

**Unilateralism Alive:**  
**Right of Retaliation under**  
**Article 8.3 of the Agreement on Safeguards**

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*Neminem laedit qui jure suo utitur<sup>2</sup>*

*“The representative of the United States said that the threat of retaliation or demands for compensation, which often acted as a deterrent for providing import relief, was an important counter-weight to domestic pressures for safeguard measures and should not be given up”.<sup>3</sup>*

**I. Introduction**

The WTO Agreement<sup>4</sup> can be cited as an authority for, inter alia, two propositions: there are no rules without exceptions and there are no exceptions without exceptions. Take, for example, safeguard measures. Pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards a Member may deviate from its tariff bindings under Article II of the GATT 1994 and the prohibition on the use of quantitative restrictions under Article XI of the GATT 1994 if it faces an increase in imports causing serious injury to its domestic industry. If a safeguard measure taken in such exceptional situation is less than three years in duration, a Member introducing the safeguard measure (“importing Member”) cannot be retaliated against by Members affected as a result of the action (“exporting Members”). This rule, however, knows two exceptions spelled out in Article 8.3 of the Agreement of Safeguards. Exporting Members may retaliate if (a) the safeguard measure has not been taken as a result of an absolute increase in imports or (b) if the safeguard measure is inconsistent with the Agreement on Safeguards.

This exception to exception – the right to retaliate under Article 8 of the Agreement on Safeguards – is the subject of the present article. The right to retaliate following the introduction of a safeguard measure was originally foreseen by the drafters of the GATT 1947 and continues to be reflected in the GATT 1994 and the Agreement of Safeguards. It was rarely enforced during the application of the GATT 1947, not least because Members

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<sup>2</sup> “No one commits a wrong against another who does what he has a right to do”. *Gaius 2 de testam. ad ed. urb.*, Dig.50.17.55.

<sup>3</sup> *Negotiating Group on Safeguards, Meeting of 26, 27 and 29 June 1989, Note by the Secretariat*, WTO Document, MTN.GNG/NG9/11, 24 July 1989.

<sup>4</sup> *The Marrakesh Agreement Establishing the World Trade Organization with Annexes*, done at Marrakesh, Morocco, 15 April 1994.

rarely used safeguards in the first turn. Nevertheless, with the entry into force of the Agreement on Safeguards and an increase in the use of Article XIX of the GATT 1994, rights of exporting Members in the context of application of safeguard measures returned to the agenda of the debates in different WTO Committees and among commentators of the WTO Agreement.

This article purports to contribute to this debate by analyzing how an exporting Member can adopt retaliatory measures in a WTO-compliant fashion. It starts by introducing the Agreement on Safeguards and then concentrates on two scenarios. The first one has to do with retaliation for the lack of absolute increase in imports while the second with the suspension of concessions in light of the inconsistency of a safeguard measure with the Agreement on Safeguards.

## **II. Agreement on Safeguards: General Remarks**

Article XIX of the GATT 1994 dealing with safeguard measures allows ‘to re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with “unexpected” and, thus, “unforeseen” circumstances which lead to the product “being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products”.<sup>5</sup> While Members using safeguards often justify them in terms of necessity to reduce or eliminate adjustment costs,<sup>6</sup> economists view the rationale for this provision mainly in the fact that an opportunity to revoke a trade concession in future increases the willingness of negotiators to make concessions at present which in turn intensifies the pace of multilateral trade negotiations.<sup>7</sup>

To introduce a safeguard measure the Member in question must determine that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry.<sup>8</sup> Such Member is also supposed to notify other Members before introducing a safeguard measure ‘as well in advance as possible’<sup>9</sup> and to afford interested Members an opportunity to consult with an aim of agreeing upon compensation.<sup>10</sup>

Legal implications of not agreeing upon compensation have changed following the completion of the Uruguay Round of Multilateral Trade Negotiations (Uruguay Round).

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<sup>5</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* (“Argentina – Footwear (EC)”), WT/DS121/AB/R, adopted 12 January 2000, para. 94.

<sup>6</sup> See, e.g.: *Steel Products Proclamation to Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products by the President of the United States of America*, 5 March 2002; *Proclamation to Facilitate Positive Adjustment to Competition From Imports of Certain Circular Welded Carbon Quality Line Pipe by the President of the United States of America*, 18 February 2000.

<sup>7</sup> Alan O. Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, University of Chicago Law Review, Winter, 1991, 58 U. Chi. L. Rev. 255.

<sup>8</sup> Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (“US – Line Pipe”), WT/DS202/AB/R, adopted 8 March 2002, para. 84.

<sup>9</sup> Article XIX:2 of the GATT 1994. The notification requirement is significantly expanded by the AS. In particular, Article 12 states that immediate notification is required for the initiation of an investigation, making a finding of serious injury or threat thereof, taking a decision to apply or extend a safeguard measure, results of consultations, results of mid-term review, any form and compensation and proposed suspension of concessions.

<sup>10</sup> Article XIX:2 of the GATT 1994.

Under the GATT 1947 in the absence of agreement on compensation the importing Member was free to proceed to the introduction of a safeguard measure, while the exporting Member was equally free to suspend substantially equivalent concessions. Such suspension of concessions, if not disapproved by all Members within thirty days after its notification, was to take place not later than ninety days after the safeguard measure had been taken.<sup>11</sup> Taking into account that safeguards under Article XIX of the GATT 1947 were to be applied on an MFN basis,<sup>12</sup> an importing Member wishing to escape retaliation in response to the introduction of a safeguard measure had to agree on compensation with all major exporters. The practice showed that this requirement was too stringent to comply with. Article XIX was rarely used being replaced by extensive use of anti-dumping measures and legally dubious practice of so called 'voluntary export restraints' (VERs).<sup>13</sup> With a view to correct these undesirable developments and make safeguard measures more attractive in comparison with other kinds of trade remedies, the Agreement on Safeguards negotiated during the Uruguay Round while reinforcing the MFN interpretation of Article XIX of the GATT 1994<sup>14</sup> and prohibiting VERs,<sup>15</sup> stipulates somewhat less stringent requirements as far as the obligation of compensation is concerned.

In particular, Article 8.3 of the Agreement on Safeguards states that if a safeguard measure has been taken as a result of an absolute increase in imports and if such measure conforms to the provisions of the Agreement on Safeguards, then the right of the exporting Member to retaliate<sup>16</sup> shall not be exercised for the first three years that a safeguard measure is in effect. Taking into account provisions of Article 8.2 of the Agreement on Safeguards, the affected Member can exercise the right to suspend concessions if:

- 1) as a result of consultations under Article 12.3 of the Agreement on Safeguards no agreement has been reached within 30 days, AND
- 2) the proposed suspension of concessions has been notified to the Council for Trade in Goods (CTG) at least 30 days before its introduction and will take place within 90 days after the safeguard measure is applied, AND
- 3) a safeguard measure (i) does not conform to the Agreement on Safeguards or (ii) has not been taken as a result of an absolute increase imports or (iii) has been in force for more than three years.

