

Recession, Technological Changes and Other Factors as Unforeseen Developments in Safeguard Investigations

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Abstract

The research aims to provide a thorough treatment of legal, economic and policy issues dealing with safeguard investigations taking into account modern political economy and rapid development of technology. Not only the historical preconditions and modern tendencies, but also suggestions of resolving the problems at issue are observed. The thesis analyses the main WTO legal provisions, the relevant case law and, in particular, Members' national decisions with especial focus on the arguments regarding the "unforeseen developments" prerequisite. Moreover, the research is beneficial both to exporters and importers as well as state officials due to the compound exhaustive list of standards of adherence to the "unforeseen developments" requirement. The key findings of the paper shall provide an insight on current argumentation and a list of factors potentially acceptable as the "unforeseen developments" for the imposition of the safeguard measures within the meaning of Article XIX of the GATT and Article 2.1 of the Agreement on Safeguards.

Declaration

This master thesis has been written in partial fulfilment of the Master of International Law and Economics Programme at the World Trade Institute. The ideas and opinions expressed in this paper are made independently, represent my own views and are based on my own research. I confirm that this work is my own and has not been submitted for academic credit in any other subject or course. I have acknowledged all material and sources used in this paper.

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LIST OF ABBREVIATIONS

AB	Appellate Body
AFTA	Association of Southeast Asian Nations Free Trade Agreement
ASEAN	Association of Southeast Asian Nations
CEPT	Agreement on the Common Effective Preferential Tariff
DR	Dominican Republic
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
EC	European Communities
EU	European Union
GATT	General Agreement on Tariffs and Trade 1994
ITC	International Trade Commission
ITO	International Trade Organisation
MERCOSUR	Common Southern Market
NAFTA	North American Free Trade Agreement
SA	Agreement On Safeguards
US / USA	United States of America
USITC	United States International Trade Commission
VER	Voluntary export restraint
WTO	World Trade Organization

INTRODUCTION

“The tragic events in Japan have added to the growing concerns about the strength of the global economy but they should not push the world back into recession”, finds the latest GPS Monthly report from CIBC World Markets Inc.¹ However, the recession triggered by the long-lasting global financial crisis with its economical distorting consequences, various technological developments and many more other factors were used by countries worldwide when imposing safeguard measures and arguing that these factors should have been considered as the “unforeseen developments”.

The thesis main contribution will be expanding the empirical efforts to quantify the coverage of the “unforeseen developments” previously covered in studies made by John H. Jackson, Alan O. Sykes, Yong-Shik Lee, Felix Mueller and others. The outcome of the thesis is to collect, produce and compare data from the available case law, particularly, Member’s national decisions, regarding legal argumentations of states on the “unforeseen developments” requirement in safeguard investigations.

Despite the increase in the number of safeguard measures, every single safeguard measure² challenged before the WTO Appellate Body (hereinafter – “AB”) have been considered as failed to meet the necessary requirements.³ It is the opinion of the author that the AB revival of GATT Art.XIX.1 (a) is a very controversial matter, and, hence, its proper analysis is of great importance. Having researched the case law at issue, author asserts that the AB decisions were correct as a logical matter. Although, as many members (drafters) did not perceive the demonstration of the unforeseen developments to be a legal requirement for the application of a safeguard measure as analyzed further below, the AB erred in reaching the decision and could have made a legal mistake. Moreover, from a conceptual perspective, the AB created the situation when the “unforeseen developments” requirement has proven

¹ GPS Monthly report from CIBC World Markets Inc., <http://research.cibcwm.com/> (retrieved 3 July 2011).

² Excluding the recent case: United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (US - Tyres (China)), WT/DS399/AB/R, 5 September 2011. The author considers the China-specific case as irrelevant to the analysis of the “unforeseen developments” requirement due to the fact that it was not argued in the case that the US national authorities failed to comply with the “unforeseen developments” requirement and mainly because issue at stake was based on the Protocol on the Accession of the People's Republic of China, not GATT or the SA.

³ In the six relevant safeguard disputes that have resulted in the decision to date (GATT Hutter’s Fur case, and the WTO disputes: Korea – Dairy, Argentina —Footwear (EC), US – Lamb, US – Wheat Gluten, and US – Steel), complaints, arguing that the national authorities failed to comply with the unforeseen developments requirement, prevailed on the issue in four out of six cases and in the remaining two matters the issue was not reached for reasons of judicial economy.

practically impossible to satisfy. With time passing the likelihood that recent developments will have been “foreseen” at the time of concession seemingly diminishes.⁴

In addition to various analytical approaches of the WTO Members⁵, the challenge that they face now can be resolved through more flexible WTO standards for safeguard protection, particularly: the elimination of the “unforeseen developments” requirement or the amendment of the AS by providing precise detailed definition and outlining the parameters of the term.

The paper aims to provide thorough treatment of legal, economic and policy issues dealing with safeguard investigations taking into account modern political economy and rapid development of technology. The historical preconditions and modern tendencies as well as suggestions of resolving the current problems at issue are to be observed.

The thesis will analyze the main WTO legal provisions as well as the relevant case law and, in particular, Members’ national decisions as well as countries’ notifications and available investigation documents with special focus on Members’ arguments regarding the “unforeseen developments” prerequisite.

In time of emergencies, “safeguards” are instruments of rescue,⁶ set out in GATT Art. XIX. It often takes the form of import-restrictions, such as increased tariffs and quantitative restrictions.⁷ The text corresponding to GATT Art. XIX: 1(a) is Art. 2.1 of the Agreement on Safeguards (hereinafter – “SA”), which does not mention the “unforeseen developments” clause and “effect of obligations incurred” requirement.

The two-fold problem in the broad language of the clause was analysed in the WTO case law: 1) the two stipulated provisions being in conflict; and 2) no guidance to what exactly constitutes an “unforeseen development”. The research will analyse the two issues, and will focus on defining the potential factors and outlining the parameters of the “unforeseen developments”.

Importantly, the AB in its numerous decisions found that the national authorities must demonstrate the “unforeseen developments” before imposing a safeguard measure, albeit did not comprehensively examine *when, where* and *how* the demonstration of unforeseen

⁴ Sykes, A. The WTO Agreement on Safeguards: A Commentary, Oxford University Press, Oxford, 2006, p.119.

⁵ The national laws of most regimes, e.g. US and India’s Customs Tariff Acts, do not contain the requirement of the “unforeseen developments”. However, as soon as the safeguard measures of these countries will be challenged before the WTO, it is highly doubtful whether such measures would pass the test prescribed by the AB.

⁶ However, there is a debate regarding this claim as the intentions were not precisely determined and stipulated in GATT or SA or otherwise documented in writing.

⁷ Jackson, J. The World Trading System, Law and Policy of International Relations 175, MIT Press, 1997.

circumstances should occur [emphasis added]. The AB clarified the issue of *when* and *where* stating that the “demonstration” must be made *before* application of measures in the competent authority’s report, which must contain a finding of reasoned conclusion on unforeseen developments. However, the question of *how* it must be done remains at stake and will be examined in the paper [emphasis added].

The concept of escape clause was always intended to be flexible by the negotiators, so as to follow the case-by-case analysis. However, if Members want it to be a workable remedy, the urgent research and guidelines for the WTO Dispute Settlement Body (DSB), Members and the investigating authorities need to be introduced with respect to the requirement of the “unforeseen developments”. The research shall at the least provide the exhaustive information on requirement for safeguards investigation procedures on subsequent determinations and reports of investigating authorities, and on the standards applied to determine requirements for safeguard measures imposition.

CHAPTER I.

THE THEORETICAL FRAMEWORK

The Chapter reviews the historical backgrounds and the evolution of the escape clause in the history of the GATT/WTO system, from its origins in the preparatory works to the amendments done and the practice that accompanied the Agreement on Safeguards. It stresses the discussion on intentions of negotiators in the Uruguay Round as well as the following period of the “grey-area” measures. This part concludes with the relationship between the SA and GATT Art. XIX. Moreover, the different scholars’ views on the cumulative application of certain provisions is being observed.

1.1. The negotiating history of GATT Article XIX

The development of the escape clause and the history of the safeguards measures start from the beginning of the United States (hereinafter – “US”) Reciprocal Trade Agreements program of its 1934 act. The escape clause was for the first time introduced into the 1942 U.S. – Mexico Agreement⁸, which shows striking similarities with GATT Art.XIX:1(a), however, still the two being not identical. Four years later the executive order, issued by the US President Harry S. Truman, required “an escape clause to be in every United States trade agreement”⁹. In 1951 the escape clause became part of the statutory law.¹⁰

After the publishing of the US first proposal for the International Trade Organisation (hereinafter – “ITO”) Charter, which mentioned an escape clause, it was decided to include the escape clause in the GATT at the beginning of 1947.¹¹ Afterwards, only once the very minor amendments to GATT Art. XIX were made since the Final Act of October 1947.¹²

The explanation of growing interest for the application of the “grey-area” measures (also entitled: voluntary restraint agreements, voluntary export restraints, orderly marketing arrangements), falling outside of the GATT provisions, can be explained on the following example. The US industry suffers decline because a newly industrialized country

⁸ Jackson, J. *The World Trading System, Law and Policy of International Relations* 175, MIT Press, p.179; Jackson, J. *World Trade and The Law of GATT*, Bobbs-Merrill Company, 1969, p.553.

