

ICTSD Project on Special Products and a Special Safeguard Mechanism



Comparing safeguard measures in regional and bilateral agreements



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Trade Law Centre for Southern Africa (TRALAC)



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ABBREVIATIONS AND ACRONYMS

ACP	African Caribbean Pacific
ASEAN	Association of South East Asian Nations
ATC	Agreement on Textiles and Clothing
CEPT	Common Effective Preferential Tariff
CET	Common External Tariff
CIF	Cost Insurance Freight
COMESA	Common Market for Eastern and Southern Africa
DSB	Dispute Settlement Body
DTI	Department of Trade and Industry
EC	European Commission
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
EU	European Union
FOB	Free On Board
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
IRR	Implementing Rules and Regulations
ITC US	International Trade Commission
LDC	Least Developed Country
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OMA	Orderly Marketing Arrangements
RTA	Regional Trade Agreement
SADC	Southern Africa Development Community
SAFTA	South Asian Free Trade Area
TDCA	Trade and Development Cooperation Agreement
TMB	Textiles Monitoring Body
VER	Voluntary Export Restraints
WTO	World Trade Organisation

FOREWORD

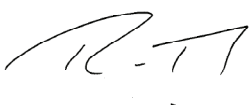
The number of regional and bilateral free trade agreements under negotiation has continued to multiply. The European Union has pursued a series of Economic Partnership Agreements (EPAs) with trading partners in Africa, the Caribbean and the Pacific, in an attempt to establish trading relationships with partners in these regions that are compatible with existing rules at the World Trade Organisation (WTO). Similarly, the United States has signed a number of bilateral and regional agreements with trading partners, and developing countries themselves have increasingly sought to formalise rapidly-growing trade with other developing countries or regions. Many of these trade agreements or draft accords include clauses relating to the use of safeguards, in many cases restricting or prohibiting the ability of countries to impose safeguards on imports. Agreements that a country has negotiated with different trading partners may contain different requirements or flexibilities - such as, for example, the various EPAs that the EU has negotiated with different developing country regions.

However, if countries lower their tariffs and remove other barriers to trade, farmers and other producers are increasingly exposed to price volatility on world markets. In particular, these producers become more vulnerable to the effects of price depressions and import surges, and consequently are likely to require their governments to establish simple and effective instruments to protect them from these risks.

At the multilateral level, WTO Members have long benefited from instruments that are intended to provide protection to producers - such as GATT Article XIX or the WTO Agreement on Safeguards. More specifically, an agricultural safeguard clause (the special agricultural safeguard, or SSG) has established conditions under which farmers can be protected from import surges and price depressions - although as developing countries have, for the most part, been unable to use the SSG, they have argued in favour of a specific instrument that they alone can use, leading to proposals during the current Doha Round of trade negotiations for a 'special safeguard mechanism' for developing countries.

Agreements at the global level can provide a useful benchmark with which to assess the flexibilities and requirements contained in bilateral and regional agreements. The authors of this study compare multilateral and regional agreements in this way, as well as grouping together regional agreements on the basis of shared characteristics, and examining the extent to which various safeguard clauses have been used in practice. They also make a number of recommendations that developing country policy-makers and negotiators could take into consideration when negotiating agreements that could affect their country's ability to apply safeguards.

Given the challenges that negotiators, policy-makers and other stakeholders face in this area, this study seeks to provide a clear, practical comparative analysis of the advantages and disadvantages of the various safeguard clauses included in bilateral and regional free trade agreements, in order to enable these actors to engage more effectively in international negotiations on this issue, and pursue agreements that better reflect development concerns.



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EXECUTIVE SUMMARY

Forty-two agreements including countries from all the continents were examined and compared to each other and to the WTO Agreement on Safeguards. The agreements vary from vague and flexible to comprehensive and rigid. In many respects the examined agreements contained similar conditions for invocation and procedural steps that are provided for under WTO law. A table is included to map the characteristics of the examined agreements.

Most agreements contain a dual system of bilateral/regional and global safeguards. The dispute resolution body of the WTO, however, will not be able to give a specific decision concerning a bilateral/regional dispute and, in addition, this will not be the appropriate forum. An intra-regional safeguard mechanism can, however, be brought to the WTO as part of another WTO dispute. This exclusion is explicitly articulated in the Economic Partnership Agreements (EPAs); dispute settlement provisions of the EPAs do not apply to the safeguard measure, and the WTO dispute settlement provisions do not apply to the bilateral regional safeguard.

In evaluating the application of safeguards within certain agreements, it is apparent that not all global safeguard initiations lead to safeguard measures being taken. Moreover, the global safeguard mechanism is not always used when a country wishes to implement trade remedies against a contracting party. The measures used will depend on the mandate of the regional or bilateral agreements. Some agreements maintain the rights of member states to use global safeguards while others, like MERCOSUR, do not allow the application of safeguards between member countries at all. The Common Market for Eastern and Southern Africa (COMESA) and the North American Free Trade Agreement (NAFTA) member countries have used the mechanism provided for in their regional agreements to protect their industries. The Association of South East Asia Nations (ASEAN) members, like the Philippines, have used the provisions in the Agreement on Safeguards, Agreement on Textiles and Clothing, Agreement on Agriculture and its own national legislation to implement safeguards against member states.

The WTO Agreement on safeguards provides clear guidelines and strict procedural obligations which must be adhered to. Although there are some systematic differences between the global and bilateral/regional safeguard, similar provisions to those found under WTO law are included in the trade agreements. Many of the agreements include identical provisions than those found in the WTO Agreement on Safeguards, while several others make direct reference to the procedure and obligations contained in WTO rules.

The more flexible and vague approach of GATT Art. XIX frustrated the member states due to its ambiguous language, demanding standards and uncertain guidelines. Developing countries must guard against this when negotiating and drafting safeguard clauses.

Safeguard provisions provide for discriminatory treatment in two instances: 1) when excluding partner countries from global safeguard actions; and 2) when excluding third countries and only imposing bilateral/regional safeguard actions on partner countries. These two exclusions are common in the examined trade agreements. This has, however, never been tested for WTO compatibility, although this is a crucial deviation from one of the guiding principles of the WTO Agreement on safeguards, namely that of non-discriminatory application 'irrespective of source'.

Special safeguard provisions should be seen as part of the portfolio of trade management instruments to mitigate the effects of regional agreements on import-sensitive industries. These measures can be invoked without demonstrating injury to the domestic industry. The Agriculture as well as the Clothing and Apparel safeguard provisions in the regional and bilateral agreements were examined. More products tend to be excluded from the process of liberalisation in the agricultural sector than in other sectors. The agricultural safeguard measures differ from agreement to agreement. Most North-South FTAs that contain a special agricultural measure set out detailed requirements and conditions in the agreement itself or annexure thereto. The South-South agreements do not contain detailed provisions regarding trigger volumes or prices, the duration of measures, specific measures that can be implemented and procedures that need to be followed.

Not many safeguard measures have been implemented since the inception of the WTO Agreement on Safeguards. The number has also been steadily declining over the past few years. The application of regional and bilateral safeguards was even less frequent. All of the bilateral or regional safeguard measures taken in terms of the examined agreements have been investigated.

The examination of the trade agreements was made more complex by the presence of the additional protocols and annexes to regulate the imposition of trade remedies. Only the provisions appearing in the trade agreements have been examined; the domestic rules and obligations regarding the imposition of safeguard were omitted. The chapter dealing with the application of bilateral and regional safeguard measures does, however, consider domestic processes to some extent.

A number of recommendations were included in the report to assist developing countries in negotiating and drafting suitable safeguard provisions. These include:

- Striking a balance between applying the safeguard measures and striving for the objective of trade liberalisation;
- Providing for a consultative process crucial for arriving at an amicable outcome;
- Paying special attention to the protection of sensitive sectors, most notably the agriculture industry which is volatile by nature;
- Stating that the application of safeguards has to comply with the GATT 1994 and the Agreement on Safeguards. Countries can otherwise set clear and transparent provisions regarding safeguard mechanisms applicable in the regional agreement;
- Including clear and transparent provisions regarding the use and duration of any mechanism within the agreement in unambiguous language;
- Setting clear developmental benchmarks and strategies prior to negotiations. Trade liberalisation should take place in the framework of these goals and strategies;
- Ensuring that provision is made for safeguard measures to be invoked if a certain volume or price trigger for the concerned products are reached;
- Allowing by North-South Regional Trading Agreements (RTAs) for asymmetry in the application of safeguards in favour of the developing party. Parallelism should not apply in terms of least developed trading partners. Least developed countries should be exempted automatically when a developed trading partner invokes safeguard actions;

- Regarding regional safeguard measures only as temporary measures, with developing countries focusing on strengthening their capabilities to implement the global safeguard mechanism; and
- Assisting developing countries with technical, financial and legal support on the international level on procedural and institutional matters regarding the use of the general safeguard measure.

1. INTRODUCTION

An increase in trade liberalisation coupled with the introduction of new competition can set new demands for certain domestic industries. In instances where domestic industries are struggling to survive, various trade remedies are available to protect them from foreign competitors. The retention of trade remedies in trade agreements serves the purpose of obtaining political support needed for the successful implementation of the agreement and assures import-competing sectors in member states that protection against unanticipated consequences of liberalisation is available.

When there is a sudden surge in imports, countries can temporarily safeguard themselves in an effort to protect the affected domestic industry. Traditionally, these safeguard measures were only available for application under World Trade Organisation (WTO) rules; but with the proliferation of trade agreements in recent years, such measures have also been included on a regional and bilateral level. While global safeguards concern the application of safeguard measures on a multilateral level, regional or bilateral safeguards refer to measures addressing distortions which come about as a result of implementing regional or bilateral trade agreements. The rules of the WTO provide that safeguard measures must be applied without discrimination. Regional or bilateral safeguards, however, address only the adverse effect of the regional or bilateral liberalisation and are therefore only applicable between contracting parties. For this reason these measures are also known as 'transitional measures', as they may not be invoked after the termination of the transition period.

Global and regional safeguards are different institutions dealing with problems arising from different free trade initiatives. The General Agreement on Tariffs and Trade (GATT) Article XIX, together with the WTO Agreement on Safeguards, remains the generally applicable safeguard regime at a multilateral level. Safeguards in regional and bilateral agreements vary greatly: from agreements containing no general

safeguard measure to agreements with detailed and rigid provisions and conditions for implementation. All of the regional and bilateral agreements which contain safeguards do nevertheless share similar characteristics and are comparable to some extent with the WTO Agreement on Safeguards. For this reason the multilateral rules on safeguards were analysed to provide a basis on which the regional and bilateral agreements can be compared. The examination of the regional and bilateral safeguards is therefore patterned on the design of the WTO Agreements on Safeguards and provides for several topics which include conditions for invocation, investigation procedures, applying the safeguard measure, duration of safeguard measures, provisional application, compensation for loss of trade, special treatment for developing countries and dispute settlement. Even though the rules and procedures for transitional safeguard measures are built into the agreements, they still need to be applied within the framework of GATT Article XXIV. The argument has been made that intra-regional safeguards are in conflict with this provision. This is due to the requirement that restrictions have to be eliminated on 'substantially all trade'. The flexibility of the article does, however, allow for intra-regional safeguard application. Only if the measure is invoked on a significant percentage of the regional trade, will the question arise whether the remaining trade qualifies as 'substantially all trade'.

In addition to regional and bilateral safeguard, special safeguard mechanisms are applicable in certain situations where protection could usually not be obtained otherwise. These measures provide additional protection to traditionally sensitive sectors like agriculture and textiles and clothing. The provisions have different requirements and conditions for the invocation regarding notification, strength and length of implementation, compensation, option of retaliation and the determination of serious injury. These special measures were also examined to determine the difference between them and the normal safeguard measures.

The challenge when formulating safeguard clauses is to maintain a balance between allowing countries to apply safeguard measures to prevent serious economic disruptions and to ensure that safeguard measures do not defeat the purpose of trade liberalisation. Developing countries face the additional challenge that agricultural commodity markets are volatile by

nature, agricultural sectors form a pivotal part of economies and are more exposed to external shocks. These are important elements which must be considered when negotiating and drafting the relevant safeguard provisions. To conclude this study, a number of recommendations are supplied which can assist developing countries in drafting suitable and appropriate clauses.

2. GLOBAL SAFEGUARDS

Under the WTO system, importing countries are primarily allowed to resort to global safeguard measures in order to deal with the negative impacts increased imports have on their domestic industries. Although global safeguards refer to the measures applied under various articles of the WTO agreements and WTO annexes, these are relevant in the context of this discussion since several of the regional and bilateral agreements under examination include references to such global safeguards. In

addition to the specific rules which set out the procedures for the imposition of a bilateral or regional safeguard measure, explicit reference is made to the global safeguard measures as contained in various multilateral agreements. At the very least, bilateral and regional agreements confirm the rights and obligations under GATT Article XIX and the WTO Agreement on Safeguards; while other agreements provide for elaborate and extensive rules regarding the imposition of global safeguard measures.

2.1 GATT Article XIX

To give industries time to gradually adjust to the increased competition resulting from reductions in tariffs and the removal of other barriers to trade, GATT practice requires tariff cuts in multilateral negotiations to be implemented or phased in over an agreed number of years. The GATT regime further recognises that, despite the phased implementation of tariff reductions, certain industries may face hardships in adjusting to the increased import competition (International Trade Centre 1999). GATT Article XIX, which has remained unchanged from the 1947 GATT provision, provides for the imposition of certain safeguard measures to temporarily restrict imports for the purpose of protecting the affected domestic industry. GATT Article XIX sets out the conditions for the invocation of multilateral safeguards in summary form:

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. (Emphasis added.)

GATT Article XIX permits member states to temporarily take certain precautions to safeguard domestic industries. Affected parties are allowed to apply various kinds of import restrictions and deviate from their multilateral obligations¹. This can, however, only be invoked if the surge in imports is unforeseen and causes, or threatens to cause, serious injury to domestic producers. It is, however, only a temporary measure and may only be imposed for such time as may be necessary to correct the injury. The purpose of the provision is to strike a balance between progressive trade liberalisation and the political and economic interests of domestic industries. In theory the provision provides a useful measure to avoid the adverse effects of multilateral trade liberalisation; but in practice member states were frustrated by its ambiguous language, demanding standards, uncertain guidelines, burdensome application and non-discriminatory basis. It soon became clear that measures other than GATT Article XIX safeguard actions were resorted to by contracting parties in order to address import surges. These measures were often designated with the term 'grey area'² measures which included Voluntary Export Restraints (VER), Voluntary Restraints Agreements and Orderly Marketing Arrangements (OMA). Instead of being formally adopted and notified, these measures were typically initiated by the export country or, alternatively, negotiated between the two parties with the purpose of restricting exports to agreed levels (United Nations Conference on

Trade and Development 2003). These measures defeated the real purpose behind GATT Article XIX, and member states were determined to clarify the process and bring it in line with WTO practice. It

2.2 The Agreement on Safeguards

Earlier GATT rounds endeavoured to amend GATT Article XIX for the purpose of addressing its shortcomings and bringing the grey measures into conformity with WTO rules. Early attempts to enact supplementary safeguard rules during the Tokyo Round in 1979 failed, but member states were more successful in the subsequent Uruguay Round (1986 - 1994). During this round, many of the inadequacies of GATT Article XIX were rectified by supplementing it with the WTO Agreement on Safeguards. In the Agreement on Safeguards, WTO members recognised that there was a need to clarify and reinforce the disciplines of GATT 1994, in particular those of GATT Article XIX as well as re-establishing multilateral control over safeguards and eliminate measures that escape such control (Agreement on Safeguards: Preamble). So, most importantly, the Agreement on Safeguards prohibited all existing 'grey area' measures and required member states to phase out or eliminate the measures within four years of the establishment of the WTO (i.e. by 1 January 1999)³. A 'sunset clause' which placed a time

is estimated that in 1995, when the WTO came into existence, there were over 200 such grey arrangements in force, covering a wide range of products (International Trade Centre 1999).

limit on the duration of the safeguard measure was also introduced, initially set at four years with the option of extending the limit to a total of eight years⁴. The agreement further relaxed the compensation requirements in circumstances which result from absolute increases in imports, as opposed to relative increases (Wilson 1999). Other areas of ambiguity have also been cleared up. It is now required that the importing country conduct a proper investigation before invoking safeguards, and 'serious injury' is now defined more clearly (Ibid.). A significant achievement of the Agreement on Safeguards - something which can have an important bearing on the use of the global safeguards in FTAs - is the requirement to apply safeguard measures on a non-discriminatory basis. Article 2.2 requires a safeguards measure to be taken 'irrespective of its source', in an effort to eliminate the application of selective safeguard measures. The principle that safeguard measures must be applied without discriminating between importing member states is a major guiding principle of the Agreement on Safeguards.