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<sup>11</sup> Article XIX:3(a) of the GATT 1994.

<sup>12</sup> On the policy and legal debate on the issue of the most-favoured-nation (MFN) application of the escape clause see: Jackson, John H. *The World Trading System: Law and Policy of International Economic Relations*. 2d ed. Cambridge: MIT Press, 1997, pp. 195-199.

<sup>13</sup> VERs is a generic term embracing a number of different measures on the export and the import side, in particular orderly marketing arrangements, export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes. For further details see: Jackson, John H., William J. Davey, and Alan O. Sykes. *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations*. 3d ed. St Paul, Minn.: West Publishing Co., 1995, pp. 609-622.

<sup>14</sup> Article 2.2 of the Agreement on Safeguards states that 'safeguard measures shall be applied to a product being imported irrespective of its source'. However, it is not to forget that under 'quota modulation provision' reflected in Article 5.2(b) of the Agreement on Safeguards it is possible to deviate from the MFN standard.

<sup>15</sup> Article 11 of the Agreement on Safeguards.

<sup>16</sup> Below the words 'retaliate' and 'retaliation' are treated as synonymous to the words 'suspend concessions' and 'suspension of concessions' respectively.

The key question as far as the third pre-condition for an exercise of a right to retaliate is concerned is how to determine that the absolute increase in imports took place and that the safeguard measure is WTO-consistent. More specifically the question is whether the exporting Member can make such determinations unilaterally or whether it has to turn to the WTO for a multilateral decision?

### **III. Right of Retaliation under Article 8.3 of the Agreement on Safeguards**

#### **1. Introduction**

As a starting point it should be noted that the Agreement on Safeguards preserves the right of the exporting Member to retaliate during the first three years following the introduction of a safeguard measure even though the exercise of this right is subject to a number of conditions. It is important to make this point since a number of commentators believe that if a safeguard measure lasts less than three years, then the right of an affected Member to suspend concessions is withheld under all circumstances.<sup>17</sup> Such interpretation does not conform to the text of Article 8.3 of the Agreement on Safeguards.

Article 8.3 of the Agreement on Safeguards states that the exporting Member has a right to suspend concessions. However, under certain conditions this right cannot be exercised for the first three years that a safeguard measure is in effect. As a plain textual matter, therefore, the right to suspend concessions *per se* has not been questioned by the drafters of the Agreement on Safeguards. As the Appellate Body noted:

“... Article 8.1 of the Agreement on Safeguards provides that "Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade." If no agreement on compensation is reached, Article 8.2 provides that "the affected ... Members shall be free, not later than 90 days after the measure is applied, to suspend ... the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure".<sup>18</sup>

To suggest that retaliation is absolutely prohibited in the first three years would violate the principle of effective interpretation<sup>19</sup> by denying meaning and effect to all terms of Article 8.3 of the Agreement on Safeguards. It would make meaningless the phrase “provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement”. As the Appellate Body has

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<sup>17</sup> Michael J. Trebilcock, Robert Howse, *The Regulation of International Trade*. Second Ed., Routledge, London, 1999, p. 237; Marco C.E.J. Bronckers, *WTO Implementation in the European Community. Antidumping, Safeguards and Intellectual Property*. Journal of World Trade 29(5): 73 - 95, 1995, p. 85.

<sup>18</sup> Appellate Body Report, *US – Line Pipe*, para. 109.

<sup>19</sup> The principle of effective interpretation or "l'effet utile" or in latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty. For a discussion of this principle see also the Yearbook of the International Law Commission, 1966, Vol II A/CN.4/SER.A/1966/Add.1 p. 219 and following. See also *E.g., Corfu Channel Case*, (1949) I.C.J. Reports, p. 24; *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994) I.C.J. Reports, p. 23; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, *Droit International Public*, 5è éd. (1994) para. 17.2; D. Carreau, *Droit International* (1994), para. 369.

stated on a number of occasions, “an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.<sup>20</sup>

If the drafters of the Agreement on Safeguards indeed intended to exclude any possibility of suspension of concession during the thirt three years of the operation of a safeguard measure, they could have done so directly, as they have done, for example, in Article 2.20 of the Agreement on Textiles and Clothing. The latter provision dealing with safeguard measure initiated against textile products during one year following the integration of these products into the GATT 1994, states unconditionally that “in such cases the exporting Member concerned shall not exercise the right of suspending substantially equivalent concessions or other obligations under paragraph 3(a) of Article XIX of GATT 1994”. This, however, is not what Article 8.3 of the Agreement of Safeguards states.

## 2. The right to retaliate for the lack of absolute increase in imports

While Article 8.3 of the Agreement on Safeguards grants the exporting Member a right to retaliate for the adoption of a safeguard measure not based on the absolute increase in imports, it does not state how to determine whether the absolute increase in imports took place.

### *(a) Unilateral Determination by the Importing Member*

Some commentators suggested that the right to make determination of absolute increase in imports belongs exclusively to the importing Member. In particular, in 2002 the United States stated in its intervention before the Committee on Safeguards that it is the importing Member that has the authority to determine whether there has been an absolute increase in imports, and there is no provision of the Agreement on Safeguards that exporting Members may unilaterally substitute their judgments on this issue for those of the importing Member's competent authorities.<sup>21</sup> The United States also noted that an importing Member under the Agreement on Safeguards must follow specific investigative procedures and explain its legal and factual findings. As a result, the exporting Member may suspend concessions under Article 8.3 of the Agreement on Safeguards only if the importing Member has decided that no absolute increase took place. A slightly modified version of this approach to interpretation of Article 8.3 is the suggestion that the decision on absolute increase in imports or lack thereof should be taken by consensus by importing and exporting Members.<sup>22</sup>

The proposed interpretation of Article 8.3 of the Agreement on Safeguards does not seem to be sound. In particular, while it is true that the Agreement on Safeguards gives right to the investigating authority of the importing Member to make findings as to the absolute increase

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<sup>20</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (“US – Gasoline”), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p.23; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (“Japan – Alcoholic Beverages II”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 12; Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear* (“US – Underwear”), WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11, p. 16.

<sup>21</sup> *Minutes of the Regular Meeting held on 29-30 April 2002, Committee on Safeguards*, WTO Document, G/SG/M/19, 16 October 2002, para. 120.

<sup>22</sup> Yong-Shik Lee, *Critical Issues in the Application of the WTO Rules on Safeguards In the Light of the Recent Panel Reports and the AB Decisions*, *Journal of World Trade* 34(2): 131– 147, 2000, p. 146.

in imports or lack thereof (Articles 2.1, 3 and 4.2(a) of the Agreement on Safeguards), nowhere does it say that this right is exclusive to the importing Member. Also, while sometimes a right to undertake certain action may belong by its nature exclusively to the subject of the action (such as a right of complainant to request consultations), there is no reason to believe that the right to make an increased imports determination belongs to that category. The text of Article 8.3 of the Agreement on Safeguards does not stand for the proposition that only importing Member can make such determination. Nor does it mandate such scenario. It is simply silent on the issue.