⁹ Jackson, J. *World Trade and The Law of GATT*, Bobbs-Merrill Company, 1969, p. 553-554 referring to Exec. Order No.9832 of Feb.25, 1947 3 CFR para.624 (1947).

¹⁰ Jackson, J. *World Trade and The Law of GATT*, Bobbs-Merrill Company, 1969, p.554 referring to the Trade Agreements Extension Act of 1951, para. 6 (b), 65 Stat. 72; H.R.Doc. No. 328, 82d Cong., 2d Sess.2 (1952).

¹¹ *Ibid*, p.555 referring to U.N. Doc. EPCT/C.6/79, at 2 (1947).

¹² *Ibid*, p.555.

(for instance, Malaysia) develops a capacity to produce certain good, which export to the US rises dramatically over a short period of time. The formal safeguard measure, restricting import from the EU and Malaysia proportionately, would trigger a threat of retaliation (even though, some exporting nations may have been in a poor position to retaliate) and necessitate substantial compensation to avoid it. The prerequisites for safeguard measures in GATT Art. XIX with all the legal detail might not be satisfied and it becomes quite a bother for the political officials due to the pressure to step outside the system.¹³ Interestingly, Hindley¹⁴ compares VERs with “out-of-court” settlements¹⁵.

There exists no complete data on the application of grey-area measures in the GATT system due to the fact that “they were outside of the system by design” and no systemic reporting or notification was obligatory. However, based on available statistics¹⁶, it is still considered that “the growth of grey-area measures was dramatic in the latter years of GATT”.¹⁷ When the Uruguay Round negotiations started, the issue of the growing protectionist impact of grey-area measures was raised and heavily discussed in one out of 15 negotiating groups, established specifically on safeguards.¹⁸

¹³ Sykes, A. *The WTO Agreement on Safeguards. A commentary*, Oxford University Press Inc., New York, 2006, p.22.

¹⁴ Hindley, B. *Voluntary Export Restraints and the GATT’s Main Escape Clause*, *The World Economy*, 3 (3), 1980, p.329-41.

¹⁵ Nicolaides, P. *The Hydra of Safeguards: An Intractable Problem for the Uruguay Round?* RIIA Discussion Paper No.21, Royal Institute of International Affairs, 1989, p.11.

¹⁶ GATT, *Council Overview of Developments in International Trade and the Trading System. Annual Report by the Director General*, C/RM/OV/2, 12 April 1991, p.8; p. 17, Appendix Table 1; and *GATT Council Overview of Developments in International Trading Environment, Annual Report of the Director General*, C/RM/OV/1, 12 June 1991, p.18.

¹⁷ Sykes, A. *The WTO Agreement on Safeguards. A commentary*, Oxford University Press Inc., New York, 2006, p.24

¹⁸ A number of developing and Pacific Rim countries, which have frequently been targeted by the grey-area measures, and sought to end the selective application of grey-area measures.(Stewart, 1993) The US and Canada supported this position and expressed the need for controlled use. However, despite of the often application of these measures against Japan, this country stated that “some of it industries reaped huge profits because of them (capturing the quota rents)” (Sykes, 2006). The European countries wanted to maintain flexibility and selectivity (Sykes, 2006; Stewart, 1993). The SA was the start in establishing the prohibition against “grey-area” measures, and “in setting a ‘sunset clause’ on all safeguard actions”(Jackson, J. Sykes, A. *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, p.14). As a result, the SA “was negotiated in large part because GATT Contracting Parties had been increasingly applying a variety of “grey area” measures (bilateral voluntary export restraints, orderly marketing agreements, and similar measures) to limit imports of certain products.” (http://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm, retrieved 27 October 2011). Moreover, the preamble to the SA states the member’s desire to “clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX, to re-establish multilateral control over safeguards and eliminate measures that escape such control”.

Under GATT 1947, safeguard measures were regulated by a single provision – Article XIX – which consisted of three paragraphs and covered less than two full pages. Under GATT 1994, the provision was supplemented by a separate agreement, containing 14 articles and covered over more than 8 pages.¹⁹

1.2. Intentions of the Negotiating Parties

The SA draft version did contain the “unforeseen developments” clause, which by mid-90s was omitted. Both the European Communities (hereinafter – “EC”) and the US rejected this clause as being too difficult and restrictive for effective application and claiming that since 1947 everyone ignored the requirement anyway.²⁰

However, the EC was the one, who actually brought it back by launching a process of strategic litigation in 1997. Before the Uruguay Round Agreement was reached, France demanded to change the majority voting to giving each country a vote, which resulted in the voting on dumping and safeguards issues as of 5 free-trader Member States vs. 7 protectionists Members (including France, Spain, Italy, Belgium). However, France did not foresee that three more states (Finland, Austria, and Sweden) would join the EC as new members on January 1, 1995 and, thus, the number would rise to eight free-traders. The way out for France was to litigate as they did by choosing very carefully their targets, in order to bring back the “unforeseen developments” clause.

One of the first cases brought before the WTO Panel was *Korea – Dairy* dispute challenged by the EC in 1997. The next year, in 1998, the EC brought an *Argentina-Footwear (EC)* case, which argued the same issue regarding the abovementioned provision, which was specifically omitted from the SA²¹. The question was whether the “unforeseen developments” clause is a legal prerequisite for the application of safeguard measure.

In the first case, the Panel disagreed with the Korea’s argument and stated that there is no formal conflict between the provisions of GATT Art.XIX:1(a) and SA Art. 2.1, and the “unforeseen developments” clause is an explanation of why a measure under GATT

¹⁹ Nuzum, J. The Agreement on Safeguards: U.S. Law Leads Revitalization of the Escape Clause, in Stewart, T. The World Trade Organisation. The Multilateral Trade Framework For the 21st Century and U.S. Implementing Legislation, American Bar Association, 1996, p. 407.

²⁰ Raychaudhuri, T. The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance, The Eastey Center Journal of International Law and Trade Policy, Volume 11 Number 1, Canada, 2010, p. 316. www.eastreyjournal.com (retrieved 30 October 2011).

²¹ See supporting arguments by Lee, Y.-S. Safeguards Measures in World Trade. The Legal Analysis, Second Edition, Kluwer Law International, Netherlands, 2005, pp. 43-47, p.50.

Art. XIX may be needed.²² In *Argentina-Footwear (EC)*, the Panel emphasized the express omission of unforeseen developments requirement from the SA²³. Moreover, “it would be unrealistic to assume that practice of non-enforcement of this condition was unknown to the drafters of SA”.²⁴

The AB overruled Panel’s decision stating that if the drafters intended to omit this clause the Agreement would expressly said so.²⁵ However, it seems to make no sense as this could have been interpreted *visa versa* by stating that negotiators did expressly omitted the provision by not directly stipulating the requirement in the SA. Besides, the binding nature of GATT on all members as part of the Uruguay Round package was emphasized by the AB. As subjectively interpreted by the AB based on SA Art.11²⁶, the drafters affirmed the continuing vitality of GATT Art. XIX and, therefore, the stated provision and the SA clause were to be read cumulatively.²⁷

Based on the examined arguments regarding intentions of negotiators, the concept of escape clause was always intended to be flexible by the negotiators. It is the opinion of the author that by recognising the express omission of the “unforeseen developments” requirement from the SA as the drafters’ intentions, the AB and Members would resolve the current ambiguity and make safeguard measures a workable remedy.

1.3. Relationship between the Agreement on Safeguards and GATT Article XIX

GATT Art. XIX and the SA are invoked far more often than any other safeguard provision in GATT.²⁸ It is probably due to that fact that GATT Art. XIX is considered to be the most protectionists of all permissible trade remedies.²⁹

²² Korea - Dairy, para. 7.42.

²³ Argentina – Safeguard Measures on the Imports of Footwear (Argentina-Footwear (EC)), WT/DS/121, para. 8.58.

²⁴ Raychaudhuri, T. The Unforeseen Developments Clause in Safeguards under the WTO: Confusion in Compliance, *The Estey Centre Journal of International Law and Trade Policy*, Vol.11 No.1 2010, p.310; Argentina – Footwear (EC), WT/DS/121, para. 8.66.

²⁵ Argentina –Footwear (EC), WT/DS/121/AB/R, para.88.

²⁶ Agreement on Safeguards, Article 11: “This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.”

²⁷ Korea – Definitive Safeguards Measures on the Imports of Certain Dairy Products (Korea – Dairy), WT/DS/98/AB/R, para. 80.

²⁸ Other GATT safeguards provisions: Articles XII, XVIII, XXV, and XXVIII.

²⁹ Bhala, R. *Modern GATT Law*, Sweet and Maxwell Ltd., London, 2005, p.943.

Article XIX:1 (a) of the GATT 1994 stipulates:

“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.”