2.3 Other multilateral safeguards

In terms of the current WTO system, GATT Article XIX together with the WTO Agreement on Safeguards remains the generally applicable safeguard regime at a multilateral level. There are, however, also other special regimes under WTO rules which make provision for certain types of safeguard measures. These different types of safeguard measures are briefly discussed below:

- *The Agreement on Agriculture*: Art. 5 provides for a special transitional regime for certain agriculture products. Special safeguard provisions for agriculture differ from normal safeguards in that higher safeguards duties can be triggered automatically when import volumes rise above a certain level, or if prices fall below a certain level; and it is not necessary to demonstrate that serious injury is being caused to the domestic industry (WTO 2004).
- *The Agreement on Textiles and Clothing*: Art. 6 contained a transitional safeguard regime for certain textiles products, but the Textiles Agreement and all its restrictions and measures were terminated on 1 January 2005. Safeguards in textile and clothing products are no longer subject to a special regime outside normal WTO rules but are instead governed by the general rules and disciplines embodied in the multilateral trading system⁵.
- *Protocol of Accession of the People's Republic of China*: The protocol provides for a transitional safeguard to limit imports from China for a period of twelve years. According to Art. 16 (1) of the protocol, a safeguard measure may be imposed if imports from China increase in quantities or enter under such conditions as to cause

or threaten to cause market disruptions to the domestic producers of like or directly competitive products. Some countries, like South Africa, have, however, contracted out of this special safeguard provision. The Memorandum of Understanding between South Africa and China waives the application of the special safeguard. Article 3(3) of the MoU states that

In view of the arrangement made by the Parties pertaining to the textile and apparel trade, South Africa commits itself to not applying Article 16 of the Protocol on Accession of China to the World Trade Organisation, and Paragraph 242 of the Report of the Working Party on the Accession of China against products originating from China, with the understanding that contentious trade issues shall be dealt with in an amicable manner.

2.4 Global safeguards in Free Trade Agreements (FTAs)

Many of the examined trade agreements contain global safeguard measures in addition to the regional and bilateral safeguards. These provisions typically allow for recourse to the rights and obligations under GATT Article XIX and the WTO Agreement on Safeguards.⁶ The implication is that all parties to a bilateral or regional agreement still retain their right to invoke a global safeguard measure, albeit with an interesting twist. A number of agreements include the discretion to exclude partner countries from global safeguard actions. An example of such a typical provision can be found in Article 508 of the Australia-Thailand FTA:

1. Each Party retains its rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards and any other relevant provisions in the WTO Agreement. This Agreement does not confer any additional rights or obligations on the Parties with regard to such global safeguard measures, **except that a Party taking such a measure may exclude imports of an originating good of the other Party from the action if such imports are not a cause of serious injury or threat thereof or of serious damage or actual threat thereof or of any other such**

Accordingly South Africa will not be able to invoke safeguards against products originating from China.

- *The General Agreement on Trade in Services: GATT Article XIX and the WTO Agreement on Safeguards only relate to trade in goods and do not cover trade in services. GATS Article X requires multilateral negotiations on the issue of emergency safeguards and provides that the result of such negotiations enter into effect on a date not later than three years from the date of entry into force of the WTO agreement. Member states have yet to agree on an emergency safeguard for services and the deadline has subsequently been extended until the conclusion of the current Doha Round.*

factor as may be provided in Article XIX of GATT 1994 and the WTO Agreement on Safeguards, and any other relevant provisions in the WTO Agreement. (Emphasis added.)

According to the above, global safeguard measures may be excluded from imports of an originating good, if such imports are non-injurious. So far the WTO jurisprudence has not clarified how WTO members that are also members of regional trade agreements should conduct safeguards investigations and implement safeguard measures permitted under WTO rules. The Agreement on Safeguards does not prescribe the origin of imports that should be looked at when conducting an investigation. Members can conduct the investigation based on all imports or they can only focus on imports originating from third countries and thereby exclude regional imports. However, it must be pointed out that Article 4.2(a) of the Agreement on Safeguards provide that the investigative authority must evaluate all relevant factors. This requirement means that the injurious impact of all imports from all sources on the domestic market must at least be evaluated. According to Pauwelyn (2004: 111 - 120) once the existence of serious injury or threat thereof has been established,

there is no need to prove that the third party imports alone have caused the actual injury. The mere fact that it attributed to the injury provides a sufficient nexus between the increased third-party imports and the serious injury or threat thereof.

When it comes to the application of the safeguard measure the wording of Article 2.2 states that, in principle, the 'safeguard measures shall be applied to a product being imported irrespective of its source'. This, however, is only the case where the injury determination is based on all imports and where the determination focuses only on third-party imports. This means that the imports included in the injury determinations made under Article 2.1 and 4.2 should correspond to the imports included in the application of the measure under Article 2.2.⁷

A similar situation arose in the CARIFORUM Economic Partnership Agreement (EPA) where imports originating in the developing economies of CARIFORUM are exempted from global safeguard measures taken by the EU for a period of five years after the entry into force of the EPA:

1. Subject to the provisions of this Article, nothing in this Agreement shall prevent the Signatory CARIFORUM States and the EC Party from adopting measures in accordance with Article XIX of the General Agreement on Tariffs and Trade 1994, the Agreement on Safeguards, and Article 5 of the Agreement on Agriculture

annexed to the Marrakech Agreement Establishing the World Trade Organization. For the purpose of this Article, origin shall be determined in accordance with the non-preferential rules of origin of the Parties.

2. Notwithstanding Paragraph 1, in the light of the overall development objectives of this Agreement and the small size of the economies of the CARIFORUM States, **the EC Party shall exclude imports from any CARIFORUM State from any measures taken pursuant to Article XIX of the GATT 1994, the WTO Agreement on Safeguards and Article 5 of the Agreement on Agriculture.**
3. **The provisions of Paragraph 2 shall apply for a period of five years, beginning with the date of entry into force of the Agreement.** Not later than 120 days before the end of this period, the Joint CARIFORUM-EC Council shall review the operation of those provisions in the light of the development needs of the CARIFORUM States, with a view to determining whether to extend their application for a further period. (Emphasis added.)

In this case, imports originating in the CARIFORUM economies will be excluded regardless whether such imports are in actual fact the cause of serious injury to the EU economy. The anomaly now exists that the country responsible for the surges in imports can in effect be excluded from the safeguard action⁸.

3. BILATERAL / REGIONAL SAFEGUARDS IN FTAS

Since 1990 and especially after the failure in Cancun (2003) there has been a trend towards bilateral and regional trade agreements. In the WTO and GATT 421 Regional Trading Agreements (RTAs) have been notified up to December 2008, with 230 of these agreements being in force. When taking into account RTAs that are in force but not yet notified, agreements that were signed but not yet in force, those currently being negotiated and those that are in the proposal stage, close to 400 RTAs are scheduled to be implemented by 2010. FTAs and partial scope agreements account for over 90 percent of these agreements, while customs unions account for less than 10 percent (WTO 2009).

The increase in trade liberalisation can set new demands for the protective effects of trade remedies. The import-competing sectors within member countries need to be assured that they have the means to protect themselves from the unanticipated consequences of regional liberalisation. The retention of trade remedies in regional and bilateral agreements serves the purpose of obtaining the political support necessary for the successful implementation of the agreement. The removal of intra-regional trade remedies can increase intra-regional trade, but might not enhance the welfare of member countries. The danger exists that the increase in intra-regional trade, through the decrease in intra-regional tariffs, is accompanied by discrimination against non-member countries. This is a result of administered protection that is directed at the imports of non-member states, while trade remedies are abolished against member states of the RTA (Teh et al. 2007).

In recent years most FTAs that were concluded provide for special and differential safeguard mechanisms that share the same or similar grounds as the global safeguard mechanism for the invocation of measures. According to the rules under the WTO, safeguard measures must be applied to both third-party importers and regional importers⁹. Safeguard measures may not be selective and must be applied to

all importers, including those that do not cause injury (Olsson 2006). However, bilateral safeguard mechanisms only address the adverse effects of the bilateral agreement and are for this reason only applicable between the contracting parties or member states (Kotera and Kitamura 2007).

With the conclusion of the GATT bilateral and regional safeguard mechanisms in FTAs they have become a remedy of special and limited nature. When there is an adverse effect due to an increase in imports that is the specific result of the additional trade liberalisation measures under an FTA, the importing countries can invoke these safeguard measures as stipulated under the FTA.

The global and bilateral safeguard mechanisms are different institutions dealing with problems that arise from different free trade initiatives. Regional safeguards are quite similar to the WTO global safeguard, but there are some important differences. Bilateral safeguards normally only allow for a tariff increase or a suspension of any further tariff reduction, while under the global safeguard mechanism there are also other measures such as quantitative restrictions¹⁰ available for the importing country to invoke. The bilateral safeguard mechanisms are usually seen as a temporary measure that can only be invoked during the transitional period. Most bilateral and regional safeguard mechanisms are known as transitional safeguards that can only be invoked during the period of liberalisation to comply with the RTA negotiated. Most RTAs state that these safeguards cannot be applied after the transitional period has lapsed. The time period for how long these safeguards are applicable will depend on the transitional period set out in the agreement. In some instances these measures can be extended, but only with the permission of the partner country. The global safeguard mechanism does not contain a specific time limit in the same way as the bilateral or regional safeguard mechanisms. The global safeguard can be invoked at any

time period, not only during the liberalisation period, as long as the requirements for the application of the mechanism are met. If the global safeguard is invoked there are strict time periods that must be adhered to (Kotera and Kitamura 2007).

Due to the fact that bilateral safeguard measures are only applicable to member countries, the question can be posed as to whether the application of a transitional safeguard measure, according to the regional arrangement, against a member country is allowed in terms of GATT XXIV. The only parties affected by the safeguard mechanism are those that are a part of the regional deal. In this instance, the dispute will be referred to a regional forum in terms of the agreement. This is due to the fact that the dispute resolution body of the WTO will not be able to give a specific answer to this dispute and will not be the appropriate forum. An intra-regional safeguard mechanism can, however, be brought to the WTO as part of another WTO dispute. The argument has been made that when intra-regional safeguards are imposed, the regional

deal does not comply with GATT Article XXIV. This is because the requirement of restrictions that have to be eliminated on 'substantially all the trade' in the region is not met when intra-regional safeguards are implemented. Article XXIV:8 contains a list of the continuation of some restrictions on intra-regional trade within a regional agreement. GATT Article XIX is not listed within this article and it is seen that for this reason intra-regional safeguards are not a restrictive policy that can continue within a regional trade arrangement. Pauwelyn (2004), however, states that the list in Article XXIV:8 is not an exhaustive one. The requirement in Article XXIV is only that restrictions need to be eliminated on 'substantially all the trade' and not that the elimination of all trade restrictions except those listed in the article must take place. The flexibility of Article XXIV:8 allows for the application of intra-regional safeguards, and only if the safeguard is imposed on a significant percentage of the trade within the region, can the question arise whether the remaining trade that is free qualifies as 'substantially all the trade'.

3.1 Methodology of comparison

Forty-two trade agreements were selected based on various criteria. The sample of agreements is geographically diverse including countries from all continents. The examination is divided as follows: 1) Agreements between developed and developing countries (North-South); 2) Agreements amongst developing countries (South-South); 3) Economic Partnership Agreements between the European Union (EU) and African Caribbean and Pacific (ACP) configurations. The sample further includes a mix of older agreements and more recently concluded ones, in order to determine if the procedures and conditions vary over time. The agreements are divided into certain types based on their individual characteristics. This is done as follows:

- *No safeguard measures:* Agreements which contain no safeguard measures.
- *WTO type safeguards:* Safeguards with similar characteristics to the WTO Agreements on Safeguards. These contain rigid and

detailed conditions for invocation and application. Specific reference is made to the WTO procedures with elaborate details on domestic and international proceedings.

- *GATT type safeguards:* Safeguards measures resemble the more flexible approach of GATT Article XIX. The agreements contain unspecific conditions for invocation and application. Procedural obligations are generally vague and generally invoke domestic procedures.
- *NAFTA type safeguards:* This kind of agreement contains comprehensive provisions on domestic investigations with rigid and detailed conditions for invocation. The procedural obligations are well developed and more extensive than any other type of agreement.
- *European type safeguards:* These agreements contain wider conditions for

invocation. The procedural obligations differ amongst these agreements depending on when they were negotiated.

The different types of agreements are then assessed in terms of the following criteria in order to arrive at the conclusion:

- *Conditions for invocation* - the characteristics that imports must possess in order to justify the invocation of a safeguard measure;
- *Investigation procedures* - the process to be followed when doing a safeguard investigation;
- *Applying the safeguard measure* - detailed requirements relating to the actual imposition of safeguard measures;
- *Duration of safeguard measures* - the length of time for which the safeguard measures can be applied;
- *Provisional application* - the temporary application of safeguard measures without resorting to formal investigation procedures;
- *Compensation for loss of trade* - compensation for countries that have been adversely affected by the imposition of safeguard measures;
- *Special treatment for developing countries* - flexible treatment for developing countries when applying the safeguard measures; and
- *Dispute settlement* - the resolution of disputes relating to safeguard measures.

4. THE BASIS – THE WTO AGREEMENT ON SAFEGUARDS

The rules and procedures in the Agreement on Safeguards will be briefly defined in order to form the foundation of the safeguard investigation. Many of the safeguard provisions are in many respects similar to the Agreement on Safeguards or make direct reference to the procedures and requirements contained therein. This exercise is necessary as well as useful since many of the examined agreements are modelled on the Agreement on Safeguards.

A. *Conditions for invocation* - the characteristics that import surges must possess in order to justify the invocation of a safeguard measure are described in Article 2(1) of the Agreement on Safeguards:

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.

Safeguard measures can therefore only be applied after the fulfilment of two requirements: 1) A product is being imported in increased quantities, 2) under such conditions as to threaten or cause serious injury. The term 'serious injury' is defined in the of the WTO Agreement on Safeguards (Art. 4(1)(a)) as 'the significant overall impairment in the position of a domestic industry'¹¹. Article 4(2) provides a list of relevant factors on which the injury assessment must be based, being either of an objective or quantifiable nature. The following factors which have a bearing on the industry must be evaluated by the competent authority:

- Rate and amount of the increase in imports of the product;

- Share of the domestic market taken by increased imports;
- Changes in the levels of sales;
- Changes in the level of production;
- Changes in the level of productivity;
- Changes in the level of capacity utilisation;
- Changes in the level profits and losses;
- Changes in the levels of employment.

A. safeguard action can only be authorised after an evaluation of the above factors and after it is established that there is a 'causal link between increased imports of the product concerned and serious injury of threat thereof' to the industry (Art. 4(2)(b)). If factors other than increased imports are causing the injury to the domestic industry, such injury will not be the causal result of increased imports (art. 4(2)(b)).

B. *Investigation procedures* - The procedural obligations are little developed, most likely because the Agreement on Safeguards is the first text developing the basic GATT provision. For example, there is no indication or limitation as to who has standing in requesting the initiation of a safeguard investigation (United Nations Conference on Trade and Development 2003). According to the Agreement on Safeguards the following procedures must be observed when conducting a domestic safeguard investigation:

- Designate an authority to carry out investigations in accordance with established and published procedures (Art. 3 (1));
- Public notice of investigations must be given and public hearings must be arranged during which stakeholders could present evidence and their views (Art. 3(1));

- Confidential information must be treated as such and not be disclosed without the permission of the party submitting the information (Art. 3(2));
- The authority must publish a detailed report setting out their findings and reasoned conclusion at the end of the investigation (Art. 3(1));
- The Committee on Safeguards must be notified if: i) a safeguard examination has been initiated; ii) a finding of serious injury has been made; and iii) a decision has been taken to apply a safeguard measure.
- Imports from certain countries have increased in disproportionate percentage compared to the overall increase in imports;
- Reasons for departure are overall justified;
- Conditions of departure are equitable to all suppliers of the product concerned.

Finally, derogation from the principle of non-discrimination is only allowed if the safeguard measure is taken to remedy imports causing serious injury, and not merely threatening to cause serious injury (Art. 5(2)(b)).