Recognizing these objections, in the same statement before the Committee on Safeguards the United States conceded that the importing Member was not the only subject entitled to make an absolute increase in imports determination. In particular it suggested that the WTO Dispute Settlement Body (DSB) could pronounce to the same effect if the exporting Member disagreeing with importing Member's determination turns to it with allegations of inconsistency.

*(b) Multilateral Determination by the DSB*

The thrust of this approach to interpretation of Article 8.3 of the Agreement on Safeguards is that only the DSB has a right to make an absolute increase in imports determination in the situation where there is disagreement on this issue between the importing and exporting Members. The argument notes first that whether there was an absolute increase in imports or not is not a simple question involving a straightforward comparison of import statistics at the beginning and end of the relevant period. It is not a simple mathematical calculation. There are a number of steps where an importing Member must apply legal standards and judgment, and there have been several dispute settlement reports that have dealt with the question of increased imports, and what the period is, and how they are determined. Furthermore, for an exporting Member to declare unilaterally that a competent authority's finding of an absolute increase in imports is incorrect, would be making a determination that the importing Member acted inconsistently with the Agreement on Safeguards. The exporting Member would in fact be prejudging the issue of whether a safeguard measure conformed to the Agreement on Safeguards. This would be contrary to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which states that Members are to not make a determination to the effect that a violation of an Agreement has occurred, and that these disputes are to be resolved under the Agreement.<sup>23</sup> In sum, the argument is that Article 8.3 of the Agreement on Safeguards mandates a multilateral increased imports determination because it is a complex determination involving issues of law and also since the unilateral determination by importing Member would run contrary to Article 23 of the DSU.

The argument is not convincing. First, an absolute increase in imports is not an issue decisive for the legality of a safeguard measure, as it is possible, under Article 2 of the Agreement on Safeguards, to impose a measure based on a relative increase. Article 2 mentions that safeguard measures may be imposed when imports are increasing in such quantities, absolute *or* relative to domestic production. Therefore, a relative increase in imports is a sufficient basis to take safeguard action and a panel could not be requested to rule against that measure, in case such a measure was taken. Almost 100 % of the safeguards actions notified to the

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<sup>23</sup> *Minutes of the Regular Meeting held on 29-30 April 2002, Committee on Safeguards*, WTO Document, G/SG/M/19, 16 October 2002, para. 122.

Committee on Safeguards rely upon both, absolute and relative increase in imports.<sup>24</sup> For that reason making a unilateral determination on the lack of an absolute increase in imports is not the same as making a unilateral determination on the consistency of a safeguard measure with the Agreement on Safeguards.

This conclusion is further supported by the text of Article 8.3 of the Agreement on Safeguards itself. As it was mentioned above, the importing Member wishing to escape retaliation in response to the introduction of a safeguard measure must (a) rely upon absolute increase in imports and (b) provide the conformity of its measure with the Agreement on Safeguards. These two conditions are cumulative: the failure by the importing Member to comply with *any* of them makes retaliation possible. That being the case, each of the two conditions must be presumed to mean something different from one another, or else there would be redundancy.<sup>25</sup> If a unilateral determination by the exporting Member on the lack of absolute increase in imports is necessarily a determination of inconsistency of a safeguard measure with the Agreement on Safeguards, the phrase “provided that the safeguard measure has been taken as a result of absolute increase in imports” becomes redundant. Its meaning becomes entirely included in the final passage of Article 8.3 of the Agreement on Safeguards stating “provided that such a measure conforms to the provisions of this Agreement”. Such interpretation cannot be correct since it again violates the principle of effective interpretation.<sup>26</sup> The phrase “provided that the safeguard measure has been taken as a result of absolute increase in imports” has a meaning different from the phrase “provided that such a measure conforms to the provisions of this Agreement”. For that reason the unilateral determination of the lack of an absolute increase in imports does not violate Article 23 of the DSU.

Second, while it is indeed correct that to make an absolute increase in imports determination is not a simple issue of fact, this does not lead to the conclusion that only the DSB can make such determination.

The Appellate Body ruled that,

“the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports

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<sup>24</sup> From 32 notifications concerning decisions to apply safeguard measures that I have reviewed only two do not specifically deal with relative increase in imports - Chile on liquid milk (G/SG/N/10/CHL/3) and on wheat, wheat flour, sugar and edible vegetable oils (G/SG/N/10/CHL/1). All other 30 notifications expressly mention absolute as well as relative increase in imports: Argentina on footwear (G/SG/N/11/ARG/1), motorcycles (G/SG/N/10/ARG/2) and peaches (G/SG/N/10/ARG/3), Brazil on toys (G/SG/N/10/BRA/1), Chile on powdered milk (G/SG/N/10/CHL/3) and synthetic socks (G/SG/N/10/CHL/2), the Czech Republic on cane and beet sugar (G/SG/N/10/CZE/1), isoglucose (G/SG/N/10/CZE/2), Egypt on safety matches (G/SG/N/10/EGY/1), fluorescent lamps (G/SG/N/10/EGY/3) and powdered milk (G/SG/N/10/EGY/4), India on acetylene (G/SG/N/10/IND/1), carbon black (G/SG/N/10/IND/2), slabstock polyol (G/SG/N/10/IND/4), propylene glycol (G/SG/N/10/IND/3), phenol (G/SG/N/10/IND/5), acetone (G/SG/N/10/IND/6) and gamma ferric oxide (G/SG/N/10/IND/7), Jordan on biscuits (G/SG/N/10/JOR/1), Korea on garlic (G/SG/N/10/KOR/2) and dairy products (G/SG/N/10/KOR/1), Latvia on swine meat (G/SG/N/10/LVA/1), Lithuania on pastry yeast (G/SG/N/8/LTU/1), Morocco on bananas (G/SG/N/10/MAR/1), Philippines on ceramic tiles (G/SG/N/11/PHL/1), the Slovak Republic on sugar (G/SG/N/10/SVK/1), and the United States on line pipe (G/SG/N/10/USA/5), wire rod (G/SG/N/10/USA/4), steel (G/SG/N/10/USA/6), lamb meat (G/SG/N/10/USA/3), broom corn brooms (G/SG/N/10/USA/1), wheat gluten (G/SG/N/8/USA/2/Rev.1).

<sup>25</sup> Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, para. 7.21; Appellate Body Report, *US – Gasoline*, p.23.

