, a reference to the conditions in the marketplace in the importing country. It further inferred that the term 'conditions' is a "shorthand reference to the … factors (other than increased import quantities) listed in Article 4.2(a), which are relevant to assess the overall state of the domestic industry"[74].

The Appellate Body did not apply its interpretation of the clause "under such conditions" to the case before it. If it must be inferred from the Appellate Body's statements that the clause is exclusively related to the conditions of the importing market and domestic industry, which conditions also need to be analysed under Article 4.2(a), one may wonder whether this clause really constitutes an additional requirement to those set out in Article 4.2(a). The Appellate Body has, however, not expressly ruled out that the clause might also refer to other conditions than those present on the importing market.

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[70] Appellate Body Report, Argentina – Footwear (EC), para. 130.

[71] Appellate Body Report, US – Lamb, footnote 88, referring to the reference period for assessment of injury.

[72] Appellate Body Report, US – Lamb, para. 138.

[73] Panel Report, para. 10.181 (footnotes omitted).

[74] Appellate Body Report, US – Wheat Gluten, para. 76–78.

7. The Determination of Serious Injury or Threat Thereof

The determination of injury consists of an assessment that the increased imports have caused or threaten to cause serious injury to the domestic industry producing the like or directly competitive product.

The presence of serious injury or threat thereof to the domestic industry as a result of the increased imports is a major substantive requirement for the imposition of a safeguard measure. A finding that the domestic industry is suffering or is threatened by serious injury requires a positive answer to the following main questions:

1. What is the domestically produced like or directly competitive product to the imports under investigation?
2. Which domestic industry is producing such a product?
3. Can the situation of the domestic industry be described as a serious injury or just a threat of serious injury?
4. Is this situation caused by imports?

Each of these questions is addressed below.

7.1 Identifying Serious Injury and Threat of Serious Injury According to Article 4, SA

Unlike Article XIX, the SA clearly spells out the factors to consider in the determination of serious injury. Article 4.2(a) provides that the injury assessment must be based on the evaluation of all relevant factors of an objective and quantifiable nature having a bearing on the domestic industry situation (the so-called 'injury factors').

It then lists a series of such factors, all of which must at a minimum be evaluated by domestic authorities:

- Rate and amount of the increase in imports of the product concerned in absolute and relative terms;
- Share of the domestic market taken by increased imports; changes in the level of sales;
- Production;
- Productivity;
- Capacity utilisation;
- Profits and losses; and
- Employment.

For a threat of serious injury some additional indications are contained in Article 4.1(c) providing that a threat determination must be based on facts and not on conjecture or remote possibility.

In the Panel Report in the Dominican Republic – Polypropylene Bags case, the Panel carried out an extensive examination of the factors:

> *"… The Commission's considerations in the preliminary and final determinations do not appear to be duly supported by the facts, nor by an adequate evaluation of the relevant factors. Firstly, the level of domestic production and its share of apparent domestic consumption performed favourably within the period of investigation. Secondly, the Commission's inventory evaluation is inadequate for the reasons already given. Thirdly, according to the information provided by the [Investigations Department (DEI)], the performance of the factors corresponding to sales, installed capacity and capacity utilisation, productivity, employment and wages, value of exports, prices of the like domestic product and investment was positive. Fourthly, the Commission also found that FERSAN had purchased new machinery for manufacturing bags with different characteristics, with a capacity equal to twice the domestic demand, and had added a third work shift within the company, which represented a favourable aspect for the domestic industry. Fifthly, the only factors actually shown to have performed unfavourably during the period of investigation are: (i) cash flow; (ii) costs; (iii) profits and losses; and (iv) inventories."*[75]
>
> **Panel Report, Dominican Republic – Polypropylene Bags**

[75] Panel Report, Dominican Republic – Polypropylene Bags, para. 7.311.

Article 4.2(b) lays down the twofold causation requirement. On the one hand, a demonstration of the causal link between increased imports and serious injury is required. On the other hand, it is also required that any injury caused by factors other than the increased imports must not be attributed to such imports.

The operational implications of Article 4 are discussed below.

7.2 Definition of Serious Injury/Threat of Serious Injury

In order for a safeguard measure to be lawfully taken, increased imports fulfilling the requirements of Article 2.1 of the SA must have caused serious injury or threat of serious injury to the domestic industry. These terms are defined in Article 4.1 of the SA which defines 'serious injury' as:

> *"… A significant overall impairment in the position of a domestic industry."*
>
> **Article 4.1(a), SA**

In addition, Article 4.1(b) of the SA provides that '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."*
>
> **Article 4.1(b), SA**

As a general matter, the Appellate Body recognises the standard of serious injury, as contained in the SA, to be "very high" (exacting)[76] and stricter than the "material injury" standard in the Anti-dumping Agreement[77].

In view of the definitions set out in Article 4 of the SA, before concluding that the situation of the domestic industry is such as to amount to serious injury or threat of serious injury, three steps must be completed:

1. Identifying the domestic products which are like or directly competitive with the imports under investigation;
2. Identifying the industry producing such products; and
3. Assessing a significant overall impairment of the domestic industry conditions (or of a threat thereof in the case where the domestic authorities rely on the threat of serious injury).

7.3 Definition of the Domestic Industry

Article 4.1(c) of the SA provides two criteria to identify the relevant domestic industry. First, it defines the domestic industry as the producers making products, which are like or directly competitive with the imports targeted by the investigation. Second, it adds that the serious injury must be assessed with respect to either the whole of such domestic industry, or to a major proportion thereof.

7.3.1 Like or Directly Competitive Products

The first Article 4.1(c) criterion to identify the domestic industry is product-centred. Although mention is made of producers, this term is immediately qualified by a reference to the particular products that must be produced by the relevant industry: only those producers making products that are like or directly competitive with imports form part of the domestic industry.

Domestic authorities enjoy discretion as to the product scope of safeguard investigations, that is, as to which foreign products they investigate. However, once the basic choice as to the product scope is made, it determines the scope of their analysis of the domestic market.

[76] Appellate Body Report, US – Wheat Gluten, para. 149.

[77] Appellate Body Report, US – Lamb, para. 124.

Accordingly, the first step in determining the scope of the domestic industry is the identification of the domestic products which are like or directly competitive. Only when those products have been identified is it possible to identify their producers.[78] This in turn raises the question of which are the like or directly competitive products related to the investigated imports.

Unlike the terms 'serious injury' and 'domestic industry', the terms 'like' and 'directly competitive' are not further defined in the SA. To date, the Appellate Body has hardly had any chance to interpret these terms as they appear in Article XIX of the GATT 1994 and Articles 2 and 4 of the SA.

The Appellate Body has, however, generally ruled on the meaning of these terms as contained in the WTO provisions, where they appear several times. While it admitted that the exact scope of these terms (particularly of the term 'like product') may vary depending on the particular provision in which it appears, the AB pointed to certain common criteria which apply to decide whether, in a given case, domestic and imported products are like or directly competitive:[79]

1. Firstly, the like products category is a subset of the broader group of directly competitive products. In other words, only some products which are directly competitive, are also like;
2. Secondly, the notion of 'likeness' mainly focuses on the physical characteristics of the products under comparison. Like products share properties, nature, qualities, and end uses. Their falling under the same tariff heading for classification purposes may also be useful in the case of a sufficiently detailed tariff schedule. Thus, for example, white spirits have been found to be like, whereas white and brown spirits have been considered to be directly competitive. More recently, the Appellate Body clarified that a difference in physical characteristics between two similar products, which has a different impact on human health, may cast doubts on the likeness of such products[80]; and
3. Thirdly, direct competitiveness focuses on the marketplace, thus the competitive conditions in the importing country, looking at the elasticity of substitution between imports and the alleged directly competitive domestic products.[81] The way in which the domestic and imported products under comparison are advertised and consumed in the importing market is also relevant.