C. *Applying the safeguard measure* -The Agreement on Safeguards emphasises that safeguard measures can only be applied 'to the extent necessary to prevent or remedy serious injury and facilitate adjustment'. This notion is supported by the preamble which confirms that the objective of safeguard measures is 'structural adjustment and the need to enhance competition rather than limit competition in the international markets'. The type of safeguard action to be taken (increase in the bound rate of tariffs or the imposition of quantitative restrictions on imports) is decided by the investigating authorities (The International Trade Centre 1999). Where quantitative restrictions are used, Article 5(2)(a) lays down specific rules for the allocation of quotas amongst supplier countries. An agreement may be concluded regarding the allocation of shares to all countries with a substantial interest in the product. If this method is not feasible, shares are allocated to supplier countries along the proportions during previous representative periods (Art 5(2)(a)). In exceptional circumstances, Article 5(2)(b) permits departure from the non-discrimination principle by discretionary application to only one or more countries. Before such departure is allowed, consultation must be conducted with supplier countries and importing countries must clearly show the following (Art. 5(2)(b)):

D. *Duration of safeguard measures* - safeguard measures are only applied on a temporary basis until the affected industry has taken appropriate steps to prepare itself for the increased competition. Article 7(1) specifically allows safeguard 'only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment'. The maximum initial period for the application of a safeguard measure is four years (Art. 7(1)), including the duration of the provisional measures (Art. 6), if it is applied. The initial period can be extended for another four years, to a maximum of eight years (Art. 7(3)), provided that the 'safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting' (Art. 7(2)). For developing countries, additional flexibility is added and the period is further extended for a maximum period of up to ten years (Art. 9(2)). If the duration of the safeguard measure exceeds one year, the country applying the measures is obliged to progressively liberalise it during the period of application (Art. 7(4)). Furthermore, if the duration of the measure exceeds three years, the current situation must be reviewed to determine the appropriate action¹². Art. 7 (4)-(5) ensures that the repeated application of safeguard measures is limited. This is to avoid that temporary

import protection in practice is turned into a permanent closure of the domestic market by way of a series of separate measures. It would also circumvent the maximum limitations set out for the initial application and the permitted extension. Therefore a 'cooling off' period is imposed by the agreement before another measure can be applied (UN Conference on Trade and Development 2003).

- E. *Provisional application* - provisional measures may be imposed, under certain critical circumstances which are specified in Article 6. The requirements are as follows:
- If the delay to invoke normal safeguard measures would cause damage that is difficult to repair;
 - A preliminary determination adducing clear evidence that increased imports have caused or are threatening to cause serious injury;
 - The provisional measures must not be applied for more than 200 days;
 - Other conditions in the Agreement on Safeguards are met; and
 - Measures may only take the form of tariff increases which must be refunded if the subsequent investigation reveals no injury.
- F. *Compensation for loss of trade* - when applying a safeguard measure, the country applying the safeguard measure is supposed to offer adequate compensation for countries that have been adversely affected by such measures. Countries must endeavour to maintain a substantially equivalent levels of concession and other obligations *vis à vis*

the affected countries (Art. 8(1)). Provision is made in Article 8 for consultations to agree on a suitable and adequate means of compensation; however, in the event that no agreement is reached, exporting countries may take retaliatory measures. The affected country is therefore free to suspend substantially equivalent concessions and other obligations (Art. 8(2)). Such a right cannot be exercised during the first three years of application, on condition that the safeguard measure is taken based on an absolute increase in imports and otherwise conforms to the Agreement on Safeguards.

- G. *Special treatment for developing countries* - developing countries receive special and differential treatment when they apply the safeguard measures as the supplier country. As mentioned, additional flexibility is added for developing countries when applying the safeguard measure. In the case of developing countries, the period for application is extended for a further two years, up to maximum of ten years (Art. 9(2)). When the developing country is the supplier country, its imports are exempted from safeguard measures if its share in the imports of the product concerned is less than three percent. This exception does, however, not apply if developing countries with less than three percent import share collectively account for not more than nine percent of the total imports of the product (Art. 9(2)).
- H. *Dispute settlement* - consultations and disputes arising under the Agreement on Safeguards are to be conducted in terms of the provisions of GATT Article XXII - XXIII, and as elaborated by the Dispute Settlement Understanding (WTO Agreement on Safeguards, Art. 14).

5. TYPES OF SAFEGUARDS MEASURES FOUND IN FTAS

Safeguard measures in RTAs can be divided into various categories:

5.1 Agreements containing no general safeguard mechanism

This is seen as the mechanism that is the least restrictive on trade seeing that no general trade restriction measure is provided for in the agreement. Most of the examined agreements make at least some provision for safeguards measures, although there are a few which do not contain any. All of the agreements which have a developed

country as member state contain recourse of some form of safeguard measures, while only three of the South-South arrangements do not provide for a safeguard mechanism. The following of the examined agreements contain no safeguard provisions: Georgia-Armenia, Egypt-Jordan, Kyrgyzstan-Uzbekistan and Turkmenistan-Georgia.

5.2 'WTO type' safeguard mechanisms

The WTO type of safeguard mechanism has similar characteristics to the WTO Agreement on Safeguards. Similarly, these types contain rigid and detailed conditions for the invocation and applications of the measures provided. Detailed domestic and international proceedings are also provided for in these agreements. The trade-restrictive nature of this agreement is seen as very limited due to the complicated conditions supplied (Kotera and Kitamura 2007). At the very least, the agreements containing 'WTO type' safeguards include simple references to the Agreement on Safeguards. Some agreements include no procedural measures and refer back to the Agreement on Safeguards for guidance. The European Free Trade Association (EFTA)-Lebanon Agreement (Art. 18) specifically states that all the provisions of GATT Article XIX and the WTO Agreement on Safeguards are applicable between the parties. The Southern African Development Community (SADC) Trade Protocol invokes Art. 4 of the Agreement on Safeguards when doing an investigation¹³ while all investigation procedures under the South Asian Free Trade Area (SAFTA) also have to comply with the provisions under relevant GATT provisions and the Agreement on Safeguards. The remainder of the agreements with 'WTO type' safeguards contains more elaborate provisions.

A. Conditions for invocation:

The characteristics that import surges possess in order to justify the invocation of a safeguard measure are on the whole similar to those set out in the Agreement on Safeguards. The requirements

are essentially the same in that products are being imported in increased quantities under such conditions as to cause serious injury (sometimes referred to as 'damage'¹⁴) or threat thereof. The only prerequisite is that these surges in imports be a result of the reduction or elimination of duties of tariffs in terms of the bilateral or regional agreement, whichever the case may be. It follows that bilateral or regional safeguards can only be invoked if the injury to the domestic industry is caused by the liberalisation in the preferential arrangements. Despite this condition, many of the agreements still retain the right to resort to global safeguards¹⁵. In some instances, partner countries are excluded from the imposition of global safeguard measures; this means that the safeguard measures are applied to all other WTO member states except the countries which are part of the preferential agreement. In all of these instances, partner countries are excluded from safeguard actions if their imports have not been the substantial cause of the serious injury or are threatening to cause the injury. The examined agreements further provide several factors which the injury investigation must take into consideration. Some of the agreements¹⁶ refer to the procedure in the Agreement on Safeguard for direction in determining 'serious injury' while others stipulate their own procedures. Other agreements¹⁷ do not make direct reference to the Agreements on Safeguards, but nevertheless mirror the factors mentioned in the WTO agreement. Considerations for the evaluation of 'serious injury' include changes in levels inventories, exports and wages in addition to

those factors mentioned in the Agreement on Safeguards (rate and amount of the increase in imports of the product; share of the domestic market taken by increased imports; changes in the levels of sales, production, productivity, capacity utilisation, profits and losses, and employment). The Agreement on Safeguards clearly states that there must be 'a causal link between the increased imports of the product concerned and the serious injury. The requirement for a 'causal link' has been incorporated into most of the bilateral and regional agreements; however, two of the agreements (the Australia-Thailand FTA and the New Zealand FTA) do not specifically mention this 'causal link'.

B. Investigation procedures:

As with the WTO Agreement on Safeguards, the procedural rules and obligations of the 'WTO type' agreements are not comprehensive. Several of the examined agreements¹⁸ make direct reference to the process stipulated in the Agreement on Safeguards while others nevertheless contain identical provisions without mentioning the procedures under WTO law¹⁹. The two remaining agreements (Japan-Mexico and Israel-Mexico) include detailed and very specific obligations which must be observed in safeguard investigations. Although the requirements are in line with the procedure described in the Agreements on Safeguards, there are a number of additional parameters. For instance, the Israel-Mexico FTA (Art. 5-04) clearly indicates who had the standing to request the initiation of a safeguard investigation and also the information to be furnished by the petitioner. The Japan-Mexico FTA (Art. 55(4)) places a timeline on the duration of the investigation, in that investigation must be completed, at the latest, within eighteen months from its initiation. The FTA (Art. 55(6)) further provides a list of relevant information which must be provided to the investigating authority. Other procedural obligations resemble those contained in the Agreement on Safeguards.

C. Applying the safeguard measure:

The type of safeguard action to be taken in bilateral and regional agreements is specifically dealt with in all the 'WTO type' agreements save for the three agreements²⁰ which invoke

the provisions as stipulated in the Agreement on Safeguards. All of the remaining agreements (except for the Singapore-Jordan and Pakistan-China FTAs) confirm that safeguard measures can only be applied to the minimum extent necessary to prevent or remedy the injury and facilitate adjustment. The safeguard measures indicated in the agreements consist of the following:

- Suspension of further tariff or duty reductions;
- Increase the tariff or duty to the level of the Most Favoured Nation (MFN) rate at the time the action is taken or the MFN applied rate at the date of entry into force, whichever one is less.

In addition, some agreements²¹ also indicate the measures to be taken in the case of seasonal products. Mention is not made of quantitative restrictions, as bilateral and regional safeguard actions will only be invoked against partner countries.

D. Duration of safeguard measures:

The duration of safeguard measures are typically shorter than the time frames contained in the Agreement on Safeguards. It varies from one year to eight years, with a seemingly arbitrary imposition on the respected timeframes. The most lenient is the SADC Trade Protocol which is identical to the Agreement on Safeguards - an initial period of four years with the total period not allowed to exceed eight years. The EFTA-Chile and Singapore-Jordan FTAs are the most conservative by setting the limit for a safeguard measures at only one year. In exceptional circumstances, an extension of two years is allowed bringing the total to a maximum of three years. The Israel-Mexico FTA (Art. 5.02(2) (d)) does not distinguish between initial and extended periods; it simply states that no action may be taken for a cumulative period exceeding two years. Most of the examined agreements make provision for the progressive liberalisation of the imposed safeguard measure, except for the Singapore-Jordan and Pakistan-China FTAs. While some agreements²² are silent on the repeated imposition (or 'cooling off' period) of safeguard measures on the same

products others contain specific time frames on when the safeguard can be reapplied. Others again make it clear that a safeguard measure may not be imposed on the same good twice. Certain agreements also exclude safeguard actions on products which have been subject to safeguard measures under WTO agreements. The bilateral and regional safeguard measures are mechanisms dealing with challenges arising from free trade and goods liberalisation. In these, the safeguard is only supposed to be applicable for the transition period, until the sensitive industry has adapted to the increased competition. Some agreements are clear - emphasising that no bilateral or regional safeguard measure will be maintained beyond the expiration of the transition period - while other agreements are silent on this point. The Israel-Mexico FTA allows bilateral safeguard actions after the expiry of the transition period if serious injury arose from the operation of the agreement, but only with the consent of the other party.

E. Provisional application:

All of the North-South arrangements involving a developed country, except the United States-Chile FTA, provide for the provisional application of a safeguard.²³ The conditions under which the provisional measures can be imposed generally reflect what is required under the Agreement on Safeguards. The duration of the provisional safeguard measure is specified as either 200 days in most instances and 120 days in others. Only one of the North-South agreements, namely the SAFTA, contains a provisional safeguard measure.

5.3 'GATT type' safeguard mechanisms

The characteristics of the safeguard measure resemble the more flexible mechanisms found in GATT Article 19. The conditions for the invocation and application of the mechanism are largely unspecific and sometimes vague while the domestic and international proceedings are generally of a political nature (Kotera and Kitamura 2007). The provisions are scarce on details and more compact than provisions found in other agreements. Unlike the 'WTO type' arrangements, none of the bilateral or regional

The requirements are the same as provided for under the Agreement on Safeguards.

F. Compensation for loss of trade:

Only the SADC Trade Protocol does not provide for compensation. In all other instances of examined 'WTO type' agreements²⁴, provision is made for trade compensation equivalent to the value of the imposed safeguard measures. If the compensation cannot be mutually agreed, parties may resort to retaliatory action. The process is in line with what is required under the Agreement on Safeguards; the only difference is the time frame provided for the consultations and the procedure for retaliatory action.

G. Special treatment for developing countries:

Only one agreement affords special and differential treatment for developing countries. The SAFTA agreement states that safeguard measures must not be applied against products originating in a Least Developed Country (LDC), as long as its share of imports of the product concerned does not exceed five percent, or provided that LDCs which collectively share less than five percent of the imports do not account for more than fifteen percent of the total imports regarding the product concerned.

H. Dispute settlement:

In all of the examined 'WTO type' agreements, all partner countries have recourse to the dispute settlement procedure stipulated in the various bilateral or regional agreements.

safeguards in the examined agreements²⁵ make direct reference or invoke any of the procedures contained in the Agreement on Safeguards²⁶. Of the examined agreements, only six display 'GATT type' characteristics: EFTA-SACU, US-Albania, US-Israel, South-East Asian Nations (ASEAN), COMESA and India-Sri Lanka.

A. Conditions for invocation:

Only the EFTA-SACU FTA contains similar conditions for the invocation of safeguard measures as those

of the Agreement on Safeguards. The US-Albania FTA uses slightly different language by stating that either actual or prospective imports must cause or threaten to cause market disruption. Here 'market disruption' is determined by applying the domestic laws of the importing party to the examination. A caveat is included, however, which requires such domestic procedures to be transparent and to afford the affected party the opportunity to submit its views. The conditions in the US-Israel FTA reflect those contained in the Agreement on Safeguards with the exception that no mention is made of the safeguard investigation. The agreement does, however, provide for mandatory consultations before any safeguard measure is taken. The ASEAN FTA also requires parties to seek acceptable solutions before implementing any safeguard action, but differs in that only particular products eligible under the Common Effective Preferential Tariff (CEPT) scheme²⁷ can be the subject of safeguard action. The same proviso is applicable to the India-Sri Lanka FTA where only the products that are subject to preferential treatment may be suspended under the safeguard action. This is somewhat different from the explicit prerequisite in other agreements whereby the injury must be the result of the reduction or elimination of duties or tariffs. The COMESA agreement takes yet another view; if there are any 'serious disturbances' in the economy which are the result of Chapter 6²⁸ of the agreement, the necessary safeguard measures may be taken. 'Serious disturbances' is not defined anywhere in the agreement and the only requirement member states have is to inform the Secretary General and other member states before taking the safeguard action. COMESA has, however, adopted a set of trade remedy regulations which are applicable to the invocation of safeguard, anti-dumping, subsidies and countervailing measures.

B. Investigation procedures:

There are few procedural obligations present in 'GATT type' agreements. None of the agreements specifically refer to a process of investigation. While some provide for consultations in order to arrive at an amicable solution, others allow for the immediate imposition of safeguard measures without resorting to an investigation

of any kind. The SACU-EFTA agreement requires the party imposing the safeguard to supply the Joint Committee with all relevant information, with the view to seeking an acceptable solution. If the Joint Committee cannot find a mutually acceptable solution, the importing party may invoke a safeguard action. The US-Albania FTA also provides for consultations, with the twofold aim to present and examine the factors causing the 'market disruption' as well as finding the means to prevent or remedy such disruptions. The US-Israel and ASEAN agreements also afford the possibility of consultations in accordance with the general consultations procedure provided for in the agreements²⁹. In the case of 'serious injury' the ASEAN FTA (Art. 6(1)) actually provides that preferences can be suspended provisionally without resorting to investigation or consultation. The relevant article (Art. 6(3)) requires immediate notification of such action; but it is only after such notification that the action may be subject to consultations. The same situation arises in the India-Sri Lanka FTA where consultations are provided for after the fact, in order to reach a mutually acceptable solution to remedy the situation. The COMESA agreement does not stipulate any procedure relating to investigations or consultations; but as mentioned before, the article has been expanded by the COMESA trade remedies regulations.

C. Applying the safeguard measure:

The remedies in the 'GATT type' agreements are more limited than those provided for in other agreements. Most of the agreements mention the suspension of the reduction in duties³⁰, the suspension of preferences³¹ and/or an increase in duties³² as the only measures to be taken in the case of injury. The EFTA-SACU agreement adds that priority must be given to the measure which least disturbs the functioning of the agreement. The US-Albania FTA has a more comprehensive approach by allowing for the imposition of quantitative restrictions, tariff measures or any other appropriate measures in order to prevent or remedy the market disruptions. Priority must also be given to the measures which cause the least disturbance to the achievement of the goals in the agreement. In addition, the parties are permitted to take appropriate measures

to ensure the compliance of partner countries with the imposed restrictions. The COMESA agreement is silent on remedies, but the COMESA trade remedies regulations provides for the use of increased tariffs, additional similar charges or quantitative restrictions.

D. Duration of safeguard measures:

The 'GATT type' agreements are often vague and unclear on the duration of safeguard action. Only the EFTA-SACU agreement is specific on the duration of imposition, namely an initial period of one year and extendable up to a maximum period of three years. The US-Albania, US-Israel, India-Sri Lanka and COMESA agreements are silent on the duration of the safeguard, although the COMESA trade remedy regulations stipulate a period of four years for initial application, which can be extended up to a maximum of eight years. The ASEAN FTA is vague, only indicating that a measure is put in place 'for such time as may be necessary to prevent or remedy such injury' (Art. 6(1)).