Therefore, GATT Art. XIX:1 (a) provides that safeguard measures may be applied to increased imports causing or threatening to cause serious injury, when such imports result from (i) unforeseen developments and (ii) compliance by any contracting party with the obligations undertaken under the GATT 1994, including tariff concessions.

The rights and obligations in GATT Art. XIX could be distinguished into the tree groups:

- 1) prerequisites or grounds on which the provision can be invoked;
- 2) rules limiting the scope and nature of a safeguard measure; and
- 3) the measures that follow once the requirements are met.³⁰

Based on the provided division, the paper will further focus on the analysis of the first group, particularly, the “unforeseen developments” prerequisite, which is difficult to appraise as its definition is rather hazy. As examined above in Section 1.1, this term was borrowed directly from the US treaty practice and “was apparently little discussed in the preparatory work”.³¹

The AB ruled on the relationship between Art.XIX:1(a) and Art. 2.1 of the SA by considering that stipulated provisions must be applied cumulatively. However, more attention was given to the term in the subsequent DSB discussions. The AB ruling on the cumulative application³² of the two provisions at hand did not support the claim that the SA supersedes the provision of GATT Art. XIX. The finding in *Argentina-Footwear (EC)* was supported by the AB in the *US-Lamb* case³³, where it stated that the SA clarifies and reinforces GATT Art.

³⁰ Jackson, J. *World Trade and The Law of GATT*, Bobbs-Merrill Company, 1969, p.556.

³¹ *Ibid*, p.560.

³² *Argentina –Footwear (EC)*, WT/DS121/AB/R, para.89.

³³ *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US - Lamb)*, WT/DS177/AB/R, WT/DS178/AB/R, 16 May 2001.

XIX GATT 1994 and expresses “the full and continuing applicability” of the article.³⁴ Moreover, this position was supported by the subsequent panels.³⁵ It proves that the AB jurisprudence is “reluctant to establish hierarchy between the provisions of the different WTO agreements”³⁶, particularly, by recognizing the newer and more specific provisions of the SA to prevail over the corresponding clause in GATT. Therefore, despite certain discrepancy in the views of scholars, WTO Members and the AB, any safeguard measure, which is imposed after the entry into force of the GATT, must comply with the provisions of the SA as well as GATT Art. XIX.

The AB based its decision mainly on the two arguments, which are discussed in detail below.

1.3.1. Argument Based on the Preamble

The AB in *Korea-Dairy* emphasised that the Preamble to the SA shows clearly the intentions of the negotiators of the Uruguay Round by stating: “to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX..., to re-establish multilateral control over safeguards and eliminate measures that escape such control”³⁷. As a result, the AB emphasized that, as the SA itself refers to GATT Art. XIX in order to justify its holding, all requirements of Art. XIX must be met in order for a safeguard measure to be imposed.³⁸

³⁴ US – Lamb, WT/DS177/AB/R, WT/DS178/AB/R, para.70.

³⁵ United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US – Line Pipe), WT/DS202/R, 8 March 2002, para. 7.295; Panel Report, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System), WT/DS207/R, 23 October 2002, para. 7.134; Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches (Argentina - Preserved Peaches), WT/DS238/R, 15 April 2003, para.7.10; United States – Definitive Safeguard Measures on Imports of Certain Steel Products (US - Steel), WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 10 December 2003, para. 10.31.

³⁶ Planck, M. Commentaries on World Trade Law, WTO Trade Remedies, 2008, Boston, p.274, referring to Mueller, F., p.1128.

³⁷ Korea – Dairy, WT/DS98/AB/R, 14 December 1999.

³⁸ See for additional arguments: Planck, M. Commentaries on World Trade Law, WTO Trade Remedies, 2008, Boston, p.275.

1.3.2. Argument Based on the “Ordinary Meaning”

The AB reversed the two panels’ findings in *Korea-Dairy* and *Argentina-Footwear (EC)* by, first, referring to SA Art. 1, which states that the safeguard measures shall be understood as the same measures as those provided in GATT Art. XIX. Second, the AB pointed out SA Art.11.1 (a) which requires that any emergency action on imports of particular products as set forth in GATT Art. XIX, should conform to the provisions of that article applied in conformity with the SA. Third, the AB reversed the Panels’ rulings with regard to giving the meaning to the express omission by the SA of the conditions contained in the GATT escape clause, by referring to the principle of effective treaty interpretation³⁹ and the ordinary meaning of SA Articles 1 and 11.1(a).⁴⁰

1.3.3. Debate among Scholars

The discussion among scholars is triggered by the controversial character of the AB jurisprudence on the issue of the “unforeseen developments”. The authors, who support the ruling stating that the discussed provisions shall apply cumulatively, at the same time, they seem to find no other solution and no alternative to the current unclear situation.

Some authors provide strong arguments against the cumulative applicability of the SA and GATT Art. XIX.⁴¹ For instance, one of the arguments in favour of non-application of GATT Art.XIX:1(a) is provided by Young-Shik Lee, who states that the wording of the reference to GATT Art. XIX in SA Art.11.1 (a) stating that “a Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement”, and shall be interpreted as proving the prevalence of the SA over GATT Art. XIX. The author agrees that the unforeseen developments clause is too ambiguous to be considered as an objective legal requirement.⁴²

However, as a doctrinal matter, the AB seems to continue concluding that the requirements of both provisions at issue must be satisfied.⁴³ Moreover, with time passing the likelihood that recent developments will have been “foreseen” at the time of concession

³⁹ Argentina – Footwear (EC), WT/DS121/AB/R, 12 January 2000, para.77

⁴⁰ Ibid, para. 88.

⁴¹ See: Lee, Sykes, Mueller.

⁴² Also supported by Raychaudhuri, T. The Unforeseen Developments Clause in Safeguards under the WTO: Confusion in Compliance, *The Estey Centre Journal of International Law and Trade Policy*, Vol.11 No.1 2010, p.310.

⁴³ Guzman, A., Pauwelyn, J. *International Trade Law*, Aspen Publishers, New York, 2009, p. 479.

seemingly diminishes,⁴⁴ as it is never easy to pre-empt something to happen than from it not happening first. The prevailing current position of scholars as well as questioned officials of the Committee on Safeguards is that the AB rulings with its not absolute and weakly defined standards, does not seem likely to change.

⁴⁴ Sykes, A. *The WTO Agreement on Safeguards: A Commentary*, Oxford University Press, Oxford, 2006, p.119.

CHAPTER II. The “Unforeseen Developments”: The DSB Standards

To date, there have been thirty seven notifications and forty disputes related to GATT Art. XIX and SA Art. 2.⁴⁵ Out of forty only in nine of these disputes the Panel reports were issued, of which seven were appealed.⁴⁶

2.1. Approach of the GATT Panel

In order to understand the evolution of the GATT practice under Art. XIX, it is vital to look at the functioning of the GATT Dispute Settlement System in general. There were few formal disputes on GATT Art. XIX, which often “did not proceed beyond discussions within the GATT Council” because the capacity of a GATT member to address the dispute was limited as “the dispute resolution was largely a matter of negotiation and conciliation”.⁴⁷

Kenneth Dam argues that the “unforeseen development” element is equal to (but not limited to) “the [analogous] principle of changed circumstances, specifically, the doctrine of *rebus sic stantibus* (i.e. in these circumstances, or things staying as they are)”⁴⁸. The meaning of the doctrine is that the “treaty cases to be obligatory upon a fundamental change of the circumstances on which it is based, where the effect of the change is to transform radically the extent of the obligations to be performed under the treaty”⁴⁹.

In 1950 the dispute arose due to US withdrawal of concession on women’s fur felt hats and hat bodies.⁵⁰ The US argued that a surge of imports of hatter’s fur resulted from the change in fashion trends and women’s hat styles, which were the “unforeseen developments”. *The Hatter’s Fur* dispute of 1951, the first dispute inconclusively resolved and brought by the former Czechoslovakia, was referred to the working party, which explained the following:

“the term ‘unforeseen development’ should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not

⁴⁵ www.worldtradelaw.net/dsc/database/agreementcount.asp (retrieved 3 July 2011)

⁴⁶ www.worldtradelaw.net/dsc/database/safeguards.asp (retrieved 5 October 2011)

⁴⁷ Sykes, A. *The WTO Agreement on Safeguards. A Commentary*, Oxford University Press Inc., New York, 2006, pp.16-17.

⁴⁸ Bhala, Raj. *Modern GATT Law*, Sweet and Maxwell Ltd., London, 2005, p.956; referring to Dam, K. *The GATT*, 1970, p.99.