With regard to the notion of 'like products' in the SA context, there has been only one challenge to the findings of the domestic authorities concerning the likeness or direct competitiveness of the domestic and imported products. In reviewing this challenge, the Appellate Body excluded the contention that certain domestic products can be like the investigated imports simply because they are in a continuous line of production to the domestic products, which are like on the basis of the criteria outlined above.[82] This exclusion is unqualified as it is not conditional on whether or not separate data are or can be collected by domestic authorities for the genuine like product industry (unlike in the case of anti-dumping investigations).

Secondly, the Appellate Body ruled out the fact that domestic products can be considered 'like' investigated imports because they are manufactured by producers who have a "substantial coincidence of economic interest" with that of the domestic producers of the genuinely like domestic products.[83]

Thirdly, the Appellate Body generally excluded that production structures may have an impact on deciding whether two products are 'like' or directly competitive. Thus, for example, the fact that a domestic producer, who makes, *inter alia*, products which are like the imports, has a vertically integrated structure, does not warrant the conclusion that the other products it makes through that structure are also 'like' or directly competitive with the imports.[84]

The rationale of these findings is that the focus of the SA is on products, not on production processes.

Under Article 2.1 of the SA, the domestic industry consists solely of the producers of like or directly competitive products[85]. A safeguard measure is imposed on a specific product, namely, the imported product under

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78 Appellate Body Report, US – Lamb, para. 87.

79 Appellate Body Report, Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R-11, adopted 1 November 1996, DSR 1996:I, 97 (pp. 20 ff.).

80 Appellate Body Report, EC – Measures Affecting Asbestos and Asbestos Containing Products (EC – Asbestos), WT/DS135/AB/R, adopted 5 April 2001, para. 118.

81 Appellate Body Report, Japan – Alcoholic Beverages II, (p. 25).

82 Appellate Body Report, US – Lamb, para. 90.

83 Appellate Body Report, US – Lamb, para. 89–90.

84 Appellate Body Report, US – Lamb, para. 94.

investigation, only if that specific imported product has the required injurious effects on the domestic industry producing the like or directly competitive products. It would thus be a clear departure from Article 2.1 if a safeguard measure is imposed because of the prejudicial effects of imports on domestic producers of products that are not like or directly competitive.

7.3.2 The Domestic Industry

The criterion laid down in Article 4.1(c) to define the domestic industry is essentially a quantitative one, and focuses on the number and the representative nature of producers constituting the domestic industry covered by the investigation. It is required that the serious injury be found to affect the totality of the domestic producers or at least a major proportion thereof.

There is, however, no clear indication as to what can constitute a major proportion of the domestic industry for the purposes of Article 4.1(c). As a result, the evaluation of whether this criterion is met is a case-by-case one, depending on the specific circumstances of each investigation.

Nonetheless, the Appellate Body has at least clarified that the collection of data relating to the so-called 'injury factors' in Article 4.2(a) need neither cover the totality of the producers of the like or directly competitive products, nor even a major proportion. A serious injury finding can also be based on data collected for a part of the major proportion, provided that it is sufficiently representative.[86] This implies that the possibility of employing statistically valid samples has been recognised by the Appellate Body.[87]

7.4 The Determination of Serious Injury

Once the like or directly competitive domestic products and the industry producing them have been identified, the situation of such industry needs to be investigated to assess whether a serious injury or threat of serious injury exists. As regards serious injury specifically, Article 4.2(a) of the SA provides that:

> *"… 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 utilisation, profits and losses, and employment."*
>
> **Article 4.2(a)SA**

The list above, which is not exhaustive, comprises the so-called 'injury factors'. The domestic authorities must conduct a substantive evaluation of the bearing or effect that such factors have on the domestic industry. By conducting such an evaluation, competent authorities can make a proper overall determination as to whether the domestic industry is seriously injured or threatened by such injury.[88]

The Appellate Body extended its findings in connection with the review of an anti-dumping measure in the Thailand – H-beams[89] case to a case in the safeguard sector. It stated that the arguments reviewed were not confined to those raised in the proceedings before the domestic authorities:

> *"… The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute."*[90]
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> **Appellate Body Report, US – Lamb**

[85] Appellate Body Report, US – Lamb, para. 81.

[86] Appellate Body Report, US – Lamb, para. 91–92, 132.

[87] Appellate Body Report, US – Lamb, para. 132.

[88] Appellate Body Report, US – Lamb, para. 104.

[89] Appellate Body Report, Thailand – Anti-dumping Duties on Angels, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland (Thailand – H-beams), WT/DS122/AB/R, 12 March 2001, adopted 5 April 2001.

[90] Appellate Body Report, US – Lamb, para. 112, quoting from Appellate Body Report Thailand – H-beams, para. 94.

The domestic authorities' examination of injury factors has both formal and substantive aspects.[91] The formal aspect requires the domestic authorities to evaluate all relevant factors (and possibly relevant 'other factors').[92] Failure to account, in full or in part, for the trend in one of the relevant factors automatically results in a violation of Article 4.2(a)[93].

The substantive aspect entails an evaluation and a reasoned and adequate explanation by the domestic authorities of how the facts support their conclusion that the domestic industry is suffering or is threatened by serious injury.[94]

Likewise, Panel reviews of safeguard measures also entail formal and substantive aspects. It should be noted that a claim under Article 4.2(a) might not relate to both the formal and the substantive aspects of the review at the same time. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate.

Since the injury factors list is not exhaustive, it is possible that other factors may have an impact on the situation of the domestic industry and thus be relevant in a particular case. These factors are often brought to the attention of the domestic authorities by responding exporters in order to show that a finding of serious injury is not warranted. They may either have a bearing on the interpretation of the listed factors, or have a relevance of their own.

For example, in calculating the profitability of the domestic industry, domestic authorities may be confronted with aggregated data also relating to different products from the same plants. Clearly, unless costs and profits are allocated to the different production lines, there is a risk that the profitability performance for the like or directly competitive products may be biased by data relating to other products. Thus, the fact that 'co-products' may result from the same broad production process, but have different costs, is one 'other factor' which must be investigated and evaluated by the domestic authorities.

The Appellate Body also clarified that domestic authorities do not have an unlimited, open-ended duty to investigate all possible other factors.[95] However, if some element is brought to their attention, or if they have reason to suspect that some other factor may be relevant, they must investigate, evaluate and take into account such other factor, or explain why it is not relevant. This requirement to investigate of one's own volition has an inherent limit, as complete control over the information available to domestic authorities and reviewing whether such authorities correctly examined the other factors may prove arduous.

It is not necessary for a finding of serious injury that all such factors, whether listed or not, show a declining trend in the domestic industry.[96] Thus, for example, declining capacity, utilisation and employment, coupled with a marked increase in imports, may be sufficient to justify a finding of serious injury, even if the industry is still profitable.

So far, Panel reviews of how domestic authorities evaluated the injury factors have not been extremely sophisticated. The reason is presumably that the claims brought under Article 4.2(a) mostly related to measures which were clearly in violation of such requirements. Thus, for example, in the first dispute settlement proceeding brought under the SA (Korea – Dairy), several factors in the list had simply not been examined and accounted for by the domestic authorities in the measure under review. It must not to be excluded that, as happened in other cases, some anti-dumping interpretations can be incorporated into the safeguards practice with respect to the analysis of injury factors.