E. Provisional application

All of the examined agreements except the US-Israel FTA provide for provisional measures of some sort. The EFTA-SACU agreement and the COMESA trade remedies' regulations contain detailed provisions which display similar characteristics to those found in the WTO Agreement on Safeguards. Critical circumstances must be present, a preliminary determination must be done and the notification procedures must be followed.³³ The remainder of the agreements (ASEAN and India-Sri Lanka) are unclear on the precise requirements for the invocation of

provisional measures. The only obligation is that parties enter into consultations immediately after provisional action is taken. Agreements are silent on the duration of the provisional measure, except for the EFTA-SACU FTA, where the maximum period for a provisional measure is indicated as six months.

F. Compensation for loss of trade:

Since the examined agreements predominately provide for a process of consultations, instead of one for investigations, compensation for loss of trade is limited. The consultations generally provide for a weighing of interests to find means and ways of preventing or remedying the injury. None of the agreements specifically refer to compensation when invoking a safeguard measure. Only the COMESA trade remedies' regulations stipulate detailed guidelines in affording compensation to affected parties, similar to the provisions in the WTO Agreement on Safeguards.

G. Special treatment for developing countries

None of the agreements make provision for the special and differential treatment of developing countries.

H. Dispute settlement:

Most of the agreements provide for dispute settlement by means of consultation, arbitration and conciliation instead of formal dispute settlement procedures. The only exception is the COMESA Treaty which established the Court of Justice to ensure adherence to the application of the treaty.

5. 4 'NAFTA type' safeguard mechanisms

This kind of agreement contains comprehensive provisions on domestic investigations with rigid and detailed conditions for invocation. The procedural obligations are well developed and more extensive than any other type of agreement. 'NAFTA type' agreements are in many respects similar to the Agreement on Safeguards, but do not provide for a dispute settlement mechanism concerning the application of safeguard

measures. In all of the examined agreements the rights of the parties to request the establishment of an arbitration group is explicitly excluded. The 'NAFTA type' mechanisms are only present in North-South arrangements where a developed country is party to the agreement. The examined agreements which display 'NAFTA type' characteristics are NAFTA, Canada-Chile, Canada-Costa Rica and Taiwan-Panama agreements.

A. Conditions for invocation:

The conditions for invocation are similar to those provided for in other agreements, even though some of the procedures are described in more comprehensive terms. The requirements for invocation are the same as elsewhere; the only difference is the determination of increased imports. Under the WTO agreement the phrase 'increased quantities' is interpreted more broadly than the standard provided for in the 'NAFTA type' agreements. 'Increased quantities' in the Agreement on Safeguards are determined in absolute or relative terms in relation to domestic production while the increase in the 'NAFTA type' agreements is decided only in absolute terms. The exception is the Taiwan-Panama agreement which is initially silent on the precise standard to be used, but later on allows for the preparation of import data either in absolute or relative terms to domestic production. As with other bilateral and regional safeguards these surges in imports must be a result of the reduction or elimination of duties under the respective agreements and can only be applied during the transition period. Parties nevertheless retain their rights and obligations under GATT Article XIX and the WTO Agreement on Safeguards. Only the Canada-Costa Rica FTA contains no exceptions to exclude partner countries from the operation of global safeguards. The other 'NAFTA type' agreements can exempt partner countries from global safeguard action unless the imports from that country account for a substantial share of total imports and that imports contributed importantly³⁴ to the serious injury or threat thereof. Unlike the other type of agreements examined in this study, meticulous guidelines are included on how such a determination must be made. In addition, those three agreements (NAFTA, Canada-Chile and Taiwan-Panama) include detailed procedures that must be followed when taking such action.

All four agreements share identical provisions on the manner in which 'serious injury' is determined. The respective investigating authorities are obliged to consider 'all relevant information appropriate to the determination it must make'. The factors of a quantifiable nature which

must be evaluated by the investigating authorities are identical to those stipulated in the WTO Agreement on Safeguards. The similarities between the Agreement and the 'NAFTA type' agreement are not surprising considering that both refer to the domestic safeguard provisions of the United States, the dominant country in the NAFTA arrangement (Kotera and Kitamura 2007). As with the Agreement on Safeguards, a causal link must be established between the increased imports and serious injury or threat thereof, before any affirmative determination can be made. The Taiwan-Panama FTA does not mention the prerequisite of a causal link; but interestingly enough, it provides for 'causal link' in its list of definitions in the beginning of the safeguard chapter.

B. Investigation procedures:

In contrast to the WTO Agreement on Safeguards and the other type of examined agreements, the 'NAFTA type' agreements contain thorough and extensive rules on investigation procedures. Each of the examined agreements include a chapter dedicated to the administration of safeguard action proceedings. The chapters deal in detail with the following issues:

- *Institution of proceedings* - which entities have the standing to institute a proceeding and the requirements related thereto.
- *Contents of a petition or complaint* - the information which must be included in the application pertaining to the product description, applicant/representative, import data, domestic production data, data showing injury, cause of injury and criteria for inclusion. These obligations are well developed and serve as a useful guideline on the contents of an application.
- *Public inspection* - an application must be made available for public inspection, save for the confidential information.
- *Consultations (only the Taiwan-Panama FTA)* - parties must hold consultations aimed at clarifying the situation. The provision sets out the procedure and obligations of such consultations.

- *Notice requirements* - the investigating authority must publish the notice of the institution of proceedings in the official journal of the party or in a nationally circulated newspaper (only in the case of Taiwan-Panama). The following information must accompany the notification: the applicant, the product concerned and its tariff subheading, the nature and timing of the determination to be made, the time and place of public hearings, dates of deadlines for filing briefs, statements and other documents, the place where the filed documents may be inspected and the name, address and telephone number of the office to be contacted for more information.
- *Public hearing* - the investigating authority must provide a public hearing to give all interested parties the opportunity to present their views.
- *Confidential information* - the investigating authority must adopt and maintain procedures for the treatment of confidential information.
- *Evidence of injury and causation* - all the relevant information must be compiled when determining the extent of the injury and a causal link must exist between the import surges and injury.³⁵
- *Deliberation and report* - provision is made for deviation in all of the examined agreements except the Canada-Costa Rica FTA from the stipulated procedures in the event of global safeguard action on perishable agriculture goods or if 'critical circumstances'³⁶ are present. Afterwards a report must be published indicating the results of the investigation and the reasoned conclusion on all pertinent issues of law and fact.
- *Extensions (only Taiwan-Panama FTA)* - rules relating to the extension of a bilateral measure after its expiry.

All of the agreements require that parties ensure the consistent, impartial and reasonable

administration of its laws, regulations, decisions and rulings governing safeguard proceedings. The determination of serious injury is entrusted to the competent authorities but their decision is subject to review as provided for in domestic regulation.

C. Applying the safeguard measure:

The remedies provided for in the 'NAFTA type' agreements are similar to the remedies in the 'WTO type' agreements. The type of safeguard action is dealt with explicitly in all of the examined agreements and confirms that safeguard measures can only be applied to the minimum extent necessary to remedy or prevent the injury. The remedies included in the agreements are the suspension of further tariff or duty reductions or an increase in the tariff or duty to the level of the MFN rate at the time the action is taken or the MFN applied rate at the date of entry into force, whichever one is less. All of the examined agreements, except the Taiwan-Panama FTA, stipulate measures to be taken in the case of seasonal products. Parties may increase the rate of a duty not to exceed the MFN applied rate of duty that was in effect on the product for the corresponding season immediately preceding the entry into force of the respective agreements.

D. Duration of safeguard measures:

The duration of the safeguard measures in the 'NAFTA type' agreements is typically three years. The Taiwan-Panama FTA distinguishes between an initial period of application and the extended one: two years for initial application which is extendable for a period of one consecutive year. The proceedings for the extension are set out in the chapter on administration proceedings as discussed in Paragraph B above³⁷. The only other agreement allowing extensions is NAFTA. Certain products which are listed in Category C+ of Schedule to Annex 302.2 can be subject to an extension of one year on the condition that the duty applied during the initial period of relief is substantially reduced at the beginning of the extended period. Safeguard actions on the same goods may only be applied twice (except in the

case of the NAFTA agreement which prohibits more than one safeguard action during the transition period) and no safeguard actions may be taken beyond the expiration of the transition period, except with the permission of the partner countries. The applicable rate of the duty after its first application is also explicitly stipulated in all of the examined agreements. The Taiwan-Panama FTA simply states that the applied rate of import must be same as the rate in the tariff liberalisation schedule. The provisions in the other three agreements (Canada-Chile, Canada-Costa Rica and NAFTA) are broader and provide that the rate must be the one that would have been in effect one year after the initiation of the action. At the beginning of the January following the action, the agreements allow for a choice between the applicable rate set out in the liberalisation schedule or the elimination of the tariff in equal annual stages ending on the date set out in the liberalisation schedule. The three agreements (Canada-Chile, Canada-Costa Rica and Taiwan-Panama) which allow for a second imposition of safeguard measure on the same good stipulate detailed conditions on when and how a second safeguard action can be imposed.

E. Provisional application:

Only the Taiwan-Panama FTA provides for the provisional application of safeguard measures. It is identical to the provision under the WTO Agreement on Safeguards, except for the duration of the measure which is set at 120 days. None of the other examined agreements make provision for provisional application; this is most likely due to the fact that due process is a cornerstone of the 'NAFTA type' agreements.

F. Compensation for loss of trade:

All of the examined agreements provide for compensation in the form of concession having equivalent trade effects or concessions equivalent to the value of the imposed safeguard measures. If parties cannot agree on the appropriate compensation, they may resort to retaliatory action. The measures must be in place for the minimum period necessary to achieve the equivalent effects of the imposed safeguard.

G. Special treatment for developing countries:

None of the agreements provide for the special and differential treatment of developing countries regarding safeguard measures.

H. Dispute settlement:

'NAFTA type' agreements rather opt for closer consultation in the event of safeguard measures. All of the examined agreements explicitly prohibit parties to request the establishment of an arbitration panel for any *proposed* emergency action. The Taiwan-Panama FTA uses slightly different language by prohibiting the establishment of an arbitration group *before the application* of any safeguard measure. It must be emphasised that the prohibition of an arbitration panel is only applicable before the safeguard action has been taken. This distinction is important, as safeguard actions have in the past been referred to arbitration panels³⁸. In the NAFTA-Mexico Broom Corn Brooms case, a panel was established to adjudicate on the validity of safeguard measures. In this case the panel was only established after the safeguard action had been taken. The prohibition of the arbitration panels is consistent with the prominence of due process in the 'NAFTA type' agreements and the philosophy of resolving disagreements on an amicable level before they spiral into full-blown disputes.

5.5 'European type' safeguard measures

What differentiates this type of agreement from the others is the existence of wider conditions for invocation. Where all other agreements invoke the normal causation of 'serious injury' as a standard to trigger safeguard measures, the 'European type' safeguard mechanisms contain a broader definition. In addition to the 'serious injury' standard, another scenario is included under which safeguard measures can be imposed. '*Serious disturbances in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region of the importing party*' provides a new and additional category for the invocation of safeguard measures. Despite the broader conditions for invocation, this type of agreement still provides detailed provisions on the manner in which the measures are to be applied. This can be explained by the tendency of the EU for more flexible safeguard mechanisms due to its strong political needs. The preferred strategy has therefore been to relax the requirements for invocation while attempting to minimise its negative effect through strict regulations on the application of safeguard measures (Kotera and Kitamura 2007). There are four North-South agreements³⁹ which display the 'EU type' characteristics while only two South-South agreements⁴⁰ follow the same pattern. The EPA agreements have also been examined to reflect the latest negotiations and texts on the safeguard mechanisms. To date⁴¹, only the CARIFORUM EPA has been signed while the other six EPA agreements have been initialled by the interested parties. Under international treaty law, initialling an agreement demonstrates that the text is authentic and ready for signature. An initialled text does not itself impose any obligations on the parties but the parties to an agreement are only under an obligation to implement its terms once it has entered into force. On signature of the text, a country enters into an obligation not to defeat its object and purpose prior to its entry into force. None of the agreements have entered into force (except for the parts which were provisionally implemented), but it is reasonably certain that the text on safeguard measures will not change from what is currently tabled. All of

the seven EPA agreements contain almost identical safeguard provisions and therefore reference is made to the EPA agreements as a whole and not to the individual texts. Regarding the asymmetry principle applicable to safeguard measures, it is important to note that the EU cannot impose any bilateral safeguard measures on ACP exports. The EU can however impose safeguard measures on ACP exports which are limited to the EU's outermost regions⁴². The same situation is applicable in the case of the Trade, Development and Cooperation Agreement (TDCA)⁴³.

A. Conditions for invocation

The characteristics that import surges must possess in order to justify the invocation of safeguard measures are what set such measures apart from the other type of agreements. The typical threshold for increased imports in the other examined agreements is causation of 'serious injury'. The 'European type' agreements contain additional conditions that allow safeguards measures to be invoked. The EC-Albania, EC-Mexico, EFTA-Mexico, Romania-Turkey and Croatia-Turkey agreements specify the threshold of 'serious disturbances' in addition to that of 'serious injury'. Serious disturbances are defined as issues which could bring about serious deterioration in the economic situation of a region of the importing party. The TDCA invokes a threshold of 'serious deterioration', but no definition is given to explain what this means. This deterioration is, however, only applicable to the economies of South Africa and the outermost regions of the EU; no mention is made of the EU economy. This implies that the EU party can not impose bilateral safeguard measures except if its outermost regions are affected by a surge in imports. The EPAs also refer to 'serious disturbances', but in particular those disturbances that cause major social problems. The EPA agreements further add conditions which cause 'disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets'. The EPA agreements do not contain any special safeguard provisions, but the bilateral safeguard mechanism has been extended

to include certain agriculture products. The problem with this type of agreement is that its application is very broad and that the agreements are all silent on the manner in which 'serious injury' or 'serious disturbances' is determined. With the 'serious injury' determination, guidelines can be found in the applicable WTO rules and dispute settlement procedures, but the determination of 'serious disturbances' is somewhat vague and unclear. What exactly is meant by 'serious disturbances' and how would the investigating authorities determine such threshold? No direction in determining the threshold of 'serious disturbances, or even a definition to assist the petitioners, is provided for in any of the examined agreements. The agreements are further silent on the requirement of a 'causal link'. Only some of the agreements specifically mention the right to resort to global safeguards. As with the TDCA, bilateral measures cannot be imposed by the EU itself, except if the outermost regions are affected. The EC-Albania FTA and the TDCA confirm the applicability of GATT Article XIX and the WTO Agreement on Safeguards. The interim EPAs include a similar provision, but exclude the partner countries in differentiating degrees from the imposition of safeguard measures. The EPAs provide for the use of multilateral safeguards including the Special Agriculture Safeguard under Article 5 of the WTO Agreement on Agriculture. However, as some ACP countries are not party to this agreement, they will be unable to use the mechanism. Those ACP countries who did not undertake tariffication during the Uruguay Round are also unable to employ the Special Agriculture Safeguard⁴⁴ - despite being parties to the Agreement on Agriculture. In these instances the mechanism will only be available to the EU. The EU does initially exempt the ACP imports from safeguard action, but only for the first five years. This is in contrast to some of the other agreements which provide for the exclusion from safeguard actions under specific conditions.⁴⁵

B. Investigation procedures

The procedural obligations contained in the 'European type' agreements are not as extensive as those provided for under the 'NAFTA

type' or 'WTO type' agreements. The processes stipulated in the examined agreements are similar to each another. According to the 'European type' agreements, the following procedures must be observed when doing a safeguard investigation:

- Difficulties must be referred to the designated investigating authority for examination. The authority can take any decision to put an end to such difficulties.
- The investigating authority must be provided with all relevant information.
- If no solution is found within 30 days (or one month in the case of Croatia-Turkey) of the referral, the importing party may adopt the appropriate measures to remedy the situation.
- Any safeguard measure must immediately be notified to the relevant investigating authority. The measure will then be subject to periodical consultations particularly with a view to establishing a timetable for the abolition of such safeguard measures.
- Priority must be given to measures that will least disturb the functioning of the agreements.

C. Applying the safeguard measure

In the examined agreements, safeguard remedies must not exceed what is necessary to remedy or prevent 'serious injury' or 'serious disturbances, whichever the case may be. This qualification is extended in the Croatia-Turkey FTA (Art. 22(4)) by ensuring that safeguard measures are not in excess of the damage caused by the difficulties. The stipulated remedies are similar to those provided for in the other types of agreements and include the suspension of further reduction of the applicable rates or duties and increase in the rate of duty for the concerned product. The EFTA-Morocco and Romania-Turkey agreements are silent on the exact type of remedy but measures must be restricted to what is necessary to rectify the situation. The EFTA-Morocco FTA (Art. 25(4)),

however, adds an important caveat:

4. The measures taken by Morocco against an action or an omission of an EFTA State may only affect the trade with that State. The measures taken against an action or omission of Morocco may be only taken by that or those EFTA States the trade of which is affected by the said action or omission.