<sup>26</sup> *Supra*, footnote 20.

of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "*such* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury".<sup>27</sup>

As a consequence, the importing Member besides establishing the fact of absolute increase in imports by merely comparing end points or looking at the overall trend over the period of investigation, has also to confirm its conclusion by analyzing trends in the most recent imports.<sup>28</sup>

Furthermore, it is also true that the determination of increased imports starts involving not only issues of fact, but also and increasingly issues of law:

“We agree with the Panel that the fulfillment of the basic conditions set out in Article 2.1 is a "pertinent *issue[] of law*" ... We agree with the Panel also that *among those "issues"* is the condition that the "product" must be "imported ... in such increased quantities, ... and under such conditions as to cause or threaten to cause serious injury".<sup>29</sup> (emphasis added)

All that, however, does not prevent an exporting Member from making a unilateral increased imports determination. The WTO Agreement as a general rule does not link the nature of issues with the authority to rule on those issues. Where such link exists, it is directly mentioned, such as in Article 17.6 of the DSU which limits the competence of the Appellate Body by stating that the latter should deal only with issues of law. There is no reason to suggest that the complex legal-factual nature of an increased imports determination mandates that it should be made exclusively by the DSB.

Respectively, neither Article 8.3 of the Agreement on Safeguards nor other provisions of the WTO Agreement mandate the multilateral finding of an absolute increase in imports to be made exclusively by the DSB.

*(c) Unilateral Determination by the Exporting Member*

If Article 8.3 of the Agreement on Safeguards or other provisions of the WTO Agreement do not mandate that an absolute increase in imports determination should be made exclusively by the importing Member or by the DSB, then the question arises whether a unilateral determination by the exporting Member is permissible? I would answer positively to this question.

First, the context of Article 8.3 of the Agreement on Safeguards shows that this agreement is based on the whole number of unilateral determinations, mostly by the importing Member. They include unilateral determinations on the issues of increase in imports (Article 2.1), injury (Article 4.2(a)), causality (Article 4.2(b)), eligibility of developing countries for the

<sup>27</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

<sup>28</sup> *Ibid.*, para. 130.

<sup>29</sup> Appellate Body Report, *US – Line Pipe*, para. 160.

exclusion (Article 9.1), duration of the measure (Article 7.1), etc. In this context it is hard to interpret Article 8.3 as suddenly implying a multilateral determination with respect to absolute increase in imports. Such determination should be as unilateral as all other determinations around. If one suggests a multilateral determination of increased imports under Article 8.3, why not to start with the same suggestion in respect of the initial increased imports determination under Article 2.1 of the Agreement on Safeguards? In other words, why not to ask the WTO to rule on whether there is an absolute increase imports *prior* to the introduction of a safeguard measure? Brazil made such proposal during the Uruguay Round,<sup>30</sup> but it was rejected and I suspect not least due to the opposition from those who argue today in favor of a multilateral determination under Article 8.3 of the Agreement on Safeguards.

Second, if under Article 8.3 of the Agreement on Safeguards an exporting Member makes unilaterally a determination on the lack of an absolute increase in imports, this determination is not as unilateral as it seems to be. Article 8.2 of the Agreement on Safeguards provides that the exporting Member can suspend concessions only if the CTG does not disapprove it. The CTG, thus, has all what it needs to stop the exporting Member from retaliating if there is credible evidence that the latter is in error. If the CTG does not disapprove the suspension of concessions proposed by the exporting Member that means that it tacitly approves it, including the unilateral determination by the exporting Member that the safeguard measure is not based on absolute increase in imports. One can argue that such interpretation is unreasonable since the consensus rule existing in the WTO guarantees such outcome in all case without exception. This argument however is not a legal one. Nothing in the WTO Agreement requires Members to act by consensus. There are procedures in place to take decisions by majority.<sup>31</sup> The fact that Members do not use majority voting does not alter that fact that this conscious choice may lead in certain situations to the legitimization of WTO-inconsistent measures.

Third, as it was pointed by the European Communities, if the exporting Member is not allowed to make an absolute increase in imports determination unilaterally and has to wait for a multilateral determination by the DSB, the safeguard action would be easily subject to abuse by the importing Member.<sup>32</sup> In its recent submission to the DSB Australia correctly pointed out that “safeguard actions are by definition time-limited,<sup>33</sup> with the result that implementation of a panel/Appellate Body decision that a safeguard action is WTO-inconsistent will often not occur until the time-frame for that safeguard action has expired”.<sup>34</sup> *De jure* it takes a Member 15 months to obtain an adopted Appellate Body report on the issue of legality of a particular safeguard measure.<sup>35</sup> However, *de facto*, as the past experience shows, the same process<sup>36</sup> takes on average 25 months.<sup>37</sup> As a result, under the proposed

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<sup>30</sup> *Negotiating Group on Safeguards, Communication from Brazil*, WTO Document, MTN.GNG/NG9/W/5, 2 July 1987, para. 12.

<sup>31</sup> Article IX:1 of the Marrakesh Agreement.

<sup>32</sup> *Minutes of the Regular Meeting held on 29-30 April 2002, Committee on Safeguards*, WTO Document, G/SG/M/19, 16 October 2002, paras. 125-126.

<sup>33</sup> The maximum duration of any safeguard measure under the Agreement on Safeguards, and the Agreement on Textiles and Clothing is four years. Under the Agreement on Agriculture, the duration for volume-based special safeguards is the end of the calendar year, while price-based special safeguards are applied on a shipment-by-shipment basis.

<sup>34</sup> *Communication from Australia*, Negotiations on Improvements and Clarifications of the DSU, WTO Document, TN/DS/W/8, 8 July 2002.

<sup>35</sup> Starting from the date of receipt of request for consultations by an importing Member.

<sup>36</sup> Starting from the date of introduction of a safeguard measure.

multilateral increased imports determination the importing Member knows *ex ante* that on average it is absolutely immune from any responsibility for its safeguard measures for 25 months. At the same time, the period of such immunity under the unilateral increased imports determination is maximum three months.<sup>38</sup> The difference of 22 months represents a considerable opportunity for abuse of safeguard measures. That could hardly be considered a satisfactory outcome from the point of view of balancing the rights of importing and exporting Members under the Agreement on Safeguards.

*(d) Conclusion*

Article 8.3 of the Agreement on Safeguards does not mandate that an absolute increase in imports determination can be done exclusively by the importing Member or exclusively by the DSB. At the same it allows a similar unilateral determination by the exporting Member. For that reason, an exporting Member has a right to suspend concession under Article 8.3 during the first three years that a safeguard measure is in force if it believes that the importing Member took a safeguard measure in the absence of absolute increase in imports.

### **3. The right to retaliate in view of illegality of a safeguard measure**

*(a) Introduction*

The second option available to the exporting Member wishing to retaliate under Article 8.3 of the Agreement on Safeguards is to do so in view of inconsistency of a safeguard measure with the Agreement on Safeguards:

“The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided... that such a measure conforms to the provisions of this Agreement”.

Again, as with the retaliation in view of the lack of absolute increase in imports, Article 8.3 of the Agreement on Safeguards is silent on how to determine the consistency of a safeguard measure with the Agreement on Safeguards. The practice of application of this provision highlighted two possible approaches.