⁴⁹ I Restatement of the Foreign Relations Law of the United States, para. 366 at 218, 1987

⁵⁰ The concession involved less than USD2 million worth of imports. See Bhala, Raj. *Modern GATT Law*, Sweet and Maxwell Ltd., London, 2005, p.956.

be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.”⁵¹

The stipulated definition comprises of both objective and subjective factors. One can understand that “the objectively ‘reasonable’ person should not have expected the negotiators of the country concerned to foresee the development”⁵². However, the words “the negotiators of the country making the concession” presumes that the objectively reasonable person shall see matters from the subjective position of negotiators.⁵³

The Working party⁵⁴ stated that “it is universally known that fashions are subject to constant changes” and concluded (except for the US members) that “the fact that hat styles had changed did not constitute an ‘unforeseen development’ within the meaning of Art. XIX”. However, they agreed (except for members from Czechoslovakia) that “the *degree* to which the change in fashion affected the competitive situation, could not reasonably be foreseen by the United States’ authorities in 1947”, and, thus, the “unforeseen developments” requirement of GATT Art. XIX was fulfilled [emphasis added]. Moreover, it was noted that “any view on such matter must be to a certain extent a matter of economic judgement and that is natural that government should on occasion be greatly influenced by social factors such as local employment problems”.

The decision is considered⁵⁵ to “very much weaken the stringency of the prerequisites to Article XIX”. However, in light of modern statistical and forecasting techniques, “only very particular changed circumstances”⁵⁶ will satisfy the “unforeseen developments” requirement.

2.2. WTO Panel and Appellate Body Interpretations

In the years prior to formulation of the SA the number of GATT Art. XIX initiations to be notified was only 30. In contrast, from 1995 till mid-2007 about 158 safeguard initiations have been reported by the WTO Members. Despite this increase in the number of safeguard measures, every single safeguard measure challenged before the AB

⁵¹ Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, (“Hatters’ Fur”), GATT/CP/106, adopted 22 October 1951, para. 9.

⁵² Bhala, Raj. *Modern GATT Law*, Sweet and Maxwell Ltd., London, 2005, p.956.

⁵³ *Ibid.*

⁵⁴ Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, (“Hatters’ Fur”), GATT/CP/106.

⁵⁵ Jackson, J. *World Trade and The Law of GATT*, Bobbs-Merrill Company, 1969, p.561.

⁵⁶ Dam, K. *The GATT*, 1970, p.102.

have been considered as failed to meet the necessary requirements. In the six safeguard disputes that have resulted in the decision to date⁵⁷, complaints, arguing that the national authorities failed to comply with the “unforeseen developments” requirement, prevailed on the issue in four out of six cases and in the remaining two matters the issue was not reached for reasons of judicial economy.

In *Korea – Dairy*⁵⁸ the panel, which constituted of Ole Lundby (Chairman), Leora Blumberg and Luz Elena Reyes, concluded that there was no need to examine whether the tendencies of import of the product, subject to investigation, result from the unforeseen developments, particularly, on the following grounds:

- (i) the requirement on the “unforeseen developments” not addressing the conditions for application of measures set forth in GATT Art. XIX:1 (a) rather explaining why a provision such as GATT Art. XIX:1 (a) is needed;
- (ii) the absence of the relevant requirement in the Agreement on Safeguards. The panel was of the opinion that since the WTO Members had understood that the reference to the “unforeseen developments” did not add anything to the rest of the paragraph (but rather described the context for application of the relevant provision); there was no need to insert the relevant requirement explicitly in SA.

The similar position was held by the panel in *Argentina – Footwear (EC)*⁵⁹, which constituted of John McNab (Chairman), Claudia Orozco and Laurence Wiedmer. The panel concluded that GATT Art. XIX cannot be understood to represent the total rights and obligations of the WTO Members as to the safeguard measures. It is the SA as applying the disciplines of GATT Art. XIX, reflects the latest statement of the WTO Members concerning their rights and obligations regarding safeguards. Therefore, the express omission of the “unforeseen developments” requirement in the SA must mean that such requirement shall not be examined.

Nevertheless, the AB, reviewing the reports of the both panels in *Korea – Dairy*⁶⁰ and *Argentina – Footwear (EC)*⁶¹, rejected the conclusions as to the application of GATT Art. XIX. The AB rulings in *Korea-Dairy* and *Argentina – Footwear (EC)*, which were issued the

⁵⁷ Including Hutter’s Fur, *Korea – Dairy*, *Argentina – Footwear (EC)*, *US – Lamb*, *US – Wheat Gluten*, and *US – Steel*; and excluding decisions in recent *US - Tyres* case due to the fact that “unforeseen development” prerequisite was not precisely analysed neither by the Panel, nor by the AB, as it was based on the Protocol on the Accession of the People’s Republic of China, but not the GATT of the SA.

⁵⁸ *Korea - Dairy*, WT/DS98/R, 21 June 1999, paras. 7.45-7.48.

⁵⁹ *Argentina – Footwear (EC)*, WT/DS121/R, 25 June 1999, paras. 8.56, 8.58, 8.66.

⁶⁰ *Korea – Dairy*, WT/DS98/AB/R, 14 December 1999, paras. 68-92.

⁶¹ *Argentina – Footwear (EC)*, WT/DS121/AB/R, 14 December 1999, paras. 82-98.

same day, are virtually identical on the issue of the “unforeseen developments”⁶². The AB concluded that any safeguard measures applied after the entry into force of the SA must conform to requirements of both agreements: the SA and GATT Art. XIX. Therefore, the “unforeseen developments” requirement shall be met for the imposition of a safeguard measure. Thus, currently, the “unforeseen developments” requirement shall be fulfilled by all WTO Members.⁶³

In *Argentina – Footwear (EC)* the AB noted that wording “unforeseen developments” modifies the phrase “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...”.⁶⁴ The AB also interpreted the “unforeseen developments” as part of “circumstances” in which a sharp increase of imports occurs in such a way as to cause a serious injury to a domestic industry.

When examining the ordinary meaning of the words of the GATT Art. XIX.1(a), the AB noted that “unforeseen” is synonymous with the word “unexpected”. Therefore, it ruled that the ordinary meaning of the phrase “as a result of unforeseen developments” requires that the developments, which resulted in the product being imported in such increased consequences and in such increased conditions as to cause or threaten to cause serious injury to domestic producers, must have been “unexpected”.⁶⁵

As to the context, pursuant to the title of GATT Art. XIX which is “Emergency Action on Imports of Particular Products”, which also appeared in SA Art.11.1(a), the AB noted that safeguard measures are emergency trade remedy of an extraordinary nature. Thus, the AB ruled that the wording of Art.XIX:1(a) GATT is “clearly not the language of ordinary events in routine commerce”⁶⁶.

The AB also stated that the object and purpose of GATT Art. XIX:1(a) are to allow a member 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”. Safeguards in contrast to anti-dumping and countervailing measures respond to fair trade practices aimed to reduce the impact of surges and provide a relief for adjustment of domestic industries in times of pressure from fairly-traded imports.

⁶² Korea – Dairy, WT/DS121/AB/R, paras. 68-92; Argentina – Footwear (EC), WT/DS98/AB/R, paras. 76-98.

⁶³ Sykes, A. *The WTO Agreement on Safeguards: A Commentary*, 2006, Oxford University Press, p. 104-106.

⁶⁴ Argentina-Footwear (EC), WT/DS/121/AB/R, para. 92.

⁶⁵ Ibid.

⁶⁶ Korea – Dairy, WT/DS121/AB/R, para.93; Argentina – Footwear (EC), WT/DS98/AB/R, para. 86.

Thus, the AB ruled that “when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account”⁶⁷.

However, the rulings in *Korea – Dairy*, *Argentina – Footwear (EC)* and *Hutter’s Fur* cases did not examine *when*, *where* and *how* the demonstration of unforeseen circumstances should occur, which was done in the subsequent disputes [emphasis added]. In *US – Lamb*, the AB concluded that it is necessary for investigating authorities to make findings that unforeseen developments exist and there is a logical connection between the latter and conditions set forth in GATT Art.XIX.1 (a).⁶⁸ In *US-Lamb*, the US, relying on decision in *Hutter’s Fur*⁶⁹, suggested that specific development in the market place leading to injurious importing surge will not normally be “foreseen” by negotiators at the time of tariff concessions. AB clarified the issue of *when* and *where* stating that ‘demonstration’ must be made before application of measures in the competent authority’s report⁷⁰, which must contain a finding of reasoned conclusion on “unforeseen developments”.

In the later *US-Steel* case, AB failed to clarify the meaning of this clause but repeated the previous positions. However, the AB emphasized that a determination of the “unforeseen developments” has to be made for each specific product at issue.⁷¹

Furthermore, the criteria necessary to determine the point in time at which the relevant tariff concession was negotiated (at the time of accession) triggers another problem.⁷² However, the analogy of time application can be found in GATT Art. XXIII “Nullification or Impairment”, when the same approach to time determination was applied to all related case law. Another example would be *Chile – Price Band System*⁷³, where panel ruled that drop in world prices could be foreseen at the time of concession.

⁶⁷ Korea – Dairy, WT/DS121/AB/R, para. 94.

⁶⁸ US – Lamb, WT/DS/178/AB/R, , para.72.

⁶⁹ Report of the Working Party (Hutters’ Fur case), GATT/CP/106, 27 March 1951.

⁷⁰ US - Lamb, WT/DS/177and178/AB/R, para.72.

⁷¹ US - Steel, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, 10 December 2003, para. 319.