The result will be a more focused approach: only the countries responsible for the surge in imports are affected. The TDCA provides an increase or reintroduction of customs duties, but this is based on a more technical calculation:

3. Customs duties on imports applicable in South Africa to products originating in the Community introduced by these measures may not exceed the level of the basic duty or the applied MFN rates of duty or 20% ad valorem, whichever is the lower, and shall maintain an element of preference for products originating in the Community. The total value of all imports of the products which are subject to these measures may not exceed 10 percent of total imports of industrial products from the Community during the last year for which statistics are available.

South Africa has the choice between whichever one is lowest of the following three remedies: 1) the level of the basic duty; 2) the applied MFN rates; or 3) 20% ad valorem. An element of preference must, however, be maintained on the imports - meaning that the imposed duties can not be higher than the MFN rate applicable to third parties. This is further qualified by a limit on the total value of imports subject to the safeguard measures which may not exceed 10% of the total imports of industrial products from the EU during the last year for which statistics are available. The EPAs also provide for the suspension of further reduction of the applicable rates or duties as well as an increase in the rate of duty for the concerned product. A similar qualification is maintained as the one in the TDCA - duties may not increase to a level which exceed the duties that are applied to

other WTO members. In addition to the typical remedies stated above, the EPAs include tariff quotas to be imposed on the product concerned. No specific rules or guidelines are, however, incorporated to regulate the allocation of quotas between suppliers.

D. Duration of safeguard measures

The duration of the safeguard measures for 'European type' agreements vary between one and four years. The Croatia-Turkey, Romania-Turkey and EFTA-Morocco agreements are silent on the exact duration, but state that the measure can only be applied for such time as may be necessary to remedy the situation. The procedures contained in these two agreements refer not only to the safeguard measures, but also to dumping, structural adjustment and re-export and serious shortages. These vague provisions are most likely the result of these general procedural obligations. The EPAs also confirm that safeguard measures are only to be taken for such time as may be necessary to prevent or remedy 'serious injury' or 'serious disturbances'. This is, however, more precisely defined as a period not exceeding two years. This can be extended for another two years if the conditions justifying the imposition of the safeguard continue to exist. If the CARIFORUM member states apply the safeguard measure, or where the EU applies a measure limited to the territory of one or more of its outermost regions, the measure may be applied for an initial period of four years, extendable to a maximum of eight years. The TDCA states that a safeguard measure can be applied for a maximum of four years, but this can be extended by the designated authority in exceptional circumstances. The remaining agreements (EC-Albania and EC-Mexico) stipulate an initial period of one which can be extended for another two years, up to a maximum of three years. In the case of EC-Albania, EC-Mexico and the EPAs, safeguard measures which exceed one year must progressively be liberalised. The other examined agreements are silent on this point arguably due to the general nature of the procedural obligations. The Croatia-Turkey, Romania-Turkey and EFTA-Morocco agreements do not mention a 'cooling-off' period before a safeguard meas-

ure can be invoked on the same good; but the Croatia-Turkey and EFTA-Morocco agreements provide for regular consultations with the view to their relaxation, substitution or abolition, when conditions no longer justify their maintenance⁴⁶. The 'cooling-off' period provided for in the EPAs is one year while the period stipulated in other agreements⁴⁷ is three years.

E. Provisional application

All of the examined agreements include recourse to provisional measures, which are referred to in certain agreements as precautionary measures. The requirements for the invocation of provisional measures are more basic than in other agreements; they simply state that where exceptional and critical circumstances make prior information or examination impossible, provisional safeguard measures can be applied. The only other obligations on the country taking the provisional measure is to inform the partner country. Only the EPAs contain slightly more comprehensive provisions that deal with the duration of the provisional measure. The limit is 200 days when measures are taken by the CARIFORUM member states or when measures are taken by the EU concerning the territory of its outermost members. The duration of the provisional action is limited to 180 days when the EU takes the measure. By implication this means that the EU is allowed to impose provisional safeguard measures, even though the EU is prohibited from imposing bilateral safeguard measures. The requirements for the imposition of provisional measures are the same as in the other 'European type' agreements.

F. Compensation for loss of trade

Only the EC-Mexico FTA makes provision for compensation. None of the other agreements mention any kind of compensation. The procedures

in the EC-Mexico FTA correspond to those in the other types of examined agreements. Concessions must be offered which are equivalent to the value of the imposed safeguard measures. If the parties are unable to agree on the appropriate compensation, the affected party may take retaliatory action.

G. Special treatment for developing countries

In the EPAs, distinction is made between the EU party and the EU's outermost states. Where an EU party applies for a safeguard measure limited to the territory of one or more of its outermost regions, the safeguard measures can be imposed for an additional period. Although strictly speaking the outermost territories are not developing countries, these regions do have severe economic handicaps, which include remoteness, insularity, difficult topography, inadequate transport services and limited market opportunities. Here the initial period is extended to two years and the overall period is increased a maximum of eight years. The same extension is applicable when the ACP member states apply safeguard measures⁴⁸. None of the other agreements provide for specific special and differential treatment⁴⁹.

H. Dispute settlement

No formal dispute settlement procedures are provided for in the EFTA-Morocco, Romania-Turkey and Croatia-Turkey agreements. The remaining agreements allow for the settlement of disputes by means of a binding decision. In the case of the EPAs, the global safeguards are not subject to the EPA dispute settlement procedure, while the bilateral safeguards are not subject to the WTO dispute settlement procedure.

6. SPECIAL SAFEGUARDS IN FTAS

Regional Trade Agreements can include various types of safeguard mechanisms. These include global and regional safeguards. Most bilateral or regional trade agreements contain provisions for special safeguards measures (Brown and McCulloch 2004).

These safeguards are special in the sense that they apply in situations where protection could usually not be otherwise obtained. Special safeguard measures are triggered by a different mechanism than normal safeguard actions, which are typically linked to price or quantity thresholds (Teh et al. 2007). Member countries are able to implement additional duties in response to an increase in the volume of imports or a decrease in the price of imports from the exporting country (Kjöllerström 2006). Special safeguard mechanisms normally have a lower injury threshold for safeguard application and/

or allow countries to act on imports only from a specific source, rather than total imports (Brown and McCulloch 2004).

These safeguard measures provide additional protection to traditionally sensitive sectors like agricultural products and textiles and clothing. The RTA member countries are typically allowed to impose additional duties on these sensitive imports once the indicated price or volume threshold is crossed. However, the tariff should not exceed the Most Favoured Nation rate. In the implementation of these measures the injury to the domestic industry need not be demonstrated. The measures can be invoked without any serious injury or a threat of serious injury to the domestic industry and they normally contain their own time period. Most measures can extend past the transitional period provided for in the RTA (Teh et al. 2007).

6.1 Textile and apparel safeguard measures

A special textile safeguard mechanism is a standard feature of almost all US FTAs. These agreements normally contain special provisions regarding the notification requirements, strength and length of the measure, the requirements for compensation, the option of recourse to retaliation and the determination of serious damage. The various agreements containing a provision on textiles also differ in many ways. The duration of the special safeguard can differ from agreement to agreement. Some agreements allow for the invocation of safeguards to take place within 10 years after a tariff has been eliminated, while others limit the invocation of the measure to the transitional period provided for tariffs to be eliminated. The contemplation of the renewal of the measure, under certain conditions, is allowed for by some agreements, while others do not allow a renewal of the measure. The requirements for an investigation to take place also vary. Some allow for the implementation of the mechanism to take place without the launch of an investigation, some require a prior investigation before action can be taken and others have no text on the issue. Normally most agreements set out rules

preventing the concurrent invocation of safeguards under a special safeguard mechanism (Hufbauer and Burki 2006). The US-Morocco, US-Chile, Canada-Chile FTAs and NAFTA provide a special mechanism to address a surge in textile and clothing imports.

The sections in the US-Morocco and US-Chile FTAs regarding safeguards on textiles and apparel are identical. The measures provide for bilateral emergency action when a surge of imports results in injury to the industry of the importing member. The measure consists of an increase in the duty on the imported good to a level that does not exceed the lesser of the MFN rate when the action is taken or the MFN rate when the agreements came into force. An investigation is needed before action can be taken with written advance notice to the exporting member. Consultations can also be entered into by the request of one of the parties. The member taking the safeguard action needs to compensate the other party in the form of concessions.⁵⁰

The Canada-Chile FTA and NAFTA contain similar safeguard provisions and are quite

detailed on the type of measures that can be taken and the goods covered by the provisions. In both agreements the bilateral emergency actions that can be taken on textiles and apparel goods are set out in annexure to the agreements.⁵¹ The actions that can be implemented are tariff actions or quantitative restrictions. The tariff actions consist of a suspension or increase in the rate of duty

6.2 Agricultural safeguard measures

Twelve of the agreements examined contain provisions regarding specific safeguards on agricultural products. However, not all of the agreements provide detailed information on when and how the safeguards can be implemented. Of those that do provide the necessary information, the majority utilize quantity based safeguard measures. These measures can be put into operation once imports from a trading partner increase past the volume trigger level. The applicable trigger levels are set out either in the text of the agreements or in the annexure, and normally increase over a specific time period. The additional duty that can be applied once the trigger volume is reached may not exceed the MFN tariff that was applied when the agreement came into force or when the action is taken, whichever one is the least. However, the US-Morocco FTA provides a specific way of calculating the additional duty Morocco can implement on imports from the US.

The US-Morocco and US-Chile FTAs are the only examined agreements allowing for priced based safeguards. These two agreements provide detailed trigger prices for all the agricultural products that are seen as sensitive products. The additional duty that can be invoked depends on the percentage difference between the import price and the trigger price. The additional duty is then determined by the difference between the MFN rate and the preferential rate set out in each member's tariff schedule.

Member states establish their own trigger volumes or prices on specific products based on the sensitivity of these products and the country's agricultural sector. Most of the North-South FTAs provide detailed provisions on the manner in which agricultural safeguard measures can be implemented. In most of these

applicable. The quantitative restrictions contain a consultation request that needs to take place and the measures can be no less than the quantity of the good imported during the first 12 of the most recent 14 months prior to the month of the consultation request and 20 percent of such quantity for cotton, man-made fibre and other non-cotton vegetable fibre goods and 6 percent for wool goods.⁵²

agreements the developing member country can invoke safeguard measures on more agricultural products and for a longer time period than its developed counterpart.

North-South FTAs that include a special safeguard mechanism include Australia-Thailand, NAFTA (which applies bilaterally between Mexico, US and Canada), Canada-Costa Rica (which is only applicable for Costa Rica), EFTA-SACU, Thailand-New Zealand, US-Morocco, US-Israel, the TDCA and Chile-US. South-South FTAs (Romania-Turkey, Croatia-Turkey and the ASEAN FTA) also provide agricultural safeguard mechanisms.

The Australia-Thailand, Canada-Costa Rica and Thailand-New Zealand FTAs contain specified volume trigger levels for the implementation of safeguards: any measure needs to be applied in a transparent manner and prior notice of the action that will be taken needs to be relayed to the other party. The Thailand-New Zealand and Australia-Thailand FTAs, however, allow for notice to be given 10 working days after the implementation of a safeguard action. These two agreements allow for an increase in the rate of customs duty for the rest of the calendar year when there is a violation of the volume trigger levels set out in the annexure to the agreements. Consultations need to be entered into between the parties on request.⁵³

In the annexure to the Australia-Thailand FTA provision was made for Australia to implement an agricultural safeguard measure on four products (prepared or preserved tuna, skipjack and bonito and pineapple products and juice) according to kilogram or litre trigger volumes. However, these measures were only applicable until the end of 2008.

The safeguard measures regarding Thailand are identical for both the Australia-Thailand and Thailand-New Zealand FTAs. Thailand can invoke safeguards on live animals and animal products; vegetable products and food, beverage and tobacco products⁵⁴ on 41 product lines. Most of these measures can be implemented up to 2015, while some allow for application until 2020. No provision is made for New Zealand to implement special safeguards in terms of the agreement.

Special safeguards for the Canada-Costa Rica agreement are set out in Annex III.3.2. These safeguards can be implemented on agricultural products for each party as stated in Appendix III.3.2.1 of the agreement. The action that can be taken is a tariff rate quota with an increase in the trigger level volumes set out in the agreement of 5 percent per year for 10 years from the date of entry of the agreement in 2002. The tariff rate will be applicable for the rest of the calendar year and parties must enter into consultations within 15 days after a request has been received. According to the appendix, Costa Rica is able to implement measures on 13 agricultural products with trigger volumes given in metric tons at the aggregate level.

In NAFTA special provisions on agriculture are provided under market access. A party can take a safeguard action on the goods listed in the special safeguard lists in accordance with the schedule. The action that can be taken is an over-quota tariff that may not exceed the least of the prevailing MFN rate and the MFN rate that was applicable since 1 July 1991.⁵⁵ According to the list of agricultural products provided in the annex Canada can apply safeguards on eight and the US on seven vegetable products and food, beverage and tobacco products. Mexico can take action on 17 products relating to live animals and animal products, vegetable products and food, beverage and tobacco products.

The US-Morocco and US-Chile FTAs show some similarities and differences regarding special safeguard provisions. Both agreements allow an additional duty to be imposed as a safeguard on agricultural goods that are listed in the annexure. The measure must be implemented in a transparent manner with written notification taking place within 60 days of implementation and consultations on request.⁵⁶ The US-Morocco agreement states that the sum of the additional duty and any other customs duty on such goods shall not exceed the least of the prevailing MFN rate or the rate applied on the day preceding the entry date of the agreement. The US-Chile agreement does not refer to other customs duties, but rather to other import duties and other charges.

The US and Chile in the US-Chile FTA and the US in the US-Morocco FTA (Annex 3-A) can implement price based safeguard measures. An additional duty can be imposed if the unit import price of the good is below the trigger price. The unit import price is determined on the basis of cost, insurance and freight (CIF) in US dollars for goods that enter Chile, while on the basis of Free on Board (FOB) in US dollars for goods entering the US.

The additional duties applicable for the US (in both agreements) and Chile are determined in the same manner. Whether an additional duty can be implemented and the amount thereof depends on the difference between the import and trigger price. The amount is then a percentage between the MFN rate and the preferential rate as set out in the various countries' tariff schedules. The schedule regarding the calculations to determine the additional duty is set out in the table below.

Table 1. Determining the additional duty; US-Chile and US-Morocco FTAs

Difference between import and trigger price is	Additional duty applicable is
a) Less or equal to 10 percent of trigger price	a) None
b) Larger than 10 percent and smaller or equal to 40 percent of trigger price	b) 30 percent of the difference between the applicable MFN rate and the preferential rate
c) Larger than 40 percent and smaller or equal to 60 percent of trigger price	c) 50 percent of the difference between the applicable MFN rate and the preferential rate
d) Larger than 60 percent and smaller or equal to 75 percent of trigger price	d) 70 percent of the difference between the applicable MFN rate and the preferential rate
e) Difference larger than 75 percent of the trigger price	e) 100 percent of the difference between the applicable MFN rate and the preferential rate

Source: US-Chile and US-Morocco FTAs annexure

The US can apply safeguards on 52 products and Chile on 15 products for a twelve year period from the date of entry of the US-Chile agreement in 2004. In the US-Morocco FTA the US can apply safeguards on 35 different vegetable and food, beverage and tobacco products. Morocco on the other hand can apply quantity-based safeguards on the goods listed when the volume of imports exceeds the trigger volumes set out in tables per product. The additional

duty that can be imposed is set out in individual schedules per good per HS subheading in the annex and declines over the implementation period. The implementation period with the decrease in the applicable duty as the time period continues for each product is set out within the annex to the agreement. The table below gives only two extractions from the annex to illustrate how the additional duty is calculated.

Table 2. Additional duty Morocco can implement against US imports

Applicable time period	Additional duty applicable is
Whole birds	
a) Years 1 to 7	a) Smaller or equal to 100 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
b) Years 8 to 13	b) Smaller or equal to 75 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
c) Years 14 to 18	c) Smaller or equal to 50 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule

Table 2. Additional duty Morocco can implement against US imports continued

Applicable time period	Additional duty applicable is
Leg quarters and wings	
a) Years 1 to 10	a) Smaller or equal to 100 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
b) Years 11 to 15	b) Smaller or equal to 75 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
c) Years 16 to 20	c) Smaller or equal to 50 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
d) Years 21 to 24	d) Smaller or equal to 30 percent of the difference in the MFN rate and tariff in Morocco's tariff schedule
e) Year 24	e) Here a review of the need for a safeguard must take place; if both parties do not agree to discontinue the safeguard the further applicable additional duty is smaller or equal to 25 percent as above

Morocco can also implement additional duties on chickpeas and lentils, bitter almonds and dried prunes. The additional duties can be implemented until the end of the calendar year in which the duty was imposed.⁵⁷

The EFTA-SACU, TDCA and US-Israel agreements do not contain detailed safeguard measure provision. The EFTA-SACU agreement states that safeguards on agricultural products must be taken in accordance with the conditions for emergency actions on particular products. Before any measure can be taken, the other party must be notified in writing and consultations can take place on request. Any measure invoked cannot be applied for more than one year. The actions that can be imposed can either be an increase in the import duty on the product or an introduction of a tariff quota for preferential trade based on the preceding five years' trade volumes (Art. 19 and 20).