The first approach has been proposed by the European Communities in *US – Wheat Gluten*<sup>39</sup> and in *US – Steel Safeguards*.<sup>40</sup> It states that an exporting Member is entitled to suspend

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<sup>37</sup> In *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* (WT/DS24) it took a Member 20 months (23 June 1995 – 25 February 1997); in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33) - 22 months (14 July 1995 – 23 May 1997); in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (WT/DS98) - 30 months (7 March 1997 – 12 January 2000); in *Argentina - Safeguard Measures on Imports of Footwear* (WT/DS121) - 28 months (13 September 1997 – 12 January 2000); in *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities* (WT/DS166) - 31 months (1 June 1998 – 19 January 2001); in *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand* (WT/DS177-178) - 22 months (22 July 1999 – 16 May 2001); in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe* (WT/DS202) - 24 months (1 March 2000 – 8 March 2002).

<sup>38</sup> Article 8.2 of the Agreement on Safeguards.

<sup>39</sup> WT/DS166 – *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*. Complaint by the European Communities. The dispute concerned the US definitive safeguard measures in the form of a quantitative limitation on imports of wheat gluten from the EC, effective as of 1 June 1998 (notifications G/SG/N/10/USA/2-G/SG/N/11/USA/2 (8 June 1998)). The EC considered these measures to

concessions immediately after the inconsistency of a safeguard measure has been established by the DSB. Implementing this approach in *US - Wheat Gluten* the European Communities in its notification of retaliation<sup>41</sup> stated that “the proposed suspension of substantially equivalent concessions or other obligations referred to in Article 8.2 would be applied from 1 June 2001 or five days after the date of a decision from the WTO Dispute Settlement Body that the safeguard measure imposed by the United States is incompatible with the WTO Agreements, whichever is earlier, and until the United States' safeguard measure is lifted”. The DSB adopted the mentioned decision on 19 January 2001 and as a result on 24 January 2001 the European Communities imposed retaliatory measures.<sup>42</sup> In *US – Steel* the European Communities followed the same approach with the support of China, Japan, Norway and Switzerland.<sup>43</sup>

The second approach to interpretation of Article 8.3 of the Agreement on Safeguards was highlighted by Poland's stand in *Slovakia – Sugar*.<sup>44</sup> Poland considered that the Slovak safeguard measure has been imposed in a manner inconsistent with various provisions of the Agreement on Safeguards, namely, Article 3.1, Article 4.2(b), Article 5.2(a), Article 7.4, Article 12.1(b), Article 12.1(c) and Article 12.3 and on this ground decided to proceed to the

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be in violation of Articles 2, 4, 5 and 12 of the AS; Article 4.2 of the Agreement on Agriculture; and Articles I and XIX of GATT 1994. The case went through the panel and Appellate Body. Both of them found certain inconsistencies of the U.S. safeguard measure with the WTO Agreement.

<sup>40</sup> WT/DS248 – *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*. Complaint by the European Communities. The dispute concerns the definitive safeguard measures imposed by the United States on imports of certain steel products effective as of 20 March 2002 (notifications G/SG/N/10/USA/6, G/SG/N/11/USA/5 (14 March 2002); G/SG/N/10/USA/6/Suppl.1 and G/SG/N/11/USA/5/Suppl.1 (15 March 2002); G/SG/N/10/USA/6/Suppl.2 and G/SG/N/11/USA/5/Suppl.2 (18 March 2002); G/SG/N/10/USA/6/Corr.1 and G/SG/N/11/USA/5/Corr.1 (20 March 2002); G/SG/N/10/USA/6/Corr.2 and G/SG/N/11/USA/5/Corr.2 (25 March 2002); G/SG/N/10/USA/6/Suppl.3 and G/SG/N/11/USA/5/Suppl.3 (27 March 2002) and G/SG/N/10/USA/6/Suppl.4 and G/SG/N/11/USA/5/Suppl.4 (12 April 2002)). The European Communities considered that the US measures were in breach of the US obligations under the GATT 1994 and of the AS, and in particular of Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 5.2, 7.1 and 9.1 of the AS and Articles I:1, XIII and XIX:1 of the GATT 1994.

<sup>41</sup> *Immediate Notification Under Article 12.5 of the AS to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the AS*, WTO Document G/SG/N/12/EEC/1, 3 August 1998.

<sup>42</sup> Commission Regulation (EC) No 6/2001 of 4 January 2001 laying down detailed rules for the application of Council Regulation (EC) No 1804/98 as regards the opening of a tariff quota for imports of residues from the manufacture of starch from maize falling within CN codes 2303 10 19 and 2309 90 20 and originating in the United States of America). The regulation expired on 31 May 2001, since there was no decision taken by the US to extend the safeguard measure (European Commission, Press-release, IP/01/776, 2 June 2001).

<sup>43</sup> *Immediate Notification Under Article 12.5 of the AS to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the AS*, WTO Document, G/C/10, G/SG/43 (EC), G/C/15, G/SG/44 (Japan), G/C/17, G/SG/46 (China), G/C/16, G/SG/45 (Norway), G/C/18, G/SG/47 (Switzerland). Each of these notifications on proposed suspension of concessions states inter alia that ‘the proposed suspension [will be applied] from 20 March 2005 or from the fifth day following the date of a decision from the WTO DSB that the safeguard measure imposed by the United States is incompatible with the WTO Agreements, if that is the earlier, and until the United States' safeguard measure is lifted.’

<sup>44</sup> WT/DS235 - *Slovakia – Safeguard Measure on Imports of Sugar*. Complaint by Poland. On 11 January 2002, the parties notified the DSB that they have reached a mutually agreed solution within the meaning of Article 3.6 of the DSU. Accordingly, Slovakia agreed to a progressive increase of the level of its quota for imports of sugar from Poland between 2002 and 2004, and Poland agreed to remove its quantitative restriction on imports of butter and margarine (Notification of Mutually Agreed Solution, G/SG/D18/1/Add.1, 16 January 2002). Both parties agreed to implement the above by 1 January 2002.

suspension of concessions under Article 8.2 of the Agreement on Safeguards without waiting until the DSB expresses its opinion on the issue.<sup>45</sup>

The difference between two approaches is mandated not by the text of Article 8.3 of the Agreement of Safeguards, but by Article 23 of the DSU. The first approach is based on the assumption that Article 23 of the DSU prohibits unilateral determinations of inconsistency of a safeguard measure by the exporting Member. The second approach, on the other hand, assumes that Article 23 of the DSU is not applicable to determinations made under Article 8.3 of the Agreement on Safeguards. To decide who is right, it is important to analyze the relationship between these two provisions.

(b) *Relationship between Article 23 of the DSU and Article 8.3 of the Agreement on Safeguards*

Article 23 of the DSU deals, as its title indicates, with the "Strengthening of the Multilateral System". Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU.<sup>46</sup> In particular it provides that:

(a) It is for the WTO through the DSU process – not for an individual WTO Member – to determine that a WTO inconsistency has occurred (Article 23.2(a)).