⁷² Sykes, A. The safeguards mess: a critique of WTO jurisprudence. World Trade Review, 2003, vol. 2, issue 03. <http://www.law.uchicago.edu/Lawecon/index.html> (retrieved 30 October 2011).

⁷³ Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile – Price Band System), WT/DS207/AB/R, WT/DS207/AB/R, 23 October 2002.

2.3. Adherence to the standards applied to determine the “unforeseen developments”

The abovementioned analysis of the practice established by the panels and the AB in respect of the application of GATT Art. XIX: 1(a) provides the list of the following standards of adherence to the “unforeseen developments” requirement:

- 1) The unforeseen developments shall be unexpected;⁷⁴
- 2) The unforeseen developments shall not establish independent conditions for application of safeguard measures, but they are certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of GATT Article XIX. Thus, there shall be a logical connection between the unforeseen developments and the conditions for imposition of safeguard measures⁷⁵;
- 3) The competent authorities must identify and examine the unforeseen developments before the safeguard measure is actually applied⁷⁶;
- 4) Increased imports, as such, do not constitute the unforeseen developments, but shall result from unforeseen developments⁷⁷;
- 5) When the safeguard measures shall be applied to a number of products, it is not sufficient merely to demonstrate that the unforeseen developments result in increased imports of the broad category of products, including other kinds of products. In this case, the competent body may impose safeguard measures on a broad category of products, even when the imports of one or a number of products in such a category have not been increasing and have not resulted from the unforeseen developments, thus, violating GATT Article XIX:1 (a). Therefore, the analysis of the effect of the unforeseen developments must be performed for each kind of product subject to a safeguard measure⁷⁸;

⁷⁴ Korea – Dairy, WT/DS98/AB/R, 14 December 1999, para. 84; Argentina – Footwear (EC), WT/DS121/AB/R, 14 December 1999, para. 91.

⁷⁵ Ibid, para. 92.

⁷⁶ US — Lamb, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001, para. 72, 76.

⁷⁷ US - Lamb, WT/DS177/R, WT/DS178/R, 1 May 2001, para. 7.16; Argentina — Preserved Peaches, WT/DS238/R, 14 February 2003, paras. 7.17-7.18; US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 10 November 2003, paras. 314, 316.

⁷⁸ US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 11 July 2003, para. 10.128; US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 10 November 2003, para. 319.

- 6) The competent authorities must provide a reasoned and adequate explanation regarding the unforeseen developments that resulted in increased imports causing or threatening to cause serious injury⁷⁹. However, the general statement on the availability of certain unforeseen developments, with no analysis on the issue, is not sufficient to conform to the requirements, provided for by GATT Art. XIX:1 (a);
- 7) The measures provided by GATT Art. XIX are of an emergency character and are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a WTO Member finds itself confronted with developments it had not foreseen or expected when it incurred that obligation⁸⁰;
- 8) In order to satisfy the requirement to demonstrate the unforeseen developments, as a minimum, some discussion should be done by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions providing grounds for safeguard measures' application occurred as a result of such circumstances⁸¹;
- 9) Since increase in imports must result from certain unforeseen or unexpected developments, such imports must also be unforeseen or unexpected (namely: recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury). Thus, the extraordinary nature of the measures applied by the WTO Members in response to increased imports does not depend on the absolute or relative quantities of the product being imported. Rather, it depends on the fact that the increased imports were unforeseen or unexpected⁸²;
- 10) The determination of the moment, when the developments should be foreseen is of an essential nature. Thus, according to the application practice of GATT Art. XIX: 1(a) such developments had to be foreseen at the time when the relevant tariff concession was negotiated. In particular, the unforeseen developments should be interpreted to mean developments occurring after the negotiation of the relevant

⁷⁹ US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 11 July 2003, para. 10.38; US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 10 November 2003, para. 326; Argentina — Preserved Peaches, WT/DS238/R, 14 February 2003, para. 7.33.

⁸⁰ Korea — Dairy, WT/DS98/AB/R, 14 December 1999, para. 86; Argentina — Footwear, WT/DS121/AB/R, 14 December 1999, para. 93.

⁸¹ Argentina — Preserved Peaches, WT/DS238/R, 14 February 2003, para. 7.23.

⁸² Argentina — Footwear, WT/DS121/AB/R, 14 December 1999, para. 131; US — Steel, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, 10 November 2003, para. 350.

tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated⁸³.

Regarding the adherence to requirements on the affects of tariffs concessions and obligations, in order to comply with GATT Art. XIX: 1 (a), not only the requirement on the unforeseen developments shall be met, but the competent authorities must also prove the logical connection between tariff concessions and increased imports, namely that the tariff concessions resulted in increased imports. The obligations, undertaken by the WTO Member in its Schedule of Concessions and Commitments annexed to the GATT, shall be taken into consideration.⁸⁴

The stipulated standards were developed by the panels and the AB during the times of GATT and the WTO. Having analysed the national decisions of WTO members⁸⁵, the conclusion shall be made that none of the available national decisions have made additional interpretation or somehow expanded on the issue of the “unforeseen developments” determination. Additionally, most scholars are very critical of the very existence of this requirement and insist on removing the “unforeseen developments” clause from the obligatory elements to be proven for application of a safeguard measure.⁸⁶ In contrast, scholars with the dissenting views support the emphasized standards, but do not provide any suggestions regarding the clarification or any other possible solutions to current problems with impossibility to prove the existence of the “unforeseen developments”.

Besides the limited and unclear standards for the determination of the “unforeseen developments” emphasised in the GATT and WTO jurisprudence, the lack of absolute standards is another issue at hand. For instance, in *US- Steel Safeguards*, the AB argued on the requirement that the increase in imports be recent enough, sudden enough, sharp enough, and significant enough (the so-called “RSSH condition”⁸⁷). The AB clarified that the RSSH condition does not articulate an "absolute standard ... for determining whether imports have increased" within the meaning of the SA Art. 2.1 and GATT Art. XIX. It further agreed with the panel that the determination "is to be made on a *case by case basis*" by the investigating

⁸³ Korea – Dairy, WT/DS98/AB/R, 14 December 1999, para. 89; Argentina – Footwear, WT/DS121/AB/R, 14 December 1999, para. 96.

⁸⁴ Korea – Dairy, WT/DS98/AB/R, 14 December 1999, para. 84; Argentina – Footwear, WT/DS121/AB/R, 14 December 1999, para. 91.

⁸⁵ Most of the national decisions are precisely analyzed in the Chapter III.

⁸⁶ See: Lee, Sykes, Mueller.

⁸⁷ Planck, M. Commentaries on World Trade Law “WTO Trade Remedies”, 2008, Boston, p. 269.

authority and that an assessment of whether an increase is "recent enough, sudden enough, sharp enough and significant enough" to cause or threaten serious injury is not a determination that is made "in the abstract".⁸⁸

The analysed WTO jurisprudence "makes it exceedingly difficult for WTO members to employ safeguards measures in a way that will withstand legal challenge"⁸⁹. Interestingly, most safeguard measures are not challenged at all, but even the challenged ones still can be valid during the Panel and/or AB proceedings.

It is the opinion of the author that the AB revival of GATT Art. XIX.1 (a) is a very controversial matter, and, hence, its proper analysis is of great importance. Having researched the case law and relevant commentaries at issue, the author asserts that the AB decision was correct as a logical matter. However, because many members (drafters) did not perceive the demonstration of the unforeseen developments to be a legal requirement for the imposition of a safeguard measure as analysed further below, the AB erred in reaching the decision and could have made a legal mistake. Moreover, from a conceptual perspective, it created the situation when the "unforeseen developments" requirement has proven practically impossible to satisfy.

⁸⁸ US – Steel, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, paras. 358 - 360.

⁸⁹ Sykes, A. *The WTO Agreement on Safeguards: A Commentary*, Oxford University Press, Oxford, 2006, p.33.

CHAPTER III.

The “Unforeseen Developments”: The WTO Members’ Approach

This Chapter is based on the conducted analysis of all the notifications available on the official WTO website, particularly, of the 1,806 documents entitled G/SG/N/, starting from the latest one made on January 10, 1996⁹⁰ and until the recent one made of September 6, 2011.⁹¹

Based on the research of the above-stipulated documents, in the author’s view, it is now rather obvious that a mere "recession" or "technology development" can never constitute the unforeseen development. Any economy will have ups and downs, and it would be extremely difficult to argue that a recession was “unforeseen”. This is likewise for a technology development.

A general "recession" could actually be taken up in relation to the argument that there is no causal link (rather than in relation to the “unforeseen developments” element) as stipulated in the minutes of the Committee on Safeguards held on 30 April 2001, where Uruguay makes this point in relation to the notification made by Chile.⁹² But one may wonder about the difference between the causal link and the unforeseen developments, and where the line is. Recession can be both considered for the proof of causal link as well as an unforeseen development. It is at the discretion of the WTO Panel and, especially, the AB, which does not seem likely to change its decisions.