The TDCA provides that the Cooperation Council needs to consider the matter when a surge in imports causes or threatens to cause

serious damage. The Council needs to find an appropriate solution. It is possible, however, to institute provisional measures to limit or reduce any disturbance for the importing member. When taking measures, the party must consider the best interest of all parties concerned. The parties can also take an appropriate action in accordance with the Agreement on Safeguards and the Agreement on Agriculture (Articles 16, 24 and 26).

The US-Israel FTA provides no detail regarding measures that can be taken within the agreement. The relevant article (Article 6) only states that import restrictions may be maintained by the member countries; these can include quantitative restrictions and fees based on agricultural policy considerations.

The agreement between Chile and the EU contains an emergency safeguard clause for all agricultural goods when imports cause serious injury or a disturbance in the market of the importing country. The penalties the country can impose include a suspension of any tariff

reductions and even an increase in the applied tariff to a certain limit. This safeguard is not an automatic measure, does not define a trigger for the implementation thereof and can include compensation for the affected party.

The South-South FTAs of the ASEAN, Romania-Turkey and Croatia-Turkey do not contain detailed provisions as seen in most of the North-South FTAs. In terms of ASEAN FTA, the Agreement on the CEPT Scheme for the ASEAN FTA contains the provision regarding agricultural safeguards. The Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products (1999: Art. vii) states that safeguard measures have to be taken in accordance with the emergency measures contained in the CEPT Scheme Agreement and its interpretive notes. The action that can be taken under this agreement is the suspension of preferences given on agricultural products with the allowance of flexibility for highly sensitive products contained in an annex to the agreement.⁵⁸ Indonesia, Malaysia and the Philippines are all allowed special safeguards on vegetable products which are identified as highly sensitive products in Annex 1. The flexibility in Annex 4 allows for the increase in ASEAN tariffs on highly sensitive products to the MFN rates when imports from an ASEAN source reach a trigger level. The formula to calculate the trigger level is given in Annex 4. The calculation takes into account the average level of ASEAN imports (in metric tons) in the previous three years, the growth rate of the share of ASEAN imports to the total imports (an acceptable number of 10 percent has been agreed upon by the members) and the growth rate of domestic consumption (the ASEAN agreed number here is 2 percent).

The agreements regarding the Romania-Turkey and Croatia-Turkey FTAs contain identical provisions. The provisions on specific safeguards

state that these measures can be implemented notwithstanding other provisions in the agreements, especially those containing the emergency action clauses and its procedures. If a member country wants to implement safeguard measures, there has to be an immediate entry into consultations with the other party to find an appropriate solution. Pending a solution, a party can take a measure it deems necessary.⁵⁹

More products tend to be excluded from the process of trade liberalisation in the agricultural sector than in other sectors. Agreements signed with the US as a contracting party seem to be an exception in terms of the coverage provided by the mechanism, but NAFTA does allow for a 15-year phase-in period with members being able to apply the agricultural safeguard protection on import-sensitive crops. Sugar, dairy products, cereals and meats are the most common exclusions from trade liberalisation agreements and thus allow safeguard measures for these products (Kjöllérström 2006).

Some agreements allow for an emergency mechanism to be implemented without specifically stating on which products these measures can be invoked. Both COMESA and AFTA contain such provisions. The US-Jordan FTA allows for a special safeguard mechanism that can result in the reduction of duties to be suspended and even reversed if the imports from the other party show a 'substantial cause of serious injury, or threat thereof' to the competing domestic industry (Brown and McCulloch 2004).

Special safeguard provisions should be seen as part of the portfolio of trade management instruments, which include long transitional periods and complex and restrictive rules of origin, to mitigate the effects of the RTA on import-sensitive industries (Teh et al. 2007).

7. APPLICATION OF SAFEGUARDS IN FTAS

The use of the global safeguard mechanism set out in GATT Article XIX is recorded by the WTO. The number of safeguard initiations does not always lead to safeguard measures being implemented. Table 1 shows the global safeguard initiations

(from 1995-2008) and measures taken (from 1996-2008) by the reporting WTO member country. Interestingly enough, the table indicates that safeguard measures are only taken in about half of the cases in which safeguards are initiated.

Table 3. Global Safeguard initiations and measures

Reporting member	Safeguard initiations	Safeguard measures taken
Argentina	6	4
Australia	2	...
Brazil	3	2
Canada	3	...
Chile	11	7
China	1	1
Colombia	3	...
Costa Rica	1	...
Ecuador	7	3
Egypt	4	4
EC	4	3
Jordan	12	6
Mexico	1	...
Morocco	3	2
Peru	1	...
South Africa	1	1
United States	10	6
Venezuela	6	...
TOTALS	79	39

Source: Adapted from WTO website⁶⁰

The table indicates the use of the global safeguard mechanism provided within GATT and the Agreement on Safeguards. However, this is not a completely true picture of the safeguard measures implemented by member countries. Not all member countries use the global safeguard measure when implementing trade remedies against other countries, especially in the context of regional trade agreements. The regional safeguard measures used will depend on the mandate of each RTA. Some regional agreements keep the rights

of the member countries to use the global safeguard measure, while some do not allow the use of safeguards on imports from member countries at all. Within FTAs such as COMESA and NAFTA member countries have used the regional safeguard mechanism provided for in the agreements. AFTA members have used the Agreement on Safeguards together with national legislation and, depending on the kind of product, the special safeguards provided for in the Agreement for Textiles and Clothing and the Agreement on Agriculture.

The Association of South East Asia Nations (ASEAN)

The ASEAN FTA was signed in 1992 and now includes all 10 member countries of ASEAN. The original members of the agreement are Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand, with some countries joining later. These are Vietnam (since 1995), Laos and Myanmar (since 1997) and Cambodia (since 1999).

The Philippines has taken some definitive safeguard measures on imports from specific countries. The Philippines is a member of the WTO, and all safeguard measures that are taken must comply with Article XIX of GATT 1994 and the Agreement on Safeguards. All disputes arising from the implementation of safeguard measures have to be referred to the WTO Dispute Settlement Unit. The Philippines also has national legislation that governs the implementation of safeguard measures. This legislation is the Safeguard Measures Act (also known as the R.A. 8800) that took effect on 9 August 2000. AFTA also has the ASEAN Agreement on the Common Effective Preferential Tariff (CEPT) Scheme that governs the increase in trade liberalisation among the member countries.

The R.A. 8800 provides for general safeguard measures for relief to the domestic industries of the Philippines suffering serious injury or the threat thereof due to an increase in imports from other countries; it also provides for special safeguard measures on agricultural products. The special safeguard measure can be implemented when the import value exceeds its trigger level⁶¹ or if the actual CIF import price falls below a trigger price level. Section 13 of the Act provides that the Tariff Commission of the Philippines will recommend an appropriate definitive safeguard measure to the Secretary of the Department of Trade and Industry (DTI). Section 13 with Rule 13.1 of its Implementing Rules and Regulations (IRR) states that general safeguard measures shall not apply to a product that originates from a developing country if the share of the total Filipino imports is less than 3 percent. Developing countries that have less than 3 percent shall not collectively account

for more than 9 percent of the total Filipino imports of the product concerned. Section 15 states that the duration of a general safeguards measure shall not exceed four years. This includes the period in which a provisional safeguard was in effect under Section 8 of the Act. The effective period, including any extensions, may not in the aggregate exceed 10 years. Section 19 gives the procedures for the extension of the measure in effect through the request of the petitioner.

The ASEAN Agreement of the CEPT Scheme contains the time period during which trade liberalisation has to take place among the member countries. The agreement is applicable to all manufactured products, including capital goods and processed agricultural products, and products that fall out of the definition of 'unprocessed agricultural products'. Safeguard measures implemented by an AFTA member against other AFTA member countries on products that are listed in the CEPT Scheme also need to comply with Articles 6 and 8 of this agreement. Article 6 contains the requirements concerning emergency measures, namely that if a product imported under the CEPT Scheme causes serious injury or a threat thereof to sectors that produce a like or directly competitive product in the importing member, the importing member can, for a time and to the extent that it is necessary to remedy or prevent the injury, suspend preferences without discrimination. The suspension shall be consistent with GATT 1994. Article 8 contains a consultation process when a member considers that another member has not carried out its obligations under the agreement.

The Philippines has implemented definitive safeguard measures on ceramic wall and floor tiles, glass mirrors, figured and float glass and technical grade sodium tripolyphosphates (STPP). These products are not part of the obligations and tariff concessions the Philippines made under GATT 1994 and thus the safeguard measures implemented do not fall under GATT XIX. The safeguard measures are governed by the Agreement on Safeguards and the national legislation (R.A. 8800). All these products fall

within the ambit of the ASEAN Agreement of the CEPT Scheme and Articles 6 and 8 are therefore also applicable.

In 2002 the DTI Secretary of the Philippines ordered the imposition of a definitive general safeguard duty for three years on the imports of ceramic floor and wall tiles. This was extended in December 2004 for a further three years. The domestic industry requested a final extension of four years of the safeguard duty in December 2007 to implement its adjustment plan and make the domestic industry globally competitive. The Tariff Commission made a recommendation to the secretary and the safeguard duty was extended for another three years up to 2010. With the application of the extension of the safeguard duty in 2004 there was an application for the reduction of the safeguards from various countries for the third year of extension. The third year of implementation of the extended definitive general safeguard measure started on 12 January 2007. Under section 13(d) of the R.A. 8800 and Rule 13.1 of the IRR an exclusion was allowed based on the fact that imports of some developing countries were *de minimis*⁶² and fell outside the percentages stated in the act. The exclusion is reviewed on a yearly basis based on the latest data available on the imports on ceramic wall and floor tiles. Currently AFTA member countries on whose imports the safeguard duty is applicable include Indonesia, Malaysia, Vietnam and Thailand.

Vietnam is one of the major suppliers of technical grade STPP to the Philippines. The Tariff Commission recommended to the DTI Secretary that a safeguard duty be implemented for three years from 6 July 2006 and is still applicable. The safeguard measure taken is a tariff quota as a definitive safeguard. The in-quota importation is levied at the regular tariff rate, while the out-of-quota importation is levied at the regular tariff plus the definitive safeguard duty. The import in-quota allocations are made by country. AFTA member countries on whose imports the in-quota rate is levied include Vietnam, Singapore and Thailand. A specific duty per kilogram is levied on imports that exceed the in-quota allocations.

Safeguard measures have also been implemented to protect the glass industry in the Philippines. A tariff quota safeguard duty was implemented from 13 October 2003 for three years on the importation of glass mirrors and figured and float glass. This duty was extended for a further three years from 13 October 2006 and is still applicable. Section 13 of the Act and Rule 13.1 of the IRR is also applicable for importation from certain countries. Due to the *de minimis* rule contained in the section the only AFTA member countries that are affected by the duty on glass mirrors and figured glass are Indonesia and Thailand. The duty on float glass is also applicable to Vietnam, Malaysia and Singapore.

Safeguard measures implemented by a member country of AFTA on other member countries are subjected to a wide range of legislation and agreements. The measure has to comply with GATT XIX if the product falls within the country's obligations and tariff concessions under GATT 1994. The Agreement on Safeguards is applicable to all member countries. The ASEAN Agreement of the CEPT Scheme Articles 6 and 8 set out certain requirements and there is national legislation within each member country that regulates the implementation of safeguard duties by that specific country (Philippines Tariff Commission).

NAFTA

Chapter 8 of NAFTA permits governments to impose a temporary tariff increase or other trade restriction that is otherwise prohibited by the obligations of Chapter 3. These are emergency actions that can be taken when an increase in imports cause or threaten to cause serious injury to domestic industries under certain specified conditions. Chapter 8 contains both global and bilateral safeguard actions that can be taken. The safeguard mechanism provided in this agreement, however, only applies to the bilateral relationships between Mexico on the one hand and the US and Canada on the other. Bilateral safeguard measures between the US and Canada are subject to the provisions of Article 1101 of the Canada-US FTA, which is incorporated into and made a part of NAFTA for such purpose.

In US law, when the domestic industry seeks to impose safeguards on a particular product, it can file a petition with the International Trade Commission (ITC). The ITC launches an investigation into the petition and when an affirmative determination of the causation or threat of injury is made, the ITC sends its recommendations to the President of the United States. Only the president has the discretion to accept or reject the recommendations of the ITC or to adopt an alternative plan of action. However, the president can only impose a safeguard measure if the ITC has made an affirmative determination of injury.

The safeguard measures the US launched against the importation of broom corn brooms is an example of a safeguard petition that was brought under the global and bilateral measures set out in NAFTA. In March 1996 a petition was filed by the US Corn broom Task Force under the Trade Act of 1974. Section 202 of this act authorises the use of the global safeguard action. At the same time the Task Force filed a petition with the ITC under NAFTA for a bilateral safeguard action provided for in NAFTA Article 801. The petition stated that broom corn brooms imported from Mexico were at such a level that these imports alone constituted a substantial cause or threat of serious injury to the domestic industry.

The ITC made an affirmative injury determination and sent their recommendations to the president. On 30 August 1996 the president decided to take appropriate safeguard measures under the global safeguard action, but refused to take safeguard actions under the NAFTA bilateral case. A proclamation was issued adopting safeguard measures for the following three years against all imports of broom corn brooms. The measures adopted included a quota on the importation of the product with an over-quota tariff rate to be levied at all imports that exceeded the quota. The tariff rate had to be reduced over the three year period until it was back to zero at the end of the period.

In January 1997 Mexico requested the establishment of a panel under Article 2009 of NAFTA in terms of the determinations made by the ITC. The panel found that since the NAFTA and WTO

versions of the rule regarding the publication requirement of the findings of the investigation authority are substantively identical, the application for the WTO rule will have no effect on a decision reached under NAFTA. The panel based their entire decision on the rule in NAFTA without relying on the WTO Safeguard Code. NAFTA provides for two different safeguard mechanisms. Article 802 protects the rights of the parties to apply the WTO safeguard on a global basis. This is the NAFTA article that authorised the safeguard measure applicable in this case.

The panel found that the determination of the ITC was not made on a reasoned conclusion on all the issues related to fact and law as set out in NAFTA and GATT Article XIX. The safeguard measures implemented were therefore a violation of the US obligations under NAFTA and the US has to comply with NAFTA as soon as possible (Final Panel Report 1998).

COMESA

The mission of the COMESA treaty is to promote intra-COMESA trade. It is recognized, however, that member countries can suffer adverse effects, and exceptions are allowed in some cases. These include the taking of emergency measures to limit imports temporarily in order to safeguard the domestic industries of the different member countries.

Within the COMESA FTA Article 61 governs the use of emergency safeguard measures among member states. The Twelfth Meeting of the Council of Ministers for COMESA also adopted Trade Remedy Regulations on 30 November 2001. These regulations are applicable to the invocation of safeguard, anti-dumping, subsidies and countervailing measures. The regulations contain all the requirements that need to be complied with when an intra-COMESA safeguard action is taken by a member country. If a member country against whose imports a safeguard measure is implemented is dissatisfied with the investigation and implementation a dispute can be referred to a dispute settlement panel established by COMESA (Naturinda 2004).

All COMESA members have the right to apply their national legislation without amendment

in conducting safeguard investigations from the date the safeguard regulations came into effect. The national legislation must, however, comply with both the WTO Agreement on Safeguards and the COMESA Safeguard Regulations (Action Aid International 2005).

Kenya as a member country has been allowed by COMESA to institute safeguard measures on sugar and wheat flour. The implementation was allowed on the condition that Kenya institute reforms in the sugar and wheat industries to make these industries more competitive in the regional market. The sugar safeguard is still ongoing and applicable to all COMESA member countries, while the wheat safeguard has expired and was only applicable to the member countries of Egypt and Mauritius.