7.5 Threat of Serious Injury

The analysis required for a finding of threat of serious injury is largely similar to that required for a serious injury finding. Article 4.1(b) of the SA, when defining threat of serious injury, refers to Article 4.2 regulating determinations of actual serious injury. The Appellate Body underlined such similarity, stating that the very

[91] Appellate Body Report, US – Lamb, para. 103.

[92] Appellate Body Reports for Argentina – Footwear (EC), para. 136, US – Wheat Gluten, para. 55, and US – Lamb, para. 103.

[93] Panel Report, Korea – Dairy, para. 7.58, 7.63, 7.68, 7.69, 7.75, 7.76 and 7.78.

[94] Appellate Body Report, US – Lamb, para. 103.

[95] Appellate Body Report, US – Wheat Gluten, para. 55–56.

[96] Appellate Body Report, US – Lamb, para. 132, 144 and 146.

high standard implied in the term 'serious injury' must be borne in mind when making a determination of threat of serious injury.[97] Some variances result, however, from the different focuses of the two notions.

A determination of threat of serious injury is future-oriented[98], in the sense that it is concerned with a future event. Furthermore, the materialisation of serious injury in the future is not entirely sure.

However, under Article 4.1(b) such a determination must be based on facts, not on conjecture. Since facts relate to the present or past, there is tension between the future-oriented analysis, which ultimately calls for a degree of extrapolation about the likelihood of a future event, and the need for a fact-based determination.[99]

Article 4.2 provides that the threat must be clearly imminent. The Appellate Body has interpreted such requirement in the US – Lamb case. The use of the term 'imminent' has to do with the timing of the materialisation, and implies that the anticipated serious injury must be on the verge of occurring.

The use of the term 'clearly' indicates that there must be a high likelihood that the threat will materialise very soon. Together with the requirement that a finding of serious injury must be based on fact, not on conjecture, the term also relates to the factual demonstration of the existence of the threat and suggests that the imminence must be manifest.[100]

Another difference from actual serious injury is that in the case of threat determinations, the most recent part of the investigation period is even more important, because it will provide the strongest indications of the future state of the domestic industry.[101]

7.6 Causation

Apart from the examination of all relevant injury factors, as required by Article 4.2(b) of the SA, a determination of the existence of serious injury requires a demonstration of "the causal link between increased imports and serious injury or threat".

The assessment of 'causation' is a two-step process, since Article 4.2(b) establishes two distinct legal requirements for competent authorities in the application of a safeguard measure. Firstly, there must be a demonstration of the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". Secondly, the injury caused by factors other than the increased imports must not be attributable to increased imports.[102] The latter is often referred to as the 'non-attribution' requirement.

The mere quotation of relevant articles or the repeating of the parties' arguments does not constitute an analysis or the identification of findings of a direct link:

> *"In other words, the DEI's preliminary and final technical reports confine themselves to citing relevant legal provisions, repeating the arguments of the interested parties during the national investigation procedure, and suggesting that there are elements of injury that "could determine the existence" of a "direct link" between the increased imports of polypropylene bags and tubular fabric and the commercial situation facing the domestic industry. The DEI's reports do not therefore contain any finding, but put the decision on whether or not to impose a provisional or definitive safeguard measure before the plenary meeting of the Commission. Neither does the injury section in the technical reports provide any explanation concerning the causation itself."*[103]
>
> **Panel Report, Dominican Republic – Polypropylene Bags**

In addition, under Article 4.2(c) of the SA, domestic authorities are required to promptly publish a detailed analysis of the case under investigation and a demonstration of the relevance of the factors examined. This is a specification of the general requirement to set forth reasoned conclusions on all pertinent issues of fact and law in Article 3.1.

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97 Appellate Body Report, US – Lamb, para. 126.

98 Appellate Body Report, US – Lamb, para. 136.

99 Appellate Body Report, US – Lamb, para 136.

100 Appellate Body Report, US – Lamb, para. 125.

101 Appellate Body Report, US – Lamb, para. 137.

102 Appellate Body Report, US – Line Pipe, para. 208.

103 Panel Report, Dominican Republic – Polypropylene Bags, para. 7.352.

As a practical matter, the examination of injury factors pursuant to Article 4.2(a) are often relevant not only for the determination of serious injury or the threat of serious injury, but also for the determination of whether the injury was caused by increased imports or other factors. This link is acknowledged by Article 4.2(b), which regulates causation but refers back to the injury factors mentioned in sub-paragraph (a).

The issue of causation is a difficult one and has given rise to considerable controversy. This has offered the Appellate Body an opportunity to clarify the interpretation of the requirement in Article 4.2(b), as summarised in its US – Lamb and US – Line Pipe reports.

With respect to the first step of the causation analysis, the Appellate Body indicated that to establish causation pursuant to Article 4.2(b), it is not necessary to show that increased imports alone are capable of causing the serious injury.[104] It should be clarified that this finding only relates to the issue of whether causation exists between the increased imports and the situation of the domestic industry. As will be clarified below, it does not affect the question of the permissible extent of the safeguard measure.

With regard to the 'non-attribution' step, the Appellate Body summarised the interpretation of Article 4.2 as follows:

> *"… In a situation where several factors are causing injury 'at the same time', a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors, increased imports, rests on an uncertain foundation, because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports. The non-attribution language in Article 4.2(b) precludes such an assumption and, instead, requires that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports. In this way, the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury."*[105]
>
> **Appellate Body Report, US – Lamb**

In other words, domestic authorities must:

> *"… [Ensure] that the injurious effects of the other causal factors… [are] … not included in the assessment of the injury ascribed to increased imports."*[106]
>
> **Appellate Body Report, US – Lamb**

The Appellate Body also concluded that, since the domestic authorities are required to separate and distinguish the effects of other factors from those of increased imports, the authorities are required to identify:

> *"… The nature and extent of the injurious effects of the known factors, as well as a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the increased imports."*[107]
>
> **Appellate Body Report, US – Line Pipe**

The Appellate Body further referred to the procedural obligation of competent domestic authorities to provide an explanation regarding their determinations. Building on such obligation, it concluded that:

> *"… To fulfil the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."*[108]
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> **Appellate Body Report, US – Line Pipe**

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[104] Appellate Body Reports for US – Wheat Gluten, para. 70 and US – Line Pipe, para. 209.

[105] Appellate Body Report, US – Lamb, para. 179.

[106] Appellate Body Report, US – Lamb, para. 185.

[107] Appellate Body Report, US – Line Pipe, para. 213.

[108] Appellate Body Report, US – Line Pipe, para. 217.

Thus, for example, if the domestic authorities recognise 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 injurious effects these had on the domestic industry. They cannot only state that a given other factor hurts the domestic industry, they must evaluate it and estimate how it may evolve or disappear.[109]

Also, domestic authorities cannot replace an appreciation of what the effects of the other factors on the domestic industry are by simply comparing the impact of each of them with the impact of increased imports. A comparative test (weighing the relative impact of imports and of other factors against one another) is no substitute for the test set out in Article 4.2(b)[110].

The Appellate Body also found that the mere assertion by the domestic authorities that injury caused by other factors has not been attributed to increased imports, with no further explanation, is insufficient to meet the requirement of Article 4.2(b). To decide whether domestic authorities have met the standard of Article 4.2(b), the investigation report and not the information provided in subsequent dispute settlement procedures, is relevant.[110] This is consistent with the principle that the causal link must be demonstrated and accounted for by the domestic authorities before taking the measure.

[109] Appellate Body Report, US – Lamb, para. 185.

[110] Appellate Body Report, US – Lamb, para. 184.