Procedural requirements for domestic authorities, wishing to impose safeguard measures, are set out in Articles 3, 6, 12 of the Safeguard Agreement. SA Art. 3.1 provides that the safeguard measures may only be applied following an investigation “pursuant to processes previously established and made public in consonance with Article X of GATT 1994”. SA Art. 12.6 requires members to “promptly notify” the Committee on Safeguards on their “laws, regulations and administrative procedures relating to safeguard measures”. Thus, no safeguard measure may be applied without prior notification of legislation providing for the safeguard investigation procedures to the Committee on Safeguards.

The direct requirement of GATT Art. XIX stating that increase in imports shall result from the unforeseen developments in order to impose safeguard measure is often disregarded by national manufacturers. As shown by the recent safeguard investigations “the

⁹⁰ G/SG/N/1/MYM/1.

⁹¹ G/SG/N/10/IND/12/Suppl.1, G/SG/N/11/IND/7/Suppl.1, G/SG/N/8/IND/21/Suppl.1

⁹² Minutes of the regular meeting of Committee on Safeguards on 30 April 2001, G/SG/M/17, para. 40.

increase in imports is caused by quite foreseen and predictable developments, even by intended actions by domestic producers.”⁹³ The surge of imports is often triggered by the own actions of manufacturers, for instance, unreasoned pricing policy or abusive pricing policy of monopolists on Ukrainian market, which “forces end-consumers to import products at lower prices and under more convenient supply terms and conditions.”⁹⁴ Unfortunately, the availability on “unforeseen developments” interpretations by the investigating authorities is rather restricted or limited, because in practice all the final determinations and the reports are confidential and any request for the access to them by non-parties is often denied.

3.1. Note from the Secretariat

Of certain significance is the recent Note from the Secretariat of November 05, 2009 on “Formats for certain notifications under the Agreement on Safeguards”⁹⁵. The Note’s importance is due to the fact that this document is making revisions to notification formats and, notably, is “encouraging” the WTO Members to attach to the notifications the documents with their relevant national decisions. Para 13 on page 6 states:

“Members are encouraged to attach, in an electronic form, publicly available document(s) containing the relevant decision(s) made by the competent authority. This document may be in the original language of the Member, even if the language is not one of the official languages of the WTO. The document will neither be translated nor circulated to the Committee, but will be made available by the Secretariat to Members requesting it.”⁹⁶

However, this is just an encouragement, and not an obligation. In practice, countries do continue to submit to the Committee on Safeguards single notification documents with no attached and even no reference to official investigation documents. Thus, as a result of the provided analysis, the author points out the vital problem with the incomplete and inconsistent data on national proceedings of WTO Members.

As stipulated above, the approach of the WTO institutions, particularly, the Committee on Safeguards, is based on “encouraging”, however, not “binding” the WTO Members to submit relevant documents with national decisions made by the competent authority. Resulting from this approach of “encouragement”, it is impossible to analyse all

⁹³ “Safeguard Investigations in Ukraine: “Hidden Reefs”, Mykolska N., Makhinova A., Kulyk D., The Ukrainian Journal of Business Law, October 2010, www.ublj.info (retrieved 30 October 2011).

⁹⁴ Ibid.

⁹⁵ G/SG/1/Rev.1.

⁹⁶ Note from the Secretariat of 05.11.2009 (G/SG/1/Rev.1), para 13.

existing relevant national decisions, except in cases when the WTO Members make such submissions. In reality, very few Members are acting this way. Therefore, one can examine the practice of the application of the “unforeseen developments” requirement by WTO Members only based on the DSB jurisprudence, discussions at the Committee on Safeguards and scholars’ writings regarding particular countries. For the purpose of this research, the choice of the examined WTO Members and relevant documents was made based on the available data.

3.2. Safeguard Measures in South America

Having analysed the official documents, obtained from the Committee on Safeguards, a short analysis of how Peru, Ecuador, Brazil, Chile, Argentina and, especially, the Dominican Republic interpret the "unforeseen developments" element, will be provided at first.⁹⁷

3.2.1. THE DOMINICAN REPUBLIC

The Dominican Republic (hereinafter – “DR”) is the only country that publishes its investigation documents compiled by the investigating authority, whereas other countries, such as Ecuador and Venezuela, make public only the imposition resolution (through their national newspapers). However, there is no reference to the “unforeseen developments” element in the resolutions for the imposition of certain measures.

Having analysed the available investigation documents of the DR⁹⁸, it usually cites the interpretations of the Dispute Settlement Body (DSB) to make reference to the definition of the "unforeseen developments". However, there is no specific methodology to analyze the cases. Detailed analysis of the DR’s documents⁹⁹ analysis shows that certain attention is paid to the “causal link” linking the “unforeseen circumstances” with increased imports of the product, which causes or threatens to cause serious injury. As stated in the documents: “[w]ithout such ‘causal link’ between the ‘unforeseen circumstances’ and the

⁹⁷ For the purpose of researching stipulated below documents, one must know that "Unforeseen developments" is translated into Spanish as "evolución de circunstancias imprevistas".

⁹⁸ For instance, File No. CDC-RD/SG/2009-004 (Imposition: 01.08.2010), File No. CDC-RD/SG/2010-006 (Imposition: 01.09.2010) and File No. CDC-RD/SG/2010-006 (Imposition: 01.09.2010).

⁹⁹ DR’s Documents No. 5407.20.20 on Investigation concerning woven fabrics obtained from strip or the like; and No. 6305.33.90 on toilet linen and kitchen linen, of terry toweling or similar terry fabrics, of polyethylene.

product for which protective measures can be applied, it would be possible to determine compliance with Article XIX of GATT.”¹⁰⁰

Pursuant to Article 251 of the Law No.1-02 On Unfair Trade Practices And Safeguard Measures¹⁰¹, the notice of initiation of a safeguard investigation shall contain the following information: “a summary of the unforeseen developments that led to the alleged increase in imports of the investigated product, or to the change in the conditions under which such imports occur”.

In the analysed Minutes of the Committee on Safeguards, the DR representatives, as well as most of other representatives of the WTO Members, would often ask the questions to be submitted in writing, esp. the questions regarding the “unforeseen developments” argumentation in the DR’s reports in order to avoid a strong opposition and discussion on such a hazy issue. For instance, this was the case when Honduras claimed that “the technical report of DR indicated that the unforeseen development was the liberalization of trade under the Central American – Dominican Republic Free Trade Agreement, but about half of the Dominican Republic imports came from other origins” and DR’s representative asked to submit the question in writing.¹⁰²

In one of the investigation documents, the DR’s authority argues that other causes cannot be considered as the potential causes of the increase of the imports. The potential causes at issue are: financial crisis, preferential trade agreements (especially with other Central American countries), and the accession of China to the WTO.¹⁰³

In the preliminary determination of another investigation documents¹⁰⁴, the DR’s investigating authority considered the fluctuation of exchange rate and the change of the main domestic producer from producer to importer as the “potential” unforeseen developments. Although, these two factors were dismissed, the investigating authority analyzed the effect of the China’s accession. Primarily based on this final factor, it was decided to impose a measure of 40%. Unfortunately, there is no analysis regarding the causality and the effect of other factors such as the financial crisis in this investigation document.

¹⁰⁰ Ibid. page. 66.

¹⁰¹ As notified by the DR (G/SG/N/1/DOM/2/Suppl.1, 4 March 2009), the Commission for the Regulation of Unfair Trade Practices and Safeguard Measures was established 18 January 2002, pursuant to the Regulations For Law No.1-02 On Unfair Trade Practices And Safeguard Measures, 18 January 2002. The decisions of the Commission may be appealed before the Tax and Administrative Litigation Tribunal.

¹⁰² Minutes Of The Regular Meeting held on 26 April 2010G/SG/M/37, 21 September 2010, p.9.

¹⁰³ Ibid.

¹⁰⁴ DR’s Documents No. 6115.95.00 on investigation concerning socks of cotton; and No. 6115.96.20 – on socks of synthetic fiber.

In the next DR's case¹⁰⁵, the investigating authority decided not to impose a measure, alleging that the financial crisis may have reduced the demand for domestic production. As emphasized, this situation may have affected domestic producers and not the increase of imports.

In the current DR's case on imports of polypropylene bags and tubular fabric, the request for Consultations was made by El Salvador.¹⁰⁶ In January 2011 the request for the establishment of a panel¹⁰⁷ stated that the "determinations do not contain reasoned and adequate findings and conclusions regarding the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure", and, thus, measure is inconsistent with Art. XIX GATT." As reported on September 6, 2011, the final decision shall be issued by November 11, 2011.

3.2.2. ECUADOR

Ecuador has notified its safeguards legislation to the Committee on Safeguards on May 24, 2011.¹⁰⁸ The Committee on Foreign Trade is the body having authority to approve and adopt the relevant report submitted by the Investigating Authority. As stipulated in Articles 68 and 107 of the Ecuador's Regulations: "[f]actors that may be relevant in the authorities' examination, in order to determine whether there is a causal link, "include ... developments in technology...". However, no reference is made neither in the legislation, nor in the submitted notifications on conducted investigations¹⁰⁹ and applied measures, to the "unforeseen developments" and, consequently, the possibility of considering developments in technology or downturns in economics as the "unforeseen developments".