In 2003 Kenya sought the intervention of COMESA for a safeguard measure on the importation of sugar from other member countries. This safeguard was granted for a year and thereafter extended for a further four years and would have expired in 2008 (Action Aid International 2005). In 2008 the sugar safeguard was extended for a final four years and will expire in 2012. The safeguard applies to all types of sugar without the distinction between white sugar intended for industrial use and brown sugar intended for domestic use. A radical proposal to increase the competitiveness of the sugar industry leading up to full liberalisation in 2012 has been agreed upon. The Treasury of Kenya approved a new tariff concession for the sugar trade between Kenya and other COMESA countries and that has been applied since 2008 (Odhiambo 2008). The COMESA safeguard has a quantitative value trigger. Before 2008 this trigger was 200 000 metric tons with a quota and maximum tariff of 110 percent on any value imported above the quota (Action Aid International 2005).

The quota covered under the COMESA Safeguard was enlarged in March 2008 with the tariff that is applied on import quantities above the quota declining each successive year until 2012. In 2008 the amount of duty-free sugar imports was increased to 220 000 tons with any consignment above the quota charged with a 100 percent duty. This new safeguard will be increased

successively by 40 tons over the next three years and eliminated in 2012. The tariff charged above the quota is being successively decreased by 30 percentage points from 2008 until 2012 when it will be zero (Odhiambo 2008). However, Kenya is continuing to experience sugar import surges from non-COMESA countries, especially Brazil and Thailand (Action Aid International 2005).

The export market of wheat flour from the COMESA region is dominated by Kenya with a share of about 34 percent. The import market is dominated by Sudan. Egypt and Mauritius are the two main low-cost producers of wheat flour in the trading bloc. COMESA allowed Kenya to introduce a tariff-rate quota safeguard on wheat flour imports from Egypt and Mauritius in 2001. This safeguard was extended in 2003, 2004, 2005 and finally in 2006. The Meeting of the Ministers of Trade, Industry and Finance of COMESA took the decision in April of 2008 not to extend the wheat flour safeguard. The safeguard lapsed in June 2008 with a transitional period of six months for Kenya after the lapse to allow for administrative arrangements (COMESA Ministers of Trade, Industry and Finance 2008).

The COMESA safeguard that was allowed under the COMESA Safeguard regulations was a tariff-rate quota. In 2007 the limit on the amount of duty-free imports from Egypt was set at 32 400 tons and for Mauritius 2 366 tons. In 2008 the duty-free imports decreased to 16 300 tons from Egypt and 1 183 tons from Mauritius. Kenya is allowed to impose a 60 cent duty on the imports plus additional taxes on imports above the set quota per country (Wanja 2007). When the wheat flour safeguard was abolished at the end of 2008 the product that was imported from Egypt and Mauritius was subjected to a duty of 10 percent, while a 35 percent duty had been charged while the safeguard was in place. (Omandi 2008).

The purpose of regional trade integration is to attain even higher levels of liberalisation than those achievable at the moment in the commitments countries make in the WTO. The protection of the sugar and wheat industries from competition with regional trading partners has been seen by some as inconsistent with the

premise that regional integration should achieve substantial reduction in barriers to trade within a reasonable time (Gathii 2008).

MERCOSUR

Since 1994 the use of safeguards among member states has been prohibited according to the MERCOSUR treaty. The Common Market Council decision 17/96 contains the 'Regulations regarding the application of safeguard measures to the imports from non-members of the MERCOSUR'.

In 1997 Argentina imposed provisional and definitive safeguards on footwear imports from all countries. The imports from MERCOSUR were included in the examination of the increased imports, but the member countries were excluded from the invocation of the measure due to the treaty prohibiting the use of safeguards among member states. In June 1998 the EC challenged the safeguard under GATT Article XIX and the Agreement on Safeguards. The WTO Appellate Body inaugurated the concept of parallelism in their report. This concept means that safeguard measures must be applied to all sources from which imports were considered in the underlying investigation. The result was that where Brazilian safeguard measures were imposed, it was done without considering the intra-MERCOSUR imports from the investigation and therefore the measures were also not invoked against the partner countries.

In some cases, the existence of a significant volume of imports from MERCOSUR members may create difficulties for members contemplating the imposition of safeguards, because of the problems associated with establishing a causal link between the import surge and the injury caused to the domestic industry (Brazilian Ministry of Development, Industry and Foreign Trade 2006).

In December 1991, MERCOSUR dispute resolution procedures were incorporated in the Protocol Brasilia. The protocol outlined the process of resolving a conflict between the MERCOSUR signatory countries. This protocol was replaced by the Protocol of Olivos in 2004; this created a Permanent Tribunal of Review for disputes arising from member countries (Vignoles 2000).

In 1999 the Argentinean Ministry of Economy, Works and Public Services implemented

Resolution 861/99. The resolution was designed as a transitional safeguard measure to be imposed on imports from Brazil, China and Pakistan for three years. The measures were taken in accordance with Article 6 of the WTO Agreement on Textiles and Clothing (ATC) and were in the form of a fixed annual quota for the importation of cotton textiles (MERCOSUR 1999-2000). The measure affecting Brazil was implemented on five different types of textile imports including sheeting fabrics and sheeting.

In July 1999 Argentina requested consultations with Brazil regarding the restrictions implemented on textile imports. Brazil referred the case to the Textiles Monitoring Body (TMB) under Article 6.11 of the ATC in September 1999. The TMB recommended that Argentina withdraw the safeguard measures. In February 2000 Brazil requested the establishment of a Dispute Settlement Body (DSB) Panel due to the noncompliance of Argentina with the recommendation of the TMB. Before the panel was established the matter was referred to the MERCOSUR arbitration tribunal under the Brasilia Protocol (Kim et al. 2002).

At the tribunal Brazil argued that Argentina had violated its obligations under the free trade agreement and that the measures were discriminating because they favoured countries that were not part of MERCOSUR (Vignoles 2000). The tribunal only ruled on the compatibility of the safeguard measure with MERCOSUR and not with the ATC (Kim et al. 2002). The tribunal ruled that there is a general prohibition on the implementation of safeguard measures on internal trade and that there was no legal basis for the imposition of safeguard measures on textile products within MERCOSUR. This is an indispensable requirement according to the articles that deal with the application of safeguard measures by other member states (Articles 1 and 5 of Annex IV to the treaty). The general prohibition can only be removed by a specific MERCOSUR norm if the contracting parties deem it useful. The tribunal thus ruled in favour of Brazil, and Argentina had to remove all safeguards affecting Brazilian exports. However, the countries agreed in October 2001 that Argentina could impose further safeguards if this is allowed by WTO rules (MERCOSUR 1999-2000).

8. RECOMMENDATIONS FOR DEVELOPING COUNTRIES ON DRAFTING SUITABLE CLAUSES

Through economic mechanisms and the political reality of countries protecting those in their own society, progress by developing countries is frequently met by an increase in protection from developed countries. This renders progress for developing countries more difficult. Developed countries, however, have shown a preference for anti-dumping measures and the carving out of agricultural policies to protect their declining domestic industries against imports from developing countries (Deardoff 2000).

The challenge when formulating safeguard clauses is to strike a balance between allowing countries to apply safeguard measures to prevent serious disruptions to their economies and ensuring that they do not resort to safeguard measures to such an extent that they defeat the trade liberalisation purpose. For this reason, consultations are provided for in many of the examined agreements. Consultations are important to achieve an amicable and mutually beneficial outcome for both parties. A process must be followed by the parties to an agreement in order to resolve their difficulty on agreeable terms. It is only after adhering to the process that the parties can request the establishment of a panel. However, in some instances, binding dispute settlement procedures are not provided for.⁶³ In addition, compensation for the affected party is included in most agreements; typically the safeguard actions have to be offset against equivalent concessions. Normally these must also be decided on an amicable basis before recourse to retaliatory action can be had. This attitude of amicable resolution is a common thread running through all of the examined agreements - something which must be kept in mind when drafting the safeguard clause.

Developing countries face an additional challenge in that their agricultural sectors require safeguards due to the fact that agricultural commodity markets are volatile by nature. The issue faced by developing countries is the stabilisation of domestic prices when short-term

price swings occur. Price instability is felt to a greater extent by developing countries because the agricultural sector forms a pivotal part of their economies and is more sensitive to external shocks. Most developing countries do not have an insurance mechanism in place nor the ability to respond to external shocks (Sharma 2000).

An approach that can be followed for the drafting of safeguard clauses is to state that the application of a safeguard measure has to conform to the provisions set out in the Agreement on Safeguards. However, the GATT safeguard mechanism has extensive procedural requirements and conditions. Many developing countries currently do not have the institutional or legal capacity to use this mechanism (Ibid.).

Another option can be to provide clear and transparent provisions regarding the use and duration of any mechanism within the agreement. These provisions will avoid the vagueness of the WTO legal language and can easily be implemented by the RTAs. The existing Special Safeguard in the Agreement on Agriculture is seen as the most straightforward multi-lateral safeguard available. Developing countries can consider building this type of safeguard within the framework of Special and Differential Treatment into their regional agreements. The safeguard can be developed based on the needs of the contracting partners and can be limited to a selected list of products that are critical for food security within the countries. High bound tariffs can also be used to cancel the need for safeguards within an agreement. The tariffs can then be increased to offset falling world prices for different products. This indicates a trade-off between the level of bound tariffs and the accessibility of safeguards. The higher the bound tariff, the less the need for the application of safeguards (Ibid.).

Developing countries should set clearly articulated developmental benchmarks and strategies before negotiations take place. Trade liberalisation must then occur according to the

developmental strategies of the different RTA member countries. Developing countries should be granted special flexibility in safeguards for the protection of sectors in relation to their development strategies. Least developed countries should be the least exposed to trade liberalisation, and developing countries should also be allowed to exclude major sectors. RTAs between developed and developing countries should allow a significant asymmetry in the application of safeguard measures for the developing party. The flexibility allowed for the developing country should be applicable to both the transitional and post-transitional periods. The principle of parallelism for safeguard mechanisms should systematically not apply to a least developed country that is a party to an RTA with a developed country. This means that when a developed country invokes a safeguard action, the least developed country member to the RTA will automatically be exempt from the invocation (Karingi and Lang 2005).

Safeguards are a safety net. Countries must ensure that provision is made for safeguard measures to be invoked if a certain volume or price trigger for the concerned products is reached. The tariff levels for the developing countries must allow local producers to have access to the domestic market. This can prevent the domestic market from being flooded with by international imports. Within a customs union it is important for the member countries to determine how the Common External Tariff (CET) will be managed. It needs

to be established whether the regional bloc as a whole needs to invoke a safeguard measure, or, if a country within the bloc takes action, whether the measure will be effective in the case of the country that needs protection. It is also necessary to have a CET that is high enough so that the safeguard measure will not result in a repeated contravention of the CET that is set for the region (Kwa 2008).

Transparent procedures and criteria are needed for the evaluation and handling of requests for the implementation of safeguard measures. Time-bound safeguard actions can be implemented with specific provisions; these safeguards can be quantitative restrictions, temporary suspension of tariff preferences and reinstatement of the MFN duties for specific products should developing countries need a simplification of the rules applicable to the implementation of safeguard measures. The simplification and transparency of any mechanism provided will reduce the cost of implementation and improve the accessibility for developing countries (Karingi and Lang 2005).

Sharma (2000) states that these bilateral safeguard measures should only be temporary provisions with developing countries' focus on the strengthening of their capabilities to use the general safeguard mechanism. Technical and financial support with independent legal assistance at the international level may be necessary to assist countries in procedural and institutional matters regarding the use of the general safeguard mechanism.

9. CONCLUSION

This examination of the regional and bilateral safeguards has shown that many similarities exist between the provisions included in the different agreements. It has also shown that, in many respects, these safeguard provisions are modelled on the same lines as the WTO Agreements on Safeguards. The main difference between the global safeguards (as provided for in the Agreement on Safeguards) and the bilateral/regional safeguards is that the latter is only permitted during the transition period. After the transition period, the only safeguard that can be implemented is the global safeguard⁶⁴. Due to the similarities between the global and bilateral/regional safeguards, the same situation can arise as in the case of the NAFTA-Mexico Broom Corn Brooms decision. The panel in this instance concluded that the dispute can be resolved either under NAFTA Annex 803.3(12) or Art. 3.1 of the WTO Agreement on Safeguards, which are virtually identical. Since the NAFTA and WTO versions of the rule are so similar, application of the WTO version of the rule would in no way have changed the legal conclusion reached under NAFTA Annex 803.3(12)⁶⁵. This can be the situation in a large number of the agreements examined. If there is practically no difference in choosing a global or bilateral safeguard, which route should developing countries take?

The fact that the same legal conclusion will be reached regardless whether the WTO rules or the bilateral/regional safeguard mechanism is to be implemented is in fact good news for developing countries. Under the WTO, 168 safeguard initiations have been reported to the Council. Of these, 89 safeguard measures have been instituted⁶⁶. Far fewer have been reported and instituted in regional and bilateral agreements. This means that a great deal more jurisprudence, decisions, guidelines and literature is available on safeguards instituted under WTO rules. One constraint of developing countries is their lack of legal and institutional capacity to use the safeguard mechanism. It is for this very reason that it is advisable for developing countries to make use of the already

established and proven provisions of the WTO Agreement on Safeguards, instead of inventing their own provisions. Many of the South-South agreements contain vague and ambiguous language which could benefit from the inclusion of WTO procedures and obligations. A good example is the COMESA Treaty, whose provisions are not entirely clear and comprehensive. This was remedied by the adoption of a set of trade remedy regulations which is applicable to the imposition of safeguard, anti-dumping, subsidies and countervailing measures and similar in many respects to the WTO Agreement on Safeguards. This is also the situation in a number of other South-South agreements where protocols and annexes to regulate trade remedies have been added to the existing regulations. This naturally makes matters more complicated especially with the limited capacity of developing countries.

The recommendations here are only applicable to regional / bilateral safeguard mechanisms and not to any of the special safeguard mechanisms. Regarding special agriculture safeguards, developing countries have complained that the existing WTO provisions are inadequate for present purposes. Few developing countries are eligible for the special safeguard mechanism while the rest have no useful instruments to counter import surges of agriculture goods. Agriculture is such an important sector for developing economies that this needs to be addressed at a multilateral level. A special safeguard mechanism (SSM) has been proposed at the WTO to rectify the deficiencies of the current regime. In contrast to the current state of affairs, all developing countries would have recourse to the proposed SSM. Another important characteristic of the proposed regime is that developing countries are allowed to impose duties higher than the bound MFN rate under certain circumstances. However, the scope and coverage of the SSM remains one of the most contentious issues in the Doha Development Round. The more powerful agriculture exporters are bent on limiting the application of the SSM while the developing countries are striving for wider treatment and broader application. This

could also be seen in the EPA negotiations where the inclusion of a similar agriculture safeguard was rejected; instead the bilateral safeguard mechanism has been extended to include certain agriculture products. It remains to be seen how the opponents and proponents of the SSM will arrive at a solution and what impact the safeguard will have at a bilateral and regional level. No regional or bilateral agreements contains provisions similar than the SSM; agricultural safeguard measures generally differ from agreement to agreement. Most North-South FTAs that contain a special agricultural measure sets out detailed requirements and conditions in the agreement itself or annexure thereto. The South-South agreements do not contain detailed provisions regarding trigger volumes or prices, the duration of measures, specific measures that can be implemented and procedures that need to be followed. Developing countries must remember that agriculture safeguards should not be employed to protect uncompetitive sectors; it is rather a mechanism to respond to specific short-term threats and prevent disruptions to agriculture industries which would typically be competitive under normal market conditions. Therefore the mechanism must be designed with clear triggers and conditions on when and how to invoke agriculture safeguard measures.

But it is doubtful whether developing countries will have ample space to negotiate when dealing with developed countries. The provisions in North-South agreements involving major economies seem to stem from the same master template. Developing countries usually have little say in how the provision is set out. This situation arose in the case of the EPAs, where all of the ACP configurations have identical safeguard clauses included in their agreements. All agreements, however, contain certain special and differential measures which are only applicable to the ACP countries and the outermost regions of the EU. The EU is not allowed to take bilateral and regional safeguard measures, unless it is taking them on behalf of the outermost regions. However, the EU is still allowed to resort to global safeguard measures as well as provisional safeguard measures. Special and

differential measures are important to include in North-South agreements, but then careful consideration of the other provisions is necessary to avoid negating of these benefits.