[111] Appellate Body Reports for US – Line Pipe, para. 220 and US – Lamb, para. 184.

8. Remedies

This Section shows the detailed requirements relating to safeguard measures. It covers, *inter alia*, the duration and types of permitted safeguard measures, as well as formalities in connection with the imposition of measures and actions allowed to re-establish the balance of rights and obligations after the taking of such measures. Concepts such as 'provisional measure', 'compensation' and 'suspension of substantially equivalent concessions or obligations' are analysed.

8.1 Appropriateness of Measures Taken

As emergency actions against fair trade, safeguard measures are typically temporary import restraints to allow some 'breathing time' for the domestic industry to adapt to a new market situation through appropriate restructuring, among others.

In principle, the adoption of safeguard measures must be preceded by a thorough investigation to assess, in particular, that the conditions set out in Articles 2 to 4 of the SA are fulfilled. However, the SA allows for the anticipation of safeguard relief through provisional measures (Article 6). Both definitive and provisional measures are addressed below.

Unlike in the case of anti-dumping or countervailing measures, safeguard measures are not typified, i.e. they are not limited to particular types or forms. Indeed, Article XIX:1 of the GATT 1994 very generally refers to the possibility of suspending obligations or withdrawing or modifying tariff concessions granted under its provisions for such time as may be necessary to prevent or remedy the serious injury inflicted or threatened by the imports under investigation. In practice, since GATT 1947, safeguard import relief in the proper sense of the term has mostly taken the form of increased tariffs (including tariff quotas), surcharges, quantitative restrictions and import authorisations.[112]

The situation was not fundamentally changed by the SA (which, in Article 11.1(a), refers back to Article XIX of the GATT 1994), except in one important respect. Article 11.1(b) expressly prohibits the so-called 'grey area' measures (voluntary export restraints, orderly marketing arrangements or similar measures entailing limitations of exports by the exporting countries or sometimes by the exporters directly, rather than import limitations by the importing country). Existing grey area measures were to be phased out by 1999 at the latest.

8.2 Definitive Measures

The application of a safeguard measure (Article 5) should be proportionate to the injury and should not be excessive so as to restrict imports more than necessary. Ideally, safeguard measures should be applied to the minimum level necessary to remedy or prevent serious injury and facilitate economic adjustment.

> *"A Member shall apply safeguard measures only to the extent necessary to prevent or remedy 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."*
>
> **Article 5.1**

Pursuant to the first sentence of Article 5.1 of the SA, all safeguard measures can be applied "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment of the domestic industry".

This sentence has been interpreted in the sense that it does not require the competent domestic authorities to provide, at the time they impose a measure, a clear and specific justification as to how such measure is necessary (with regards to its scope, level and type) to prevent or remedy the serious injury and to facilitate adjustment of the domestic industry.[113] If a measure is imposed without satisfying the substantive requirements of the SA, particularly if the measure counters injury or threat thereof not caused by the

[112] See *Analytical Index to the GATT*, 1995, Vol. 1, pp. 539 ff.

[113] Appellate Body Reports for Korea – Dairy, para. 99 and US – Line Pipe, para. 133–134.

increased imports, the measure exceeds what is 'necessary'. As a consequence, there is a rebuttable presumption (a *prima facie* case) that such measure violates the first sentence of Article 5.1[114].

Furthermore, if a Member chooses to provide safeguard relief in the form of a quantitative restriction pursuant to the second sentence of Article 5.1, the measure must not reduce the quantity of imports below the level of a recent period (i.e. 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 other words, in this particular case a specific justification of the necessity of the measure at the time it is taken is required.[115]

Article 5.2(a) SA

As to quantitative restrictions, Article 5.2(a) lays down specific rules applicable to the allocation of quotas between supplying countries. The Member intending to apply the measure may seek agreement as to such allocation from Members supplying substantial amounts of a certain product. In the absence of an agreement, the allocation should be based on the respective shares of the supplying Members over a previous representative period, adjusted so as to take into account special factors which may have affected or may be affecting the trade in the product concerned.

Article 5.2(b) SA

Quota levels may be modulated differently from past market shares, upon the importing Member showing good cause in accordance with Article 5.2(b) of the SA and with other substantive and procedural requirements. Firstly, departure from Article 5.2(a) is only allowed if a measure is taken to remedy serious injury, not merely a threat. Secondly, prior consultations must have been held with the supplying Members. Thirdly, the importing Member must show clearly to the Committee on Safeguards that (1) imports from certain Members have increased in disproportionate percentages compared to the overall increase in imports, (2) overall the derogation is justified, and (3) the conditions of such a departure are equitable to all suppliers of the product concerned. Last, a measure taken on this basis cannot last longer than four years.

Article 5.2 of the SA echoes Article XIII:2(d) of the GATT 1994. The latter Article, primarily aimed at quantitative restrictions, also applies to tariff quotas by virtue of the express extension to such measures in its paragraph 5. By contrast, in the absence of an express extension, the applicability of Article 5.1, first sentence, and Article 5.2 of the SA to tariff quotas was ruled out in the US – Line Pipe case[116]. Accordingly, the allocation of tariff quotas taken as safeguard measures can only be challenged under Article XIII of the GATT 1994, not under Article 5.2 of the SA.

8.3 Duration of Definitive Safeguard Measures

Article 7.1, SA

In line with the nature of safeguard measures as emergency, temporary relief to the domestic industry, several provisions are laid down in the SA to regulate duration.[117] Article 7.1 of the SA only allows safeguards "for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment".

8.3.1 The General Rules

Article 7.4, SA

More specifically, the initial period of application of definitive safeguard measures must not exceed four years, including the duration of provisional measures, if applied (Articles 6 and 7.1 of the SA).

[114] Appellate Body Report, US – Line Pipe, para. 242–243, 261.

[115] Appellate Body Report, Korea – Dairy, para. 99.

[116] Panel Report, US – Line Pipe, para. 7.75.

[117] Working Party Report, US – Hatters' Fur, p. 18, para. 50.

In addition, safeguard measures exceeding the duration of one year must be progressively liberalised at regular intervals during the period of their application (Article 7.4 of the SA). If, moreover, the duration of the measure exceeds three years, the Member applying the measure must review the situation no later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation.

For measures existing at the entry into force of the WTO Agreement, Article 10 provided for termination at the latest five years after such entry into force.

8.3.2 Extensions

The original duration of a definitive safeguard measure may be extended, only if (1) such a measure continues to be necessary to prevent or remedy serious injury and (2) there is evidence that the domestic industry is adjusting (Article 7.2). These conditions are partly different from those set out in the first sentence of Article 5.1 of the SA for initial application. Since reference is made to the fact that the measure continues to be necessary, one must arguably have regard for economic data relating to the period subsequent to the initial imposition of the measure. In addition, the adjustment of the domestic industry must demonstrably have begun.

Article 7.3, SA

In the case of extension, the total period of application, including provisional measures, must in any event not exceed eight years (Article 7.3 of the SA).

If the period of application of a measure is extended, the extended measure shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalised if exceeding one year in total.

8.3.3 New Measures 'Cooling Off Period'

Not only is the duration of safeguard measures regulated by the SA. The SA also makes sure that the repeated application of safeguard measures with respect to the same product is limited. This is to avoid the possibility that temporary import protection is in practice turned into a permanent closure of the domestic market by way of a series of separate measures. Allowing reiterated safeguard measures on the same products would also circumvent the four and eight year deadlines set out for initial application and extension of a (single) measure. This is why Article 7 of the SA also imposes a 'cooling off period' after expiry of a measure and before a new one can be applied to the same product.