¹⁰⁵ DR's Document No.3. 7010.90 on investigation regarding stoppers, lids and other closures.

¹⁰⁶ WT/DS418/1, G/L/933, G/SG/D40/1, 21 October 2010.

¹⁰⁷ WT/DS418/7, 6 January 2011.

¹⁰⁸ "The Organic Code of Production, Trade and Investment" (Published in Official Journal No. 351 of 29 December 2010 (Annex I), and "The Regulations to Implement Book IV of the Organic Code of Production, Trade and Investment, Regarding Trade Policy, its Supervisory Bodies and Instruments" (Published in Official Journal No. 435 of 27 April 2011 (Annex II). Moreover, the recent Ecuador's Resolution with Official Registration No. 587 (Initiation: 19.04.2010, Imposition:11.10.2011) is silent on the "unforeseen developments" requirement and, furthermore, no investigation document is available for public. G/ADP/N/1/ECU/3, G/SCM/N/1/ECU/3, G/SG/N/1/ECU/5, 24 May 2009.

¹⁰⁹ On windshields, G/SG/N/11/ECU/1, G/SG/N/8/ECU/3/Suppl.1, October 27, 2010; G/SG/N/10/ECU/4, G/SG/N/8/ECU/3, October 21, 2010; On Tableware and Kitchenware, G/SG/N/16/ECU/4, April 8, 2008; On Ceramic Products, G/SG/N/16/ECU/3; April 7, 2008; On Textile Products, G/SG/N/16/ECU/1, January 8, 2008; On Taps, Cocks and Valves for Domestic Use, G/SG/N/16/ECU/2, March 10, 2006; On Pneumatic Tyres of Rubber, G/SG/N/6/ECU/7, December 17, 2003.

3.2.3. PERU

Now turning to the analysis of Peru, the entity, which is in charge of the investigating process is the Secretariat of Dumping and Subsidies of INDECOP.¹¹⁰ The last imposed measure in Peru was in the nineties. Although, in 2009 there was an investigation which did not end up in the imposition of a measure.¹¹¹ In the investigation made by the Peruvian investigation authority a causality analysis was done. It was done through statistical tool (simple econometrics) which is not usually used in these types of determination in Latin American countries.

Precisely, the linear regression analysis was conducted and no use of any causality test was made. In such kind of analysis as a linear regression the idea is to demonstrate that a variable (in the given case - the reduction of domestic sales) is explained by the increase of imports as well as other variables. However, to make this analysis, it is more appropriate to use the causality tests. However, in the case of Peru it is said to be an improvement, a technical one, because this kind of analysis had not been made before. The simple statistics analysis, like correlations, was often conducted, but mostly in the antidumping investigations.

Starting from 2000, Peru faces “partial retreat from the principles of non-political interference and liberalization”¹¹². For instance, only two investigation applications were considered as appropriate. The CDS investigated the case initiated on May 11, 1999 by Siderperu and presented a positive report to the Multisector Commission. However, “this body never met to make a decision”,¹¹³ which shows the political nature of the issue. Thus, the continuing existence of the protectionist’s pressure for the immediate application of safeguards will depend on the Peruvian new-coming governments and their policies.

¹¹⁰ The National Institute for the Defence of Competition and Protection of Intellectual Property, for additional information see: <http://www.indecopi.gob.pe/0/home.aspx?PFL=1> (retrieved 30 October 2011).

¹¹¹ Investigation on cotton yarn imports from all countries, including India. For the Official Investigation Report see: http://www.indecopi.gob.pe/repositorioaps/0/5/par/inf_043_2009_cfd/inf-043-resumenejecutivo-cfd.pdf (retrieved 30 October 2011).

¹¹² Richard Webb, Josefina Camminati and Raúl León Thorne. Antidumping mechanisms and safeguards in Peru, Washington, D.C. : World Bank, 2005, p.29.

¹¹³ Ibid. p.25.

3.2.4. BRAZIL

Having incorporated the SA into the legislation¹¹⁴, the Brazilian Safeguards Law¹¹⁵ and the rules are also established in the scope of the Common Southern Market, MERCOSUR¹¹⁶. Since the establishment of the WTO, Brazil has conducted two safeguard investigations¹¹⁷. Safeguard measures were applied in both cases, in 1997 and in 2002, and in one case, on imports of toys, a preliminary safeguard measure was applied in 1996. Both safeguard measures have effect only in the customs territory of Brazil, not in other MERCOSUR countries.¹¹⁸ The few investigations in Brazil were conducted only on the two products (toys¹¹⁹ and coconuts) and, therefore, Brazil has a little experience with safeguard investigations.¹²⁰

Although the Brazilian SG Law does not contain any requirement regarding the “unforeseen developments”, Brazilian authorities comply with GATT Art. XIX:1, which is incorporated into Brazilian legislation. For instance, in the safeguard investigation on imports of dried and unpeeled coconuts, rasped or not, in August 2001¹²¹, it was shown by the complainant that “the economic crisis in Asia in 1997 has affected the Asian companies,

¹¹⁴ Decree No. 1,355 of 30 December 1994; WTO document G/SG/N/1/BRA/1, 11 April 1995.

¹¹⁵ Decree No. 1,488 of 11 May 1995, amended by Decree No. 1,936 of 20 June 1996, provides for the administrative procedures for the application of safeguard measures. WTO documents G/SG/N/1/BRA/3, 26 March 1996, and G/SG/N/1/BRA/3/Suppl.1, 27 January 1997.

¹¹⁶ The 19 Additional Protocol to the Economic Complementation Agreement No.18 of 17 December 1997, signed by Brazil, Argentina, Uruguay and Paraguay, incorporated by Decree No. 2667, 10 July 1998, and based on the SA, establishes the procedures for the application of safeguard measures by MERCOSUR, as a single entity, and in the name of a member State.

¹¹⁷ Safeguard investigations are initiated by the Secretariat of Foreign Trade (SECEX). The Chamber of Foreign Trade (Câmara de Comércio Exterior or CAMEX) is responsible for determining the safeguard measures, which can take the form of tariff surcharges or quantitative restrictions and can be applied for a maximum of four years, renewable for six years in accordance with Decree No. 4,732, of 10 June 2003.

¹¹⁸ Under the MERCOSUR agreements with Chile and Bolivia, safeguard measures may be applied for up to two years, until the implementation of the agreements is completed, when no safeguard measures will be applied between the parties.

¹¹⁹ Brazil applied a safeguard measure on imports of toys during 1997-1999. See: Inter Ministerial Order No. 21, 19 December 1996; See WTO documents G/SG/N/14/BRA/1, 8 November 1999, G/SG/N/8/BRA/2, 2 December 1999, and G/SG/N/8/BRA/2/Suppl.1, 9 March 2000; G/SG/N/14/BRA/1, 8 November 1999, G/SG/N/8/BRA/2, 2 December 1999, and G/SG/N/8/BRA/2/Suppl.1, 9 March 2000; G/SG/Q2/BRA/6, 27 January 2000, and G/SG/Q2/BRA/8, 26 October 2000; G/SG/N/6/BRA/1/Suppl.1, 14 November 2003; CAMEX Resolution No. 47 of 29 December 2003. Available online at: <http://www.desenvolvimento.gov.br/legislacao/resolu/resCamex/2003/resCamex047.PDF> (retrieved 30 October 2011).

¹²⁰ Business guide to trade remedies in Brazil: anti-dumping, countervailing and safeguards legislation, practices and procedures / International Trade Centre. Authors: International Trade Centre UNCTAD/WTO. Imprint: Geneva : International Trade Centre, 2009, p.129.

¹²¹ WTO document G/SG/N/6/BRA/2, 12 September 2001.

which are major suppliers of coconuts worldwide”¹²². Moreover, the decline in demand for coconut oil worldwide resulting in excessive offer of this product, which was destined to Brazil, was demonstrated. The investigation resulted in the application of safeguard measures on all WTO Members as of September 1, 2002, with the exception of MERCOSUR members and developing countries providing imports below the *de minimis* specified in the SA.¹²³

3.2.5. CHILE

In February 2005 Chile notified¹²⁴ on positive investigation results of injurious imports of wheat flour from Argentina. In Chile’s notification, the “unforeseen developments” constituted “the discriminatory and selective imposition of export duties in Argentina”, as “a situation that would not occur under normal market conditions”, which explained the increasing imports of wheat flour into Chile.

In notification dated July 19, 2002 on imports of the two steel products¹²⁵, the Chilean investigating authority argued that “[w]ith regard to ‘unforeseen developments’, the recent trend in international prices for the most representative steel products were taken into account, as well as the protective measures adopted by a group of producer countries as of March this year.”