(b) It is for the WTO or both of the disputing parties, through the procedures set forth in Article 21 – not for an individual WTO Member – to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings (Article 23.2(b)).

(c) It is for the WTO through the procedures set forth in Article 22 – not for an individual WTO Member – to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed as a result of a WTO inconsistency, as well as to grant authorization for the actual implementation of these suspensions.<sup>47</sup>

The Appellate Body added in *US – Certain EC Products* :

“Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They *all* concern the obligation of Members of the WTO not to have recourse to unilateral action”.<sup>48</sup>

<sup>45</sup> *Notification Under Article 12.5 of the AS to the Council for Trade in Goods of Proposed Suspension of Concessions*, WTO Document G/SG/35, 2 July 2001.

<sup>46</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 ("US – Section 301")*, WT/DS152/R, adopted 27 January 2000, para. 7.35.

<sup>47</sup> *Ibid.*, para. 7.38.

<sup>48</sup> Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities ("US – Certain EC Products")*, WT/DS165/AB/R, adopted 10 January 2001, para. 111.

Taking into account these statements it would seem at first sight that both the European Communities and Poland are wrong in their interpretations of Article 8.3 of the Agreement on Safeguards. The European Communities measures in *US - Wheat Gluten* and *US - Steel Safeguards* are inconsistent with Article 23.2(b) and (c) of the DSU since the European Communities did not follow the DSU procedures for determination of reasonable period of time for compliance and setting the level of suspension of concessions. Poland's approach violates Article 23.2(a-c) of the DSU by making a unilateral determination of inconsistency without recourse to the DSU and retaliating without determining in a DSU-compliant fashion the reasonable period for Slovakia to comply and the equivalent level of the suspension of concessions.

This first impression, however, is wrong for the following reasons.

- (i) *Article 23 of the DSU does not prohibit otherwise WTO-consistent unilateral measures*

Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU, such as the Agreement on Safeguards. The DSU is a coherent system of rules and procedures for dispute settlement which applies to "disputes brought pursuant to the consultation and dispute settlement provisions of" the covered agreements.<sup>49</sup> Appendix 2 to the DSU lists special or additional provisions of other multilateral agreements designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement. Those provisions prevail over the DSU procedures to the extent of the conflict.<sup>50</sup> On the definition of a conflict, the Appellate Body ruled:

"...only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to prevail over the provision of the DSU".<sup>51</sup>

By virtue of Article 1.1 of the DSU Article 23 of the DSU applies to disputes under the Agreement on Safeguards. It mandates exclusive jurisdiction of the DSB with regard to determinations of WTO Agreement violations. Article 8.3 of the Agreement on Safeguards at the same time provides that the exporting Member has a right to retaliate in view of illegality of a safeguard measure under the Agreement on Safeguards. Article 8.3 of the Agreement on Safeguards is not listed among special provisions of Appendix 2 to the DSU. Thus, if Articles 23 of the DSU and Article 8.3 are interpreted so that the conflict arises between them, Article 23 of the DSU prevails to the extent of the conflict. It should also be noted that if there is an interpretation that allows to avoid a conflict between two provisions of the WTO Agreement, it should be preferred to an interpretation resulting into a conflict between those provisions since only the former interpretation would be in compliance with the principle of effective interpretation requiring to give full meaning to all terms of the treaty.<sup>52</sup>

<sup>49</sup> Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("Guatemala – Cement I"), WT/DS60/AB/R, adopted 25 November 1998, para. 64.

<sup>50</sup> Article 2.1 of the DSU.

<sup>51</sup> Appellate Body Report, *Guatemala – Cement I*, WT/DS60/AB/R, adopted 25 November 1998, para. 66.

<sup>52</sup> *Supra*, footnote 20.

The interpretation that allows to avoid a conflict between Article 23 of the DSU and Article 8.3 of the Agreement on Safeguards may look as follows. Article 23.1 of the DSU prohibits Members from seeking the redress of a violation of the WTO Agreement without the recourse to the WTO dispute settlement system. But what if while seeking the redress of such violation, a Member actually follows a multilateral WTO agreement, other than DSU, such as Article 8.3 of the Agreement on Safeguards? There are reasons to suggest that in all instances where a WTO Member makes unilateral determinations as to the consistency of behavior of other Members with the WTO Agreement, those determinations as well as measures adopted on their basis do not violate Article 23 of the DSU, provided that they are taken in compliance with a multilateral WTO agreement.

First, the fact that unilateral measures are adopted pursuant to WTO procedures means that they do not “seek to redress a WTO violation” within the meaning of Article 23 of the DSU. Such measures are adopted in pursuance of objectives of a particular multilateral WTO agreement and thus fall outside of the scope of Article 23 of the DSU. Article 23 of the DSU in this context applies only when a Member seeks to redress a WTO violation and in doing so does not follow provisions of a particular multilateral WTO agreement.

Second, suggesting that unilateral determinations of WTO inconsistency even if made in accordance with a WTO agreement other than the DSU are inconsistent with Article 23 of the DSU may lead to a number of truly disastrous consequences. In particular, it could mean that the imposition of antidumping and countervailing duties is inconsistent with Article 23 of the DSU since Article VI of the GATT 1994 foresees unilateral measures to address dumping and subsidies. In taking those decisions Members make on a daily basis unilateral determinations as to the consistency of behavior of another Member with the WTO Agreement.<sup>53</sup> Antidumping and countervailing measures are unilateral in nature<sup>54</sup> being based on unilateral determinations of a WTO Agreement violation. Thus they violate Article 23.2(a-c) of the DSU. This outcome can hardly be considered a reasonable interpretation of Article 23 of the DSU.

Third, there is an indirect authority for the proposition that otherwise WTO-consistent unilateral determinations do not violate Article 23 of the DSU. In *US - Cotton Subsidies* Brazil brought a number of claims against U.S. cotton subsidies under Article XVI of the GATT 1994 and Article 5 and 6 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Immediately following the composition of the Panel, the United States submitted a letter in which it asserted that Brazil may not maintain its action based on its claims of adverse effects and serious prejudice under the SCM Agreement and Article XVI of the GATT 1994 unless the Panel had found that United States support measures for upland cotton do not conform to Article 13 of the Agreement on Agriculture. Pursuant to Article 13(a)(ii) of the Agreement on Agriculture domestic support measures that “conform fully to the provisions of Annex 2 to this Agreement” are “exempt from actions based on Article XVI of the GATT 1994 and Part III of the Subsidies Agreement”. And pursuant to Article 13(b)(ii) of the Agreement on Agriculture, “domestic support measures that conform fully to the provisions of Article 6” are “exempt from actions” based on GATT 1994 Article XVI:1 and SCM Agreement Articles 5 and 6. The United States requested the Panel to organize its

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<sup>53</sup> According to the economic theory underlying the Antidumping Agreement, the ultimate fault for dumping lies with the Member whose products are dumped. This fault consists in creating a sanctuary domestic market allowing to compensate domestic producers for injurious dumping abroad.