In principle, a safeguard measure may not be applied to a product again until a period of time equal to the duration of the initial measure (or at least two years) has expired (Article 7.5 of the SA). However, if the first safeguard measure lasted no longer 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 introduction of the new measure.

8.3.4 Developing Countries

Article 9.2 of the SA allows developing Member Countries, as users of safeguard measures, additional flexibility as to the duration thereof. Such Members may apply safeguard relief for a total of up to ten years, rather than eight as provided for in Article 7.3 of the SA. Furthermore, the cooling off period for applying for a new safeguard measure on the same issue is only half of the duration of the original measure (though the minimum two year interval must be maintained).

8.4 Provisional Measures

In addition to providing the procedural requirements for the application of a safeguard measure, Section 2 of Article XIX of the GATT 1994 legitimises the use of provisional measures. It provides that:

> *"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."*
>
> **Section 2 of Article XIX**

Article 6, SA

The requirements for imposing provisional safeguard measures are set out rather abruptly in Article 6 of the SA and have not yet been clarified through Panel or AB interpretation. It is therefore not easy to comment and anticipate how they may be interpreted should provisional measures be reviewed in dispute settlement procedures.

Article 6 of the SA authorises the taking of provisional safeguard measures in "critical circumstances". Those are defined as circumstances "where delay would cause damage which it would be difficult to repair".

In addition, the application of a provisional measure is premised on a preliminary determination that there is clear evidence that the increased imports have caused or are threatening to cause serious injury.

Provisional measures may only take the form of tariff increases and may be applied for a maximum of 200 days. This duration cannot be extended, and Article 6 of the SA further provides that it is counted for the purposes of calculating the initial period and any extension referred to in Article 7.1, 2 and 3.

Pending the duration of the provisional measure, the Member applying it must make sure that the conditions set out in Articles 2 through 7 and 12 of the SA are met. However, if the subsequent investigation does not determine that increased imports have caused or threaten to cause serious injury, provisional measures shall lapse and the duties perceived must be promptly refunded.

The reference to the "subsequent investigation" (that is, following the imposition of the provisional measure) may indicate that a provisional measure may be imposed without a fully-fledged investigation; provided, of course, that the domestic authorities have made a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury and, presumably, that there are "critical circumstances". This inference may be confirmed by the fact that a Member is only required under Article 6 of the SA to meet the conditions in Articles 2 through 7 (amongst which are those relating to the investigations) after the imposition of the provisional measures.

8.5 Non-discriminatory Application of Safeguard Measures

Although not expressly provided for in Article XIX, a contracting party is not allowed to apply a safeguard measure to a product simply because it is from a certain country.[118] Under the provision that "safeguard measures shall be applied to a product being imported, irrespective of its source", Article 2.2 retains the non-discrimination or *erga omnes* requirements.

The application of safeguards on an MFN-basis, that is, without discriminating between supplying Members, is a major guiding principle of the SA and indeed a fundamental achievement compared to Article XIX of the GATT. The possibility of applying selective safeguard measures (that is, only against certain supplying countries) was hotly debated under GATT 1947[119].

A specific question relating to non-discriminatory application of safeguard measures is whether a Member can exclude products originating in its partners in a Free Trade Area (FTA) or a Customs Union (CU) from a safeguard measure (thus discriminating against other WTO Members). It must be recalled that Article XXIV of the GATT 1994 allows, in order to facilitate deeper economic integration between Members of a FTA or a

[118] See GATT BISD 27S at 199 (1981). The GATT Panel decision on Norway's safeguard measures on the import of certain textile products emphasised the requirement of a non-discriminatory application of a safeguard measure.

[119] See *Analytical Index to the GATT*, 1995, Vol. 1, p. 519.

CU and under certain conditions, departures from the MFN obligation and other GATT provisions. In other words, it allows Members of an FTA or a CU to agree to further liberalisation, which need not be extended to other WTO Members.

It is however debatable whether the exclusion of FTA or CU partners from safeguard measures is one of the permissible departures. The issue is further complicated by the fact that Article XXIV only refers to GATT rules (thus, in principle, it does not cover derogations from other WTO provisions, such as Article 2.2 of the SA). The Appellate Body recently reversed a Panel's finding that such departure was permissible, but did not itself rule on the issue.[120]

Article 2.1, SA

In addition to the non-discrimination principle in paragraph 2, Article 2.1 of the SA has been interpreted by the Appellate Body to embody the so-called 'parallelism' requirement.

In accordance with this principle, the scope of a safeguard measure must correspond with the scope of imports which were investigated and in respect of which the requirements for the imposition of safeguard measures (increased imports, serious injury or threat thereof and causation) were established.[121]

This means, for example, that the exclusion of imports from certain supplying Members from a measure is not warranted if the requirements for imposition of the measure have been assessed also considering the imports from such Members.

Thus, ultimately, discrimination between 'sources' within the meaning of Article 2.2 may also result from failure to respect the parallelism between the imports subject to the investigation and those subject to the safeguard measure. The Appellate Body considered that if a WTO Member imposed a measure after conducting an investigation on imports from all sources, it is also required under Article 2.2 of the SA to apply such measure to all sources (including partners in an FTA).[122]

Notwithstanding the non-discrimination obligation in Article 2, WTO Members are obliged not to apply safeguard measures to imports from developing countries if below certain thresholds.

8.6 Compensation and Suspension of Substantially Equivalent Obligations

Article 8.1 SA

The adoption of safeguard measures represents a temporary departure of the importing WTO Member from its obligations. This breaches the balance of rights and obligations *vis-à-vis* the affected WTO Members. Therefore, Article 8.1 of the SA requires such Member first and foremost to endeavour to maintain a substantially equivalent level of concessions and other obligations with respect to affected exporting Members.

To attain this objective, the importing Member may first negotiate trade compensation with the affected Members for the adverse effects of the measure.

However, without an agreement within 30 days, the affected exporting Members may individually suspend substantially equivalent concessions and other obligations *vis-à-vis* the Member imposing the safeguard measure. The right to suspend "substantially equivalent concessions" was already set out in Article XIX:3 of the GATT and was exercised under the GATT 1947. The right is conditional upon the notification of the proposed suspension measure to the Council for Trade in Goods and the non-disapproval by such body. The authorisation procedure must be completed within 90 days of the application of the safeguard measure (Article 8.2 of the SA).[123]

[120] Appellate Body Report, US – Line Pipe, para. 263, point (f).

[121] Appellate Body Reports for Argentina – Footwear (EC), para. 111 and US – Line Pipe, para. 197.

[122] Appellate Body Report, Argentina – Footwear (EC), para. 112.

[123] Certain WTO Members have notified their agreement to postpone the 90 day deadline applicable in a particular instance. In practice, this means that the Member affected by a safeguard measure renounces the carrying out of the Article 8.2 authorisation procedure, and thus enforcement of its rights, until a later date. While it is unclear from Article 8.2 whether such deadline may be derogated by agreement among some or all the Members concerned by a safeguard measure, it is clear that such agreements are not 'covered agreements' within the meaning of Article 1.1 of the DSU. Accordingly, in the case of violation they are not enforceable through dispute settlement procedures.

Article 8.3 SA

While confirming the right to suspend equivalent concessions, the SA introduced an additional constraint on its exercise. Article 8.3 of the SA provides that the right to suspend substantially equivalent concessions and other obligations cannot be exercised during the first three years of application of a safeguard measure if (1) the measure is taken based on an absolute increase in imports, and (2) otherwise conforms to the provisions of the Agreement.