The message to developing countries is to keep it simple and utilise the already proven design provided for under multilateral rules. Developing countries have been complaining that the WTO Agreement is more useful for developed countries, but this is certainly not owing to the way in which the safeguard mechanism was designed. It could be useful to widen the conditions for invocation as seen in the 'European type' agreements but a clear definition must be included to stipulate the precise conditions under which safeguard actions can be taken. The investigation process must be clearly set out: perhaps not as detailed as in the 'NAFTA type' agreements, but at least in accordance with established procedure that is transparent and publicly available. A process of consultations should also be provided for in an attempt to resolve the matter amicably, especially since compensation is in turn awarded to the affected party. Stakeholders must be able to present their views, confidential information must be treated accordingly and notification procedure must be adhered to. At the end of the process, a detailed report must be published recording the evidence, findings and reasoned conclusion. The safeguard measure must only be applied to the extent necessary to prevent or remedy serious injury and facilitate adjustment, something which is echoed in most of the agreements. The remedies can include suspension of further reductions or an increase of the applied duties or tariffs, as long as these are not more than the MFN duties applicable at the inception of the agreements. This is necessary for the members of the regional or bilateral configuration to still reserve a degree of preferences over third countries - the essence and object of negotiating trade agreements. This is confirmed in the EPAs which state that tariffs can be increased but only to a level which does not exceed the duties applied to other WTO members. A similar qualification is required in other agreements where an importing country is obliged to maintain an

element of preference for products originating in a partner country. Quantitative restrictions are also provided as a remedy in the more recent agreements and can be included; clear guidelines on how the quotas are allocated must, however, be included. The duration greatly varies between agreements and the period is a subjective choice, on condition that the initial application, possible extensions and 'cooling off' periods are clearly stated. Provisional application is an important feature of a safeguard clause, but the conditions for invocation, the process of determination, the

duration and the measures must be clearly stipulated. Developing countries can include recourse to binding dispute settlement procedure, but this should only be instituted after all other possibilities have been exhausted. The above guidelines can be incorporated into the benchmarks and strategies that have been articulated in the negotiating forum. Developing countries can still construct and design their safeguard clauses as they feel inclined, but for the smooth operation of the safeguard mechanism it is necessary to include certain minimum requirements.

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Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (2008)

Agreement establishing a framework for an Economic Partnership Agreement between the Central African States, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

Agreement establishing a framework for an Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern Southern Africa States, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

Interim Agreement establishing a framework for an Economic Partnership Agreement between the Pacific States, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

Interim Agreement establishing a framework for an Economic Partnership Agreement between the SADC EPA States, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

Interim Agreement establishing a framework for an Economic Partnership Agreement between the Ivory Coast, of the one part, and the European Community and its Member States, of the other part (text initialled 2007)

ANNEXURE A

No Safeguard Mechanism	WTO type Safeguard	GATT type Safeguard	NAFTA type Safeguard	EU type Safeguard
Egypt - Jordan	Australia - Thailand	EFTA - SACU	Canada - Chile	EC - Albania
Georgia - Armenia	EFTA - Chile	US - Albania	Canada - Costa Rica	EC - Mexico
Kyrgyzstan-Uzbekistan	EFTA - Lebanon	US - Israel	NAFTA	EC - South Africa (TDCA)
	Japan - Mexico	ASEAN	Panama - Taiwan	EFTA - Mexico
	Japan - Philippines	COMESA		Romania - Turkey
	Singapore - Jordan	India - Sri - Lanka		Turkey - Croatia
	Thailand - New Zealand			CARIFORUM EPA
	US - Chile			Central Africa EPA
	US - Jordan			EAC EPA
	US - Morocco			ESA EPA
	Israel - Mexico			Pacific EPA
	Pakistan - China			SADC EPA
	SADC Protocol			West Africa EPA
	Agreement on South Asia Free Trade (SAFTA)			

ANNEXURE B

Indicators (North-South agreements)	Australia-Thailand	Canada-Chile	Canada-Costa Rica	EC-Albania	EC-Mexico	EC-South Africa (TDCA)	EFTA-Chile
1. No safeguard measures							
2. WTO type safeguard	X						X
3. GATT type safeguard							
4. NAFTA type safeguard		X	X				
5. EU type safeguard				X	X	X	
6. Recourse to global safeguards	X	X	X	X		X	X
7. Excluding partner countries from global safeguards	X	X					
8. Special safeguard mechanism (only agriculture and textile and apparel)	X	X	X			X	
9. Period of application (years)	2	3	3	1	1	4	1
10. Period of extension (years)	2 - 4	–	–	2	2	–	2
11. Provisional application	X			X			X

Indicators	EFTA-Lebanon	EFTA-Mexico	EFTA-SACU	Japan-Mexico	Japan-Philippines	NAFTA	Panama-Taiwan
1. No safeguard measures							
2. WTO type safeguard	X			X	X		
3. GATT type safeguard			X				
4. NAFTA type safeguard						X	X
5. EU type safeguard		X					
6. Recourse to global safeguards	X		X	X	X	X	X
7. Excluding partner countries from global safeguards				X		X	X
8. Special safeguard mechanism (only agriculture and textile and apparel)			X			X	
9. Period of application (years)	–	1	1	3	3	3	2
10. Period of extension (years)	–	2	3	1	1	1	1
11. Provisional application			X	X	X		X

Indicators	Singapore-Jordan	Thailand-NZ	US-Albania	US-Chile	US-Israel	US-Jordan	US-Morocco
1. No safeguard measures							
2. WTO type safeguard	X	X		X		X	X
3. GATT type safeguard			X		X		
4. NAFTA type safeguard							
5. EU type safeguard							
6. Recourse to global safeguards	X	X		X		X	X
7. Excluding partner countries from global safeguards	X	X		X		X	
8. Special safeguard mechanism (only agriculture and textile and apparel)		X		X	X		X
9. Period of application (years)	1	2	-	3	-	4	3
10. Period of extension (years)	2	1	-	-	-	-	2
11. Provisional application	X	X	X			X	X

Indicators (South-South agreements)	ASEAN	COMESA	Egypt-Jordan	Georgia-Armenia	India-Sri Lanka	Israel-Mexico	Kyrgyzstan-Uzbekistan
1. No safeguard measures			X	X			X
2. WTO type safeguard						X	
3. GATT type safeguard	X	X			X		
4. NAFTA type safeguard							
5. EU type safeguard							
6. Recourse to global safeguards						X	
7. Excluding partner countries from global safeguards						X	
8. Special safeguard mechanism (only agriculture and textile and apparel)	X						
9. Period of application (years)	-	1			-	-	
10. Period of extension (years)	-	-			-	2	
11. Provisional application	X				X		

Indicators	MERCOSUR	Pakistan-China	Romania-Turkey	SADC Protocol	SAFTA	Turkmenistan-Georgia	Turkey-Croatia
1. No safeguard measures	Safeguard measures only until 31/12/94					X	
2. WTO type safeguard		X		X	X		
3. GATT type safeguard							
4. NAFTA type safeguard							
5. EU type safeguard			X				X
6. Recourse to global safeguards		X					
7. Excluding partner countries from global safeguards							
8. Special safeguard mechanism (only agriculture and textile and apparel)			X				X
9. Period of application (years)		2	-	4	3		-
10. Period of extension (years)		1	-	8	-		-
11. Provisional application		X			X		X

Indicators (EPA agreements)	CARIFORUM	Central Africa	EAC	ESA	Pacific	SADC	West Africa
1. No safeguard measures							
2. WTO type safeguard							
3. GATT type safeguard							
4. NAFTA type safeguard							
5. EU type safeguard	X	X	X	X	X	X	X
6. Recourse to global safeguards	X	X	X	X	X	X	X
7. Excluding partner countries from global safeguards	X	X	X	X	X	X	X
8. Special safeguard mechanism (only agriculture and textile and apparel)	X	X	X	X	X	X	X
9. Period of application (years)	2-4	2-4	2-4	2-4	2-4	2-4	2-4
10. Period of extension (years)	2-4	2-4	2-4	2-4	2-4	2-4	2-4
11. Provisional application	X	X	X	X	X	X	X

ENDNOTES

- 1 The GATT clause was often referred to as an 'escape clause' originating because of its dual purpose. The clause permits Member States to apply import restrictions and at the same time escape from their agreed multilateral obligations.
- 2 Defined as 'grey areas' due to their possible inconsistency with GATT rules
- 3 In some instances countries can, however, maintain one such measure over an additional period of one year, but this duration may not extend beyond 31 December 1999. See Art. 11 of the Agreement on Safeguards.
- 4 For developing countries, this limit is further extended to ten years.
- 5 See www.wto.org.
- 6 Other agreements also make direct reference to Art. 5 of the Agriculture Agreement or other relevant safeguard provisions included in WTO agreements. See Par. 3.2 above for a discussion on the different safeguard measures under WTO law.
- 7 According to Pauwelyn (2004) the concept of parallelism was first adopted in the Appellate Body Report *Argentina - Safeguard Measures on Imports of Footwear* (WT/DS121/AB/R). This rule of parallelism has been applied and found violated in only one set of circumstances namely where the investigation was done on all imports but the subsequent application of the safeguard measure was then limited to imports from third parties.
- 8 The Agreement on Safeguards provides for an exception to the rule against non-discrimination in Art. 9 when it comes to the application of safeguard measures on imports originating from developing countries. See below for further information
- 9 For more information on global safeguards see the discussion in Section. 2.2 above.
- 10 Some of the newer agreements, most notably the EPAs, provide for the introduction of tariff quotas.
- 11 Art. 4(1)(a) of the WTO Agreement on Safeguards
- 12 See Art. 7(4) of the WTO Agreement on Safeguards. If appropriate, the measure can be withdrawn or the pace of liberalisation can be increased.
- 13 See Art. 20 of the SADC Protocol on Trade.
- 14 See Art. 502 of the Australia - Thailand FTA
- 15 The only 'WTO type' arrangement silent on recourse under the Agreement on Safeguards is the three agreements which provide direct reference to the WTO agreement when invoking safeguards. These are the EFTA - Lebanon; SADC Trade Protocol; and the SAFTA.
- 16 EFTA-Chile, EFTA-Lebanon, Japan-Philippines, Singapore-Jordan, US-Chile, US-Jordan, US-Morocco, Pakistan-China, SADC Trade Protocol and SAFTA.
- 17 Australia-Thailand, Japan-Mexico, Thailand-NZ and Israel-Mexico.
- 18 EFTA-Chile, EFTA-Lebanon, Japan-Philippines, Singapore-Jordan, US-Chile, US-Jordan, US-Morocco, Pakistan-China, SADC Trade Protocol and SAFTA.

- 19 Australia-Thailand, New Zealand-Thailand.
- 20 EFTA-Lebanon, SADC Trade Protocol; and the SAFTA.
- 21 Singapore-Jordan, US-Jordan, US-Morocco, Pakistan-China.
- 22 EFTA-Chile, Singapore-Jordan.
- 23 The EFTA-Lebanon FTA does not explicitly mention provisional safeguard measures but incorporates the provisions of the WTO Agreement on Safeguards; therefore, by implication, countries will have recourse to the provisional safeguard mechanism.
- 24 In the EFTA-Lebanon FTA and the SAFTA FTA no explicit reference is made to compensation; however, the compensation obligations of the WTO Agreement on Safeguards are incorporated into these agreements.
- 25 The EFTA-SACU FTA confirms the rights and obligations contained in GATT Art. XIX and the WTO Agreement on Safeguards, but these refer to recourse under the global safeguard mechanism and not a bilateral mechanism between the parties.
- 26 The only direct reference to WTO law is found in the ASEAN FTA where it states that any 'suspension of preferences shall be consistent with the GATT'. This is, however, more of a general reference to the whole of the GATT agreement and not specifically to the rights and obligations contained in GATT Art. XIX.
- 27 This is an agreed effective tariff, preferential to ASEAN, to be applied to goods originating from ASEAN member states and which have been identified for inclusion in the CEPT scheme.
- 28 Chapter 6 of the COMESA Agreement has the title heading of Cooperation in trade liberalisation and development and concerns the following issues: scope of liberalisation, customs duties, common external tariff, rules of origin, elimination of non-tariff barriers, security and other restrictions, dumping, subsidies, competition, MFN, national treatment, drawback and trade promotion.
- 29 Art. 18 of the US-Israel FTA (Notice and consultations) and Art. 8 of the ASEAN (Consultations).
- 30 EFTA-SACU and US-Israel.
- 31 ASEAN and India-Sri Lanka.
- 32 EFTA-SACU.
- 33 For a discussion on the requirements for provisional measures under the WTO Agreement on Safeguards, see Section. 2.2 above.
- 34 All the agreements containing such a clause actually use the word 'importantly'. This must be interpreted, but it can be argued that in this context the word has the same meaning and purpose than words such as 'substantially', 'considerably', 'significantly' and 'decidedly'.
- 35 As mentioned above, the explicit reference to the causal link is absent in the case of the Taiwan-Panama FTA.

- 36 'Critical circumstances' is defined as circumstances where the delay would cause damage that is difficult to repair.
- 37 See paragraph B: Investigation procedure above under the Section 5.4: 'NAFTA type' safeguard mechanisms.
- 38 See Section 7 below on the NAFTA Broom Corn Brooms case.
- 39 EC-Albania, EC-Mexico, EC-South Africa and EFTA-Morocco.
- 40 Croatia-Turkey and Romania-Turkey.
- 41 As of April 2009.
- 42 The EU's seven outermost regions (Guadeloupe, French Guiana, Réunion, Martinique, the Azores, Madeira, and the Canary Islands) give it exclusive economic areas totalling 25 million km², containing assets of all kinds. But these regions also have severe economic handicaps, including remoteness, insularity, difficult topography and climate, inadequate transport services and very limited market opportunities.
- 43 The TDCa was an FTA that was concluded between South Africa and the EC. It covers amongst other things: trade relations, financial aid, development cooperation and political dialogue. Only the trade and development aspects of the agreement were provisionally implemented with immediate effect on 1 January 2000, since the EC had authority over these aspects. EC member states retained authority over the economic and political aspects included in the TDCa and therefore the agreement had to be ratified before it could be fully implemented. On 1 May 2004 the trade arrangement moved to the next level with commencement of full implementation of the TDCa, subsequent to ratification by the 15 new EC member states.
- 44 A major imbalance in the Agreement on Agriculture is the special safeguard mechanism is only available where a country has 'tariffied' a product in the Uruguay Round. Only 20 developing countries are eligible and therefore most developing countries have no proper instrument to counter import surges of agriculture goods.
- 45 See above for the NAFTA type safeguard clauses.
- 46 See Art. 22(5) of the Croatia-Turkey FTA and Art. 25(5) of the EFTA-Morocco FTA.
- 47 EC-Albania, EC-Mexico and the TDCa.
- 48 The question now arises as to what party the shorter period refers to. For example, Art. 6(b) of the CARIFORUM EPA states: "Safeguard measures referred to in this Article shall not be applied for a period exceeding two years. Where the circumstances warranting imposition of safeguard measures continue to exist, such measures may be extended for a further period of no more than two years. Where the CARIFORUM States or a Signatory CARIFORUM State apply a safeguard measure, or where the EC Party apply a measure limited to the territory of one or more of its outermost regions, such measures may however be applied for a period not exceeding four years and, where the circumstances warranting imposition of safeguard measures continue to exist, extended for a further period of four years". Due to the principle of asymmetry, the EU agreed not to impose any bilateral safeguard measures on CARIFORUM exports. Now, if special and differential treatment is afforded to the CARIFORUM and EU's outermost states, to what party does the original time frame refer?

- 49 As stated earlier, in the case of the TDCA, the EU is not allowed to impose bilateral safeguard measures. The only instance in which they can impose bilateral safeguard measures is when its outermost regions are affected. The EU does, however, still have recourse to the global safeguard mechanism.
- 50 US-Chile FTA Section G, Article 3.19; US-Morocco FTA Article 4.2.
- 51 Canada-Chile FTA Annex C-00-B; NAFTA Annex 300-B.
- 52 Canada-Chile FTA Annex C-00-B Section 3; NAFTA Annex 300-B Section 4.
- 53 Australia-New Zealand FTA Article 509 and Annex 5; Thailand-New Zealand Article 5.11 and Annex 1 and 3.
- 54 Products divided into different sections based on the HS 2 level chapter classification of the various product lines.
- 55 Article 703, Annex 703.3 and the Schedule to Annex 302.2.
- 56 US-Morocco FTA Article 3.5; US-Chile FTA Article 3.18.
- 57 US-Chile FTA Article 3.18 and Annex 3.18; US-Morocco FTA Article 3.5 and Annex 3-A.
- 58 CEPT Scheme Agreement Article 6 with Annex 1 (products that are sensitive) and Annex 4 (products that are highly sensitive).
- 59 Romania-Turkey FTA Article 16, 28, 32; Croatia-Turkey FTA Article 13, 19 and 22.
- 60 Statistics available on http://www.wto.org/english/tratop_e/safeg_e/safeg_stattabl_e.xls.
- 61 R.A. 8800 Chapter III, section 21 to 24 available at <http://www.tariffcommission.gov.ph/ra8800.html>
- 62 The product originating from developing countries has a share of less than three percent in the total Philippine imports of the product and collectively all the developing countries with a less than three percent share do not account for more than nine percent of the total Philippine imports of the product concerned.
- 63 In the case of NAFTA type agreements, recourse to dispute settlement procedures is explicitly excluded.
- 64 Some agreements provide for the application of safeguard measures after the expiry of the transition period, but then only with the permission of the partner country against who the action was instituted.
- 65 See Final Panel Report (1998).
- 66 These are the totals from 29 March 1995 to 12 November 2008.

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