<sup>54</sup> Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* (“*US – Offset Act (Byrd Amendment)*”), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, para. 271.

procedures to determine first whether Brazil was permitted to maintain any actions based on the provisions exempted by Article 13 of the Agreement on Agriculture. If the Panel allowed Brazil to proceed with its substantive claims under the SCM Agreement and the GATT 1994, and only concluded later that the measures at issue conformed to Article 13 of the Agreement on Agriculture, the measures at issue would already have been subject to actions based on those claims, which would contradict the ordinary meaning of "exempt from actions".

The Panel rejected the U.S. argument. It considered that,

“the ordinary meaning of the terms read in their context and in light of the object and purpose of the treaty, indicated that "exempt from actions" means that dispute settlement actions based on the listed provisions shall not be invoked with respect to measures that satisfy the conditions in Article 13 of the Agreement on Agriculture. However, that does not preclude multilateral dispute settlement based on the listed provisions where a Member *considers* that benefits accruing under covered agreements are being impaired by a measure taken by another Member that does *not* satisfy the relevant conditions set forth in Article 13 of the Agreement on Agriculture.”<sup>55</sup> (emphasis added)

Article 8.3 of the Agreement on Safeguards is identical textually to the respective provisions of Article 13 of the Agreement on Agriculture. While the former states that “the right of suspension... shall not be exercised... provided that ... a [safeguard] measure *conforms* to the provisions of the Agreement”, the latter in paragraph (a)(i) provides that “domestic support measures that *conform* fully to the provisions of Annex 2 to this Agreement shall be exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement”. Under the Agreement on Agriculture Panel’s finding means that the plaintiff wishing to challenge domestic support measures under for example, Article XVI of the GATT 1994 has a right to do so even if there is no prior multilateral ruling on the consistency of domestic support measures with Annex 2 to the Agreement on Agriculture. The plaintiff may “consider” this issue for itself by making in fact a unilateral determination on the consistency of a domestic support measure with Annex 2 to the Agreement on Agriculture. Respectively under the Agreement on Safeguards that would mean by analogy that the exporting Member may “consider” for itself whether the safeguard measure conforms to the Agreement on Safeguards. In other words, it would mean that a unilateral determination of inconsistency is permissible under Article 8.3. The reason that the issue of violation of Article 23 of the DSU does not arise in this context is that the unilateral action is taken in compliance with the provision of another WTO Agreement.

(ii) *Article 8.2 of the Agreement on Safeguards does not foresee a role for the DSB*<sup>56</sup>

Article 8.2 of the Agreement on Safeguards represents an immediate context for the interpretation of Article 8.3 of the same Agreement. It states:

If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days

<sup>55</sup> Panel Report, *United States – Subsidies on Upland Cotton* ("US – Cotton Subsidies"), WT/DS267/R, circulated 8 September 2004, para. 7.320.

<sup>56</sup> This argument is equally relevant for the previous section on Article 8.3 retaliation in view of the lack of absolute increase in imports.

after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

This language suggests that the determination of inconsistency of a safeguard measure under Article 8.3 of the Agreement on Safeguards should be undertaken by the exporting Member alone. Were the latter to wait for a DSB ruling on the issue of legality of the safeguard measure, it would miss the prescribed 90 days deadline for the application of the retaliatory measures.

This conclusion is not undermined by the fact that it has become an accepted practice in the GATT/WTO to allow for extension of this 90 days period. Normally such extension takes place through bilateral agreement between the Members concerned with subsequent submission of joint communication to the CTG to the effect that they, for example, “have agreed that their reciprocal rights and obligations under the Agreement on Safeguards and the GATT 1994 will be maintained, and for this purpose they have agreed that as between them the 90-day period set forth in Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 shall be considered to expire on ...”<sup>57</sup>. Such practice, however, only confirms the proposition that Article 8.3 of the Agreement on Safeguards presupposes unilateral rather than multilateral determinations.

(iii) *Article 8.3 determinations are legitimized by the CTG*

An important argument in favor of interpreting Article 8.3 of the Agreement on Safeguards as allowing a unilateral determination of inconsistency of a safeguard measure with the Agreement on Safeguards is the fact that pursuant to Article 8.2 of the said Agreement all retaliatory measures are to be notified to the CTG and will enter into force only if not disapproved by it. That means that every decision of the exporting Member to suspend concessions under the pretext of illegality of a safeguard measure is in fact ratified by the CTG. The fact that such ratification takes place by inaction rather than by action is of no legal importance in the same way as acquiescence is no different from positive action.

Furthermore, the decision making-rule of reverse consensus used for Article 8.2 ratification of retaliation is identical to the rule used by the DSB to authorize the suspension of concessions under Article 22.7 of the DSU as well to adopt Panel and Appellate Body reports under Articles 16.4 and 17.14 of the DSU. The legal effect of adoption of Panel and Appellate Body reports by the DSB is that:

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<sup>57</sup> *GATT, Analytical Index: Guide to GATT Law and Practice*, 6<sup>th</sup> Edition (1994), p. 486-487). Examples of such notifications are: *Immediate Notification under Article 12.5 of the AS to the Council for Trade in Goods Concerning United States Action in Respect of Certain Steel Wire Rod*, Joint Communication from the United States and the European Communities, WTO Documents, G/L/375, G/SG/N/12/EEC/4, G/SG/N/12/USA/2, 3 May 2000; *Immediate Notification under Article 12.5 of the AS to the Council for Trade in Goods Concerning Argentina’s Action in Respect of Imports of Footwear*, Joint Communication from Argentina and Indonesia, WTO Documents, G/L/378, G/SG/N/12/ARG/2, G/SG/N/12/IDN/1, 4 May 2000.

“...[they] must be treated by the parties to a particular dispute as a final resolution to [that] dispute.”<sup>58</sup>

Since the CTG acts upon the suspension of concessions under Article 8.2 of the Agreement on Safeguards in the same way as the DSB acts with respect to Panel and Appellate Body reports and since the CTG consists of exactly the same Members that the DSB does, CTG’s action should be treated as a multilateral determination by Members on the legality of the importing Member’s safeguard measure. Thus, even assuming that the suspension of concessions introduced in view of illegality of a safeguard measure violates Article 23 of the DSU, such violation is cured by a CTG ratification.