Practice under Article 8.3 of the SA is very limited to date, and has not been reviewed in dispute settlement. The two above-mentioned conditions in Article 8.3 have been interpreted in the sense that suspension of equivalent concessions may be exercised without waiting for three years if either condition is not fulfilled. A consequence of such interpretation is, for example, that a measure based on a relative increase in imports may entitle the immediate exercise of the right to suspend equivalent concessions or other obligations.

It has also been advanced that the decision as to whether a measure "otherwise conforms to the provisions of the Agreement" is reserved for multilateral dispute settlement, not for the Member seeking suspension of equivalent concessions.

In accordance with this interpretation, a Member affected by a safeguard measure deferred actual suspension of substantially equivalent concessions, which had been authorised within the 90 day deadline in Article 8.2, until after the adoption of dispute settlement reports by the DSB finding the measure incompatible.[124]

8.7 Formal Requirements of the Imposition of Safeguard Measures

Articles 8 and 12, SA

The various activities concerning the application of the SA are subject to transparency requirements in the form of notifications and consultations. These are primarily regulated in Articles 8 and 12 of the SA.

The initiation of safeguard investigations, the making of a finding that the domestic industry has suffered or is threatened by serious injury caused by increased imports, and the decision to apply or extend safeguard measures (including provisional measures) are all subject to an obligation of immediate notification to the Committee on Safeguards (Articles 12.1 and 12.4 of the SA).

To facilitate the discharge of this duty, special forms and guidelines have been drawn up by the Committee on Safeguards, while the Technical Cooperation Handbook on Notification Requirements has been prepared by the WTO Secretariat.[125]

The notifications concerning the injury findings and the measure proposed must supply "all pertinent information", including evidence of serious injury or threat, product description and details of the proposed measure (entry into force, duration and timetable for progressive liberalisation). In the case of an extension, evidence of adjustment of the domestic industry must additionally be provided.

Prior to imposing safeguard measures, WTO Members must also offer the exporting Members adequate opportunity for consultation (Article 12.3 of the SA). The consultations must cover all the matters to be addressed in the notifications (including the measure proposed), as well as the possible ways for the importing Member to maintain the balance of its concessions *vis-à-vis* the exporting Members, in accordance with Article 8.1 of the SA. It would appear that, for provisional measures, consultations may still be held immediately after adoption of the measures, as provided for in Article XIX:2 of the GATT 1994.

Article 8.2 proposes the suspension of substantially equivalent concessions, pursuant to the result of consultations as per Article 12. The results of mid-term reviews under Article 7.4 are also subject to notification, pursuant to Article 12.5 of the SA.

[124] See G/L/251,G/SG/N/12/EEC/1, 3 August 1998, p. 2.

[125] See G/SG/1, 1 July 1996, and WT/TC/NOTIF/SG/1, 15 October 1996.

PART III – PROCEDURAL RULES FOR THE IMPOSITION OF SAFEGUARD MEASURES AND DEVELOPING COUNTRY MEMBERS

9. The Domestic Procedures

The adoption of a safeguard measure by a WTO Member is premised on its competent authorities carrying out an investigation to assess whether the relevant conditions and WTO requirements are met. This Section reviews the main obligations imposed on the domestic authorities and the rights conferred on the interested parties.

9.1 Overview of Articles 3, 6 and 12 of the SA

The SA contains far fewer procedural rules than the other two WTO texts regulating the use of trade defence instruments – the Anti-dumping Agreement and the Subsidies and Countervailing Measures Agreement. For example, the SA contains no indication or limitation as to who has standing to request the initiation of a safeguard investigation, a choice that is left to the domestic safeguard regulations. Unlike in the area of anti-dumping measures (and indeed countervailing measures), the SA is the first text that further develops the basic GATT provision. This is presumably one reason why procedural obligations are very little developed. Essentially, they are contained in Articles 3, 6 and 12 of the SA.

The SA first provides that the investigations have to be conducted in accordance with procedures previously established and published. These must also be notified to the Committee on Safeguards (Article 12.6), the body established to oversee the functioning of the SA.

Furthermore, initiation of safeguard investigations must be subject to public notice (Article 3.1).

Thirdly, during the investigation interested parties must be given an opportunity to present evidence and arguments and to respond to the evidence and arguments presented by other parties.

Fourthly, if, in the course of an investigation, the competent authorities receive information, which is confidential in nature or is provided on a confidential basis, they cannot disclose it without the permission of the party submitting it, provided certain conditions are met (Article 3.2).

Fifthly, a detailed report setting forth the domestic authorities' findings and reasoned conclusions on all pertinent issues of fact and law must be published at the end of the safeguard investigation (Article 3.1).

For provisional measures, at least a preliminary affirmative determination that there is clear evidence of serious injury caused by increased imports and that there are 'critical circumstances' must be provided (Article 6).

Finally, it may be added that the SA provides that the initiation of investigations, findings of serious injury/threat of serious injury and decisions to apply or extend safeguard measures must be notified to the Committee on Safeguards (Article 12.1).

9.2 Obligation to State Reasons

The obligation to state the reasons for taking a safeguard measure is set out in general terms in Article 3.1 of the SA:

> *"… The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."*
>
> **Article 3.1, SA**

This rather sweeping text also covers, for example, the other factors which the domestic authorities have or should have examined when assessing serious injury or threat of serious injury, or other information not specifically referred to in the SA, but which the domestic authorities nonetheless found relevant. Likewise,

if additional or different information from that originally set out in a published report is actually retained as the basis for a safeguard measure, this additional information and alternative justifications must be stated.[126]

Also, if contrary facts or arguments to those retained by the domestic authorities as the basis for their decision have been brought to their attention, they are required to address these possible additional explanations and state the reasons why they are not sufficiently strong to warrant a different conclusion.[127]

In addition to the general obligation set out in Article 3.1, Article 4.2(c) of the SA specifies, in respect of serious injury, that the competent authorities shall promptly publish a detailed analysis of the case under investigation, as well as a demonstration of the relevance of the factors examined.

Failure to state reasons is relevant in two ways. It results in a formal defect of the measure, regardless of whether such measure is objectively justified by the facts before the domestic authorities, or which the domestic authorities should have investigated. This amounts to a violation of Article 3.1 of the SA.

Furthermore, failure by the domestic authorities to address some of the SA requirements in the reasoning of a measure, or in separate published reports, amounts to failure to show that these requirements were met. It therefore warrants a finding of a violation of such requirements. In other words, the reasoning in the safeguard measure and in the additional reports containing the findings of the domestic authorities also provides the benchmark to review compliance with the obligations in, for example, Article 2 or 4 of the SA.

Not only does the foregoing apply to the conditions set out in the SA, it also applies to those in Article XIX of the GATT 1994, since that provision and the SA are to be applied together. Thus, for example, in the US – Lamb case the Appellate Body found, in respect of the requirement of 'unforeseen developments', a violation of Article XIX:1 of the GATT 1994, because the relevant investigation report did not discuss, demonstrate or even explain how such requirement was met.[128] In addition, it noted that Article 3.1 of the SA, by requiring the domestic authorities to set forth their findings and reasoned conclusions on all pertinent issues of fact and law, also requires such authorities to include a finding or reasoned conclusion on unforeseen developments.[129]

> *"It bears repeating that a Panel will not be in a position to assess objectively, as it is required to do under Article 11 of the DSU, whether there has been compliance with the prerequisites that must be present before a safeguard measure can be applied, if a competent authority is not required to provide a 'reasoned and adequate explanation' of how the facts support its determination of those prerequisites, including 'unforeseen developments' under Article XIX:1(a) of the GATT 1994. A Panel must not be left to wonder why a safeguard measure has been applied."*[130]
>
> **Appellate Body Report, US – Certain Steel Products**

9.3 Procedural Rights – Confidential Information

The procedural rights (sometimes also referred to as 'due process rights') of the parties to a safeguard investigation are set out in Article 3.1 and include:

- The right to be informed, through public notice, about the initiation of an investigation; and
- The right to be heard or to be provided other appropriate means to present evidence and views on the case (including the opportunity to respond to the presentations of other parties and to submit views on whether the application of a measure would be in the public interest).

Article 3.1 confers these rights on "all interested parties". The parties most directly interested in an investigation are the domestic producers, foreign producers (exporters) and domestic importers. In fact, importers and exporters are expressly referred to in Article 3.1. However, the term 'interested parties' is sufficiently broad to be interpreted as covering exporting WTO Members and possibly industry associations, unions and consumer associations. Who will be considered interested parties in a given case is left to the domestic rules and procedures of the WTO Members.

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126 Appellate Body Report, US – Wheat Gluten, para. 55.

127 Appellate Body Report, US – Lamb, para. 159–161.

128 Appellate Body Report, US – Lamb, para. 72–73.

129 Appellate Body Report, US – Lamb, para. 76.

130 Appellate Body Report, US – Certain Steel Products, para. 298.

Regarding the treatment of confidential information, pursuant to Article 3.2 of the SA, the competent domestic authorities cannot disclose information which is confidential in nature or is provided on a confidential basis without the permission of the party submitting it, provided that two conditions are met: 1) confidential treatment must be genuinely justified and 2) parties providing confidential information may be requested to provide a non-confidential summary of such information, or an explanation as to why the information cannot be summarised.

If confidential treatment is not justified in the view of the domestic authorities, and the parties supplying the relevant information refuse disclosure in a non-confidential form, the domestic authorities may disregard such information, unless its veracity and correctness is demonstrated through sources other than the confidential one.

The provisions protecting confidential information in domestic safeguard procedures are intended to balance different interests and needs. On the one hand, neither of the private parties primarily concerned (the complaining domestic producers and the exporters/importers) can risk having their business secrets or other sensitive commercial information disclosed to their competitors as a result of their cooperating in a safeguard investigation. On the other hand, a thorough investigation of the facts of the case, which is ultimately in the interest of all players, may necessitate access to such sensitive information and some form of refutation and adversarial process in connection with it.

Reconciling these needs is a difficult exercise. In addition, the balance struck by a WTO Member for the purpose of its domestic proceedings may be questioned if a measure adopted on the basis of confidential information is challenged in dispute settlement proceedings. In particular, the WTO Member whose measure is challenged may face the dilemma of either supplying, in dispute settlement proceedings, information that it treated as confidential at domestic level, or not be able to justify its measure. In this regard, it should be noted that confidentiality of dispute settlement proceedings is ensured by a specific obligation imposed on the parties to the dispute by Article 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Furthermore, under the same provision, Panels can request the parties to supply information they consider relevant to their assessment of the facts, and the parties are therefore under a duty to cooperate to this end.

The Appellate Body has had the opportunity to criticise a Member's almost complete refusal to supply dispute settlement proceeding information which it had treated as confidential in its domestic proceeding according to its domestic standards.[131] In this specific case, the Member concerned refused to supply information (which it had treated as confidential in domestic procedures, in spite of the Panel's offer to devise additional procedures to deal with this information, so as to render the obligation in Article 13 of the DSU more specific and stringent). The refusal to provide the information requested by the Panel was held to seriously undermine the Panel's ability to make an objective assessment of the facts and discharge its mandate under Article 11 of the DSU.[132]

More recently, a Panel considered the provision of data treated as confidential in domestic proceedings in indexed, aggregated or weighted average form (rather than in full) to be sufficient to its objective assessment of the facts.[133]

[131] Appellate Body Report, US – Wheat Gluten, para. 171.

[132] Appellate Body Reports for, US – Wheat Gluten, para. 171 and Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft), WT/DS70/AB/R, adopted 20 August 1999, para. 187.

[133] Panel Report, US – Line Pipe, para. 7.8–7.10.

10. The WTO Procedures

The following part examines two sets of procedures and procedural requirements relating to safeguards. On the one hand, reference is made to the procedural requirements imposed by the SA in connection with the various application phases of its rules. On the other hand, the specific features of dispute settlement procedures when addressing safeguard measures are reviewed.

10.1 The Role of the Committee on Safeguards: Article 13, SA

Some procedures and procedural obligations in connection with safeguard matters are set out in Article 13 of the SA. This Article provides for the establishment of the Committee on Safeguards, under the authority of the Council for Trade in Goods, to oversee the implementation of the Agreement. This Committee is open to representatives from all WTO Members and its main functions can be outlined as follows:

The Committee is the addressee of all the notifications (including initiation of investigations, injury findings, provisional or definitive measures, extensions, results of consultations prior to the imposition of a measure, compensation, mid-term reviews) that WTO Members must make in accordance with the SA. Besides providing a forum for discussing such notifications, the Committee must report thereon to the Council for Trade in Goods (Article 13.1(f)). To assist Members in making such notifications, suggested formats have been drawn up (although they are not legally binding, and following their suggestions does not guarantee that the relevant legal requirements in the SA are fulfilled).

Furthermore, at the request of a Member taking a safeguard measure, the Committee reviews whether proposals to suspend concessions or other obligations are "substantially equivalent" to those suspended through the safeguard measure, and reports as appropriate to the Council for Trade in Goods (Article 13.1(e)).

The Committee also finds, upon request of an affected Member, whether or not the procedural requirements of the SA have been complied with in connection with a safeguard measure, and reports its findings to the Council (Article 13.1(b)).

The Committee furthermore assists Members in their consultations under the provisions of the SA (Article 13.1(c)) – a supporting activity which may prove particularly valuable for those Members with limited experience in the sector. In addition, the Committee has general monitoring functions on the implementation of the SA (Article 13.1(a)), which results in the preparation of an annual report to the Council for Trade in Goods, *inter alia* recording the measures taken by Members.

10.2 Dispute Settlement Procedures: Article 14, SA

Pursuant to Article 14 of the SA, a review of WTO Members' safeguard action through dispute settlement proceedings is based on the applicable provisions in Articles XXII–XXIII of the GATT 1994 (consultations and dispute settlement), and Articles 4 and 6 of the DSU. This section outlines some issues arising in dispute settlement proceedings concerning safeguard measures.

10.2.1 Standard of Review

The standard of Panel reviews of safeguard measures is the same as stated in Article 11 of the DSU. Accordingly, Panels are called upon to make "an objective assessment of the facts" submitted for their review by a Member. Unlike in the case of a review of anti-dumping measures, Panels are not instructed to defer to the interpretation chosen by the domestic authorities, even if it is amongst the permissible ones.[134]

The issue has, however, arisen as to what facts and arguments Panels can hear, compared to those heard and reviewed by the competent authorities in domestic proceedings leading to the measure under review. Building on its previous pronouncements, the Appellate Body reviewed this issue extensively in US – Lamb, and the relevant findings can be summarised as follows:

[134] ADA, Article 17.6.