It should also be noted that CTG’s decision-making inaction described above is different from inaction of WTO Committees dealt with in Appellate Body reports in *India – Quantitative Restrictions* and *Turkey – Textiles* and Report of the Panel in *US – Line Pipe*. Neither the Understanding on Balance-of-Payments Provisions of the GATT 1994 and Article XII of the GATT 1994 nor Article XXIV of the GATT 1994 and Understanding on the Interpretation of Article XXIV of the GATT 1994 grant respectively to the Committee on Regional Trade Agreements and Committee on Balance-of-Payments Restrictions rights to take decision by reverse consensus with respect to balance-of-payments measures and regional trade agreements notified to them. Respectively, Panel’s and Appellate Body’s findings on legal insignificance of the inaction of those Committees on the legality of measures notified to them are of little importance in the context of Article 8.3 of the Agreement on Safeguards.<sup>59</sup>

(c) *Conclusion*

Exporting Member may suspend concession under Article 8.3 of the Agreement on Safeguards if it believes that the safeguard measure affecting it is inconsistent with Agreement on Safeguards. Exporting Member may rely upon its own unilateral determination of WTO-consistency of such safeguard measure while taking a decision to suspend concessions.

#### IV. Final Remarks

Article 8.3 of the Agreement on Safeguards allows an exporting Member to unilaterally determine whether the safeguard measure imposed by an importing Member conforms to the Agreement on Safeguards and whether it has been introduced in view of an absolute increase in imports. Based on the results of this determination the exporting Member can proceed to the suspension of the application of substantially equivalent concessions in accordance with Article 8.2 of the Agreement on Safeguards within the first three years that a safeguard measure is in operation. Such interpretation is consistent with the object and purpose of the Agreement on Safeguards to preserve the balance between the interests of importing and exporting Members in the situation where safeguard actions are taken against a “fair trade”.<sup>60</sup>

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<sup>58</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, para. 97.

<sup>59</sup> Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/AB/R, adopted 22 September 1999, paras 101-105; Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/AB/R, adopted 19 November 1999, paras. 59-60; Panel Report, *US – Line Pipe*, paras. 7.142-7.143.

<sup>60</sup> Appellate Body Report, *US – Line Pipe*, para. 83.

The contrary approach stating that the exporting Member should rely on multilateral determination by the DSB of either the absolute increase in imports or illegality of a safeguard measure or both does not balance the competing objectives, but provides a clear advantage to the importing Member who may act upon its own unilateral determinations.

For those who believe that granting unilateral rights to the exporting Member would in practice prevent importing Members from introducing any safeguard measures, it is important to look at the experience of Members with Article 8.3 of the Agreement on Safeguards in the recent years. The practice of application of this provision shows that importing Members rarely use this possibility. In 2003 the Committee on Safeguards reviewed 19 notifications concerning decisions to apply safeguard measures. At the same time there were no notifications concerning immediate suspension of concessions (prior to the expiration of three years period).<sup>61</sup> The same ratios for the previous years are: 26 to 12 in 2002 (mainly due to the steel dispute),<sup>62</sup> 20 to 1 in 2001,<sup>63</sup> 21 to 0 in 2000,<sup>64</sup> 14 to 0 in 1999,<sup>65</sup> 1 to 1 in 1998<sup>66</sup> and 4 to 0 in 1997.<sup>67</sup> The reasons for a relatively small number of Article 8.3 retaliatory measures are straightforward. First, retaliation is a sensitive tool to use politically and second, it hurts economically. The dispute with respect to U.S. steel safeguard measures has highlighted both issues.<sup>68</sup>

On the other hand what can be expected from an ‘increased’ threat of retaliation by exporting Members is the enhanced compliance with the requirements of the Agreement on Safeguards by importing Members. As John Jackson put it, “a quid pro quo for adhering to more precise and higher standards and criteria will be... an escape from retaliatory type measures for this limited period of three years”.<sup>69</sup> Limited instances of application of Article 8.3 of the Agreement on Safeguards demonstrate that these expectations are not without ground. In *US – Wheat Gluten* the European Communities managed to preclude the extension of the US safeguard measure;<sup>70</sup> in *Slovakia – Sugar* Polish countermeasures resulted into increase of the

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<sup>61</sup> *Report (2003) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/651, 24 October 2003.

<sup>62</sup> *Report (2002) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/583, 4 November 2002.

<sup>63</sup> *Report (2001) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/494, October 31, 2001.

<sup>64</sup> *Report (2000) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/409, 23 November 2000.

<sup>65</sup> *Report (1999) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/338, 26 October 1999.

<sup>66</sup> *Report (1998) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/272, 11 November 1998.

<sup>67</sup> *Report (1997) of the Committee on Safeguards to the Council for Trade in Goods*, WTO Document, G/L/200, 28 October 1997.

<sup>68</sup> See, for example: *Fearing Trade War, EU Industry Groups Lobby States to Reject EC Steel Retaliation*, BNA WTO Reporter, 15 April 2002; *EU Head Office Finds Little Support for Campaign to Retaliate for US Steel Tariffs*, AP, 21 April 2002; *EU split over steel sanctions on US*, Financial Times, 2 May 2002; *EU to delay tit-for-tat sanctions against US*, Financial Times, 31 May 2002; *Japan May Delay Retaliatory Tariffs On U.S. Steel Until After G-8 Summit*, BNA WTO Reporter, 5 June 2002; *EU Members Support Plan to Delay Retaliatory Sanctions on U.S. Products*, BNA WTO Reporter, 11 June 2002; *EU delays retaliation against US on steel*, Financial Times, 19 July 2002.

<sup>69</sup> Jackson, John H. *The World Trading System: Law and Policy of International Economic Relations*. 2d ed. Cambridge: MIT Press, 1997, p. 211.

<sup>70</sup> European Commission, Press-release, IP/01/776, 2 June 2001.

quota on the Polish sugar;<sup>71</sup> and finally in *US – Steel Safeguards* the European Communities merely by threatening to impose immediate retaliation in the amount of \$ 380 million achieved exclusions requested by its steel mills with an estimated value of over \$ 300 million<sup>72</sup> and later on, once the Appellate Body report was adopted, managed to obtain withdrawal of the safeguard measure long before it was due to expire.<sup>73</sup>

For all these reasons, actions provided for by Article 8.3 of the Agreement on Safeguards may belong to those rare instances within the WTO legal regime where unilateral behavior is in fact and in law possible and moreover should be possible as it follows from the ordinary meaning of this article, its context and the object and purpose of the Agreement on Safeguards. It is in short a typical situation where the Roman legal maxim is true -- *Neminem laedit qui jure suo utitur*.<sup>74</sup>

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<sup>71</sup> *Slovakia - Safeguard Measure on Imports of Sugar, Notification of Mutually Agreed Solution*, WTO Document, G/SG/D18/1/Add.1, 16 January 2002.

<sup>72</sup> *EU Agrees to Hold Fire on Steel Sanctions Against U.S. Until Sept. 30 Due to Exclusions*, BNA WTO Reporter, 22 July 2002.

<sup>73</sup> *Proclamation by the President of the United States to Provide for the Termination of Action Taken with Regard to Imports of Certain Steel Products*, 4 December 2003.

<sup>74</sup> “No one commits a wrong against another who does what he has a right to do”. *Gaius 2 de testam. ad ed. urb.*, Dig.50.17.55.