- The applicable standard is neither a *de novo* review (a complete re-examination and re-evaluation of the facts), nor a 'total deference', but is rather the objective assessment of the facts[135];
- When a review concerns compliance with Article 4 requirements (and presumably also other substantive requirements), a Panel must examine whether, as required by Article 4 of the SA, the domestic authorities have considered all the relevant facts and adequately explained how the facts support the determinations made[136];
- An objective assessment of a claim under Article 4.2(a) of the SA has two elements, a formal one and a substantive one. The formal aspect that a Panel must review is whether the competent authorities have evaluated all relevant factors. The substantive aspect that a Panel must review is whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. A claim under Article 4.2(a) might not relate at the same time to both aspects of the review envisaged here, but only to one of these aspects. For instance, the claim may be that, although the competent authorities evaluated all relevant factors, their explanation is either not reasoned or not adequate[137]; and
- In examining a claim under Article 4.2(a), a Panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate, but only if it critically examines that explanation in depth and in the light of the facts before the Panel. A Panel must, therefore, review whether the competent authorities' explanation fully addresses the nature and, especially, the complexities of the data and whether it responds to other plausible interpretations of that data. A Panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation[138].

10.2.2 'New' Claims Compared to Those Raised in Domestic Proceedings

This issue was addressed by the Appellate Body in US – Lamb, together with that of the standard of review. The Appellate Body clearly found that:

- In arguing claims in dispute settlement, a WTO Member is not confined merely to rehearsing arguments that were made to the competent authorities by the interested parties during the domestic investigation, even if the WTO Member was itself an interested party in that investigation; and
- Likewise, Panels are not obliged to determine and confine themselves to the nature and character of the arguments made by the interested parties to the competent authorities. Arguments before national competent authorities may be influenced by and focused on the requirements of the national laws, regulations and procedures. On the other hand, dispute settlement proceedings of the DSU concerning safeguard measures imposed under the SA may involve arguments that were not submitted to the competent authorities by interested parties[139].

10.2.3 Treatment of Confidential Information

A further procedural issue discussed in dispute settlement proceedings on safeguard measures is the disclosure of confidential information to Panels and other WTO Members.

[135] Appellate Body Report, US – Lamb, para. 102.

[136] Appellate Body Reports for US – Lamb, para. 102 and Argentina – Footwear (EC), para. 121.

[137] Appellate Body Report, US – Lamb, para. 103.

[138] Appellate Body Report, US – Lamb, para. 106.

[139] Appellate Body Report, US – Lamb, para. 113.

11. Developing Country Members

The SA contains provisions granting preferential treatment to developing Member Countries, both as users and as victims of safeguard measures.

11.1 Article 9.1 of the SA: De Minimis *Rule*

Article 9.1 of the SA mandates that safeguard measures should not be applied against a product originating from a developing Member Country, as long as the country's import share of the particular product in the importing Member Country does not exceed 3%, and provided that developing Member Countries with less than 3% import share collectively account for not more than 9% of total imports of the product. This is sometimes referred to as a *de minimis* rule in favour of developing countries.

In US – Line Pipe, the Panel ruled that Article 9.1 requires the express exclusion of developing countries from the application of safeguard measures, as long as the stipulated conditions are met. The Panel concluded that, since the Line Pipe measure imposed by the US applies to all developing countries in principle, the US had failed in its obligation under Article 9.1, regardless of the fact that the Line Pipe measure may not have any actual impact on developing countries.

> *"Article 9.1 is clear in its mandate that a safeguard measure "shall not be applied" to imports of developing countries accounting for not more than 3 percent of total imports … If a measure is not to apply to certain countries, it is reasonable to expect an express exclusion of those countries from the measure.*[140] *… There is a clear difference between an obligation that a measure not affecting imports from certain developing countries and an obligation that a measure not be applied to imports from certain developing countries."*[141]
>
> **Panel Report, US – Line Pipe**

The Panel Report in the context of the Dominican Republic – Polypropylene Bags case reads as follows:

> *"… In cases in which the exclusion is based on Article 9.1 of the Agreement, the Panel does not consider it necessary to undertake a new analysis of the increase in imports, the injury and causation. In this case, it would be enough for the competent authorities to show in their report that the excluded Members actually satisfied the requirements laid down in Article 9.1 of the Agreement on Safeguards. Moreover, the Panel agrees with the Dominican Republic that the fact that the Agreement on Safeguards itself, in Article 9.1, imposes the obligation to exclude products from specific origins from the application of the safeguard measure results in a departure from the usual application of the principle of parallelism with regard to such imports."*[142]
>
> **Panel Report, Dominican Republic – Polypropylene Bags**

The Appellate Body confirmed and strengthened this finding. Its conclusions can be summarised as follows:[143]

- A specific list of WTO Members either included or excluded from the measure is not required to comply with Article 9.1 of the SA (though it would help by providing transparency);
- Calculation of the percentages mentioned in Article 9.1 should be done on the basis of the latest available data at the time the measure takes effect; and
- The WTO Member imposing the measure must take all the reasonable steps it can to make certain that developing countries exporting less than the percentages indicated in Article 9.1 are excluded from the measure.

[140] Panel Report, US – Line Pipe, para. 7.175.

[141] Panel Report, US – Line Pipe, para. 7.181.

[142] Panel Report, Dominican Republic – Polypropylene Bags, para. 7.385.

[143] Appellate Body Report, US – Line Pipe, para. 128–132.

11.2 Other Rights of Developing Countries in the Application of the SA

In addition to providing for the so-called *de minimis* rule, as already mentioned, Article 9.2 allows developing Country Members, as users of safeguard measures, additional flexibility.

These countries enjoy special rights in connection with dispute settlement procedures, which are also relevant when safeguard measures are under review. These include the right to select a panellist from a developing country (Article 8.10 of the DSU), special deadlines for Panel proceedings (Article 3.12, 12.10 of the DSU), special consideration of their interests during dispute settlement consultations (Article 4.10), legal assistance (Article 27), as well as some special rights in connection with the implementation of reports (Article 21, para. 2, 7 and 8).

11.3 Developing Countries and the Application of the SA

Similarly to the case of anti-dumping measures, developing countries have not been great users of safeguard measures under GATT 1947[144]. On the other hand, they appear to be the primary users of the safeguard instrument under the WTO[145].

[144] See *Analytical Index to the GATT,* Vol. 1, 1995, pp. 539 ff., recording five measures taken by developing countries (Nigeria, Peru, Chile), out of a total of 139.

[145] Based on the annual reports of the Committee on Safeguards.

LIST OF ABBREVIATIONS

AA	Agreement on Agriculture
AB	Appellate Body
CCFRS	Certain Carbon Flat-rolled Steel
CMT	Committee of Ministers of Trade
COMESA	Common Market for Eastern and Southern Africa
CU	Customs Union
DEI	Investigations Department
DSU	Dispute Settlement Understanding
EAC	Eastern African Community
EC	European Communities
FTA	Free Trade Area
GATS	General Agreement in Trade in Services
GATT	General Agreement on Tariffs and Trade
HS	Harmonised system
IP	Investigation period
LDCs	Least developed countries
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
NTM	Non-Tariff Measures
OMAs	Orderly Marketing Arrangements
RECs	Regional Economic Communities
SA	Agreement on Safeguards
SADC	Southern African Development Community
SSG	Special safeguard measure
TFN	Trade Negotiating Forum
TFTA	Tripartite Free Trade Area
TRQ	Tariff Rate Quota
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USITC	United States International Trade Commission
VERs	Voluntary Export Restraints
VRAs	Voluntary Restraint Arrangements
WTO	World Trade Organization

Notes

K-10319 [www.kashan.co.za]

TradeMark Southern Africa

Physical: 1st and 2nd Floor, Building 41, CSIR Campus, 627 Meiring Naude Road, Brummeria, Pretoria, 0001, South Africa
Postal: PO Box 107, Persequor Park, Pretoria, 0020, South Africa

Tel: +27 12 349 7500
Fax: +27 12 349 7513
E-mail: info@trademarksa.org