3.2.6. ARGENTINA

Regarding the “unforeseen developments” interpretation, Argentina has mentioned in its Supplements to Notification of 2000 that “a considerable proportion of the fall in the output of the company Alpargatas was attributable to a reduction in its exports to Brazil in 1998 and 1999 as a result of an unforeseen rupture of the licensing agreement with NIKE.”¹²⁶ Later in 2001 in response to the EC claim, Argentina stated that “above and beyond how elusive this concept was and regardless of how difficult it was to define something as ‘unforeseen’ - the investigating authority did consider that the record world over-production

¹²² Business guide to trade remedies in Brazil : anti-dumping, countervailing and safeguards legislation, practices and procedures / International Trade Centre. Authors: International Trade Centre UNCTAD/WTO. Imprint: Geneva : International Trade Centre, 2009, p.156.

¹²³ WTO documents G/SG/N/8/BRA/3, G/SG/N/10/BRA/3, G/SG/N/11/BRA/2, 6 August 2002. The exclusion of MERCOSUR countries was based on the determination that imports from these countries did not cause serious injury to the domestic industry. The measure consisted in quantitative restrictions to remain in place for four years, until 31 August 2006. (WTO documents G/SG/N/8/BRA/3/Suppl.1, G/SG/N/10/BRA/3/Suppl.1, G/SG/N/11/BRA/2/ Suppl.1, 10 March 2003).

¹²⁴ G/SG/N/8/CHL/3, G/SG/N/10/CHL/6, G/SG/N/11/CHL/5, 28 February 2005.

¹²⁵ G/SG/N/10/CHL/4, G/SG/N/11/CHL/4, 19 July 2002.

¹²⁶ G/SG/N/8/ARG/1/Suppl.1, G/SG/N/10/ARG/1/Suppl.4, G/SG/N/11/ARG/1/Suppl.4, 18 July 2000.

of peaches, and particularly over-production from Greece, had gone beyond what could be considered predictable.”¹²⁷

3.3. The North American Safeguards

3.3.1. THE UNITED STATES OF AMERICA

As discussed in Chapter I, the US – Mexico trade agreement in 1942 and the subsequent executive orders, including the “unforeseen conditions” prerequisite, started the modern safeguard history. However, in the early 1950s this requirement was deleted as a condition for the application of safeguard measures in order to avoid the difficulty in obtaining a remedy.¹²⁸ Since then the United States International Trade Commission (hereinafter – “USITC”) is not obliged pursuant to US legislation¹²⁹ to require petitioner to prove the “unforeseen developments” prerequisite. However, those measures were challenged in the WTO DSU particularly regarding this omitted explanation of the “unforeseen developments” requirement and newer won by the U.S., which is discussed in Chapter II of the paper.

In 1913, the newly created US central bank, the Federal Reserve, began issuing credit-based money in the US. Within ten years, the central bank flow of credit ignited the 1920s US stock market bubble, which triggered years of American “drinking the kool-aid” of investment banking. After the collapse of the bubble in 1929, the 1930 Smoot-Hawley Tariff Act raised import tariffs on more than 20,000 items to record levels and the world entered the Great Depression in 1933.

¹²⁷ Minutes of the regular meeting held on 30 April 2001, G/SG/M/17 25 September 2001, p.7.

¹²⁸ Stewart, T. *The GATT Uruguay Round: a negotiating history (1986-1992)*, Boston : Kluwer Law International, 2003, p. 1733.

¹²⁹ The US statutory authority is as follows: Sections 201-204 of the Trade Act of 1974, as amended¹²⁹; Section 406 of the same act, providing relief against market-disruptive imports from communist countries; Section 421¹²⁹, which is a country specific remedy applying only to injurious imports from China and Viet Nam; and Section 302 of the North American Free Trade Agreement (hereinafter – “NAFTA”) Implementation Act¹²⁹, regarding imports originating in Canada or Mexico, and similar provisions for the subsequent US FTAs. The authority and procedures for obtaining GATT Art. XIX escape clause relief are provided in the Sections 201-204 of the Trade Act of 1974, as amended¹²⁹. The proceedings begin with a petition to the International Trade Commission (ITC), which makes a determination. In case that determination is affirmative, the matter is passed on to the President. The most common form of relief granted by the President is an increase of tariffs, and/or adjustment assistance, tariff-rate quotas, and the combination of the two. However, he is also entitled by US law to enter into agreements with exporting nations (however, one must recall the prohibition by the WTO on such “grey-area” measures).

The changing economic environment in 1960s led the US to weaken the requirements, particularly by enacting the Section 201 of the Trade Act of 1974. Oil shock caused a recession in 1979-1980, several Section 201 cases, and the second change to the US safeguard legislation. In the first case on the imports of Japanese automobiles in 1980, the USITC made a negative injury determination, which was widely criticized by the public¹³⁰. The decision was based on the fact that the impact of the recession outweighed the impact from the injurious imports.¹³¹ The causation requirement after this case was once again relaxed by the US Congress as a result of political pressure. Consequently, the members of the Commission voted in favour in the similar case on motorcycles in 1983. Therefore, the US safeguards decisions show the dependency on the economic environment: either economic expansion with tighter conditions for safeguard measures, or easier conditions in times of economic recession or intense foreign competition.

Some scholars consider that we are today in the initial stages of another collapse that might lead to another Great Depression. The regulations put in place to prevent such from happening were disassembled in 1990s; and in the 2000s, the US government moved even closer to exposing its citizenry and indeed the world to the speculative carnage and folly of investment banking excess.

3.3.2. CANADA

Canada has imposed safeguard measures on imports of gloves, clothing, footwear, frozen strawberries, meat, yellow onions, corn, and turkeys. The Canadian International Trade Tribunal is conducting safeguard investigations in Canada pursuant to the Canadian International Trade Tribunal Act (CITT)¹³², its regulations and Canadian International Trade Tribunal Rules.¹³³ The Export and Import Permits Act¹³⁴ regulates imposition of safeguard

¹³⁰ Despite the negative vote of the USITC, President Regan did secure a voluntary restraint agreement with Japan, lasting until 1994.

¹³¹ Lee, Y. *Safeguard Measures In World Trade : The Legal Analysis*, The Hague : Kluwer Law International, 2005.

¹³² G/SG/N/1/CAN/3, 10 August 2004.

¹³³ *Business guide to trade remedies in Canada: anti-dumping, countervailing and safeguards legislation, practices and procedures / International Trade Centre UNCTAD/WTO*. International Trade Centre UNCTAD/WTO. Geneva: International Trade Centre, 2006.

¹³⁴ *Export and Import Permits Act*, R.S. Chapter E-19 Section 5(2)(b), 1985.

measures in the form of surtaxes, whereas the Customs Tariff Act¹³⁵ – of quantitative restriction, administered by the Department of Foreign Affairs and International Trade¹³⁶.

Section 60 of the Customs Tariff Act provides that the measure can be imposed “by executive order either as a result of a Minister of Finance or an inquiry by the [CITT]”¹³⁷. However, there is no requirement for a link between “unforeseen developments” and the trade concessions in Canadian legislation.

Canada distinguishes between the two types of safeguard measures: 1) Global safeguards; and 2) Safeguards on Imports from China. Up to date, there have been conducted three global safeguard investigations with the issued final reports¹³⁸. In the first one¹³⁹ no mention of the “unforeseen developments” was made. In the second final report on Safeguard Inquiry into the Importation of Certain Steel Goods¹⁴⁰, for each product, the Tribunal has examined world market developments in order to determine whether any increase in imports was resulting from the unforeseen developments as contemplated under GATT Art. XIX. At first it was stipulated that : “[t]he requirement to consider the impact of imports from all sources, as contemplated under the CITT Act, the Order and the international agreements, does not support the proposition that separate unforeseen developments must be shown for each country.¹⁴¹”. The report gives the identical explanation for each of the products. It points out a number of unforeseen developments leading to the significant increase in imports in 1998, such as: “[t]he Asian crisis, the Japanese economic slowdown and the collapse of the Russian and Commonwealth of Independent States economies, with the resulting economic turmoil, [which] weakened many economies in Asia and Eastern Europe”.

¹³⁵ Customs Tariff Act, R.S. Chapter 41 Section 60, 1985.

¹³⁶ Business guide to trade remedies in Canada: anti-dumping, countervailing and safeguards legislation, practices and procedures / International Trade Centre UNCTAD/WTO. International Trade Centre UNCTAD/WTO. Geneva : International Trade Centre, 2006 Call number: 339.53/.54(71) ITC 2006, p.98.

¹³⁷ Stewart, T. The GATT Uruguay Round: a negotiating history (1986-1992), Deventer; Boston: Kluwer Law International, 2003, p.1743.

¹³⁸ http://www.citt.gc.ca/safeguard/global/finalrep/gloin04_e.asp (retrieved 30 October 2011).

¹³⁹ Final Report, An Inquiry Into The Importation Of Boneless Beef, Originating In Countries Other Than The United States Of America, GC-93-001, May 28, 1993, ftp://ftp.citt-tcce.gc.ca/doc/english/safeguard/global/finalrep/gc93001_e.pdf.

¹⁴⁰ Safeguard Inquiry into the Importation of Certain Steel Goods, GC-2001-001, August 2002, ftp://ftp.citt-tcce.gc.ca/doc/english/safeguard/global/finalrep/gc2b001_e.pdf.

¹⁴¹. Article 2.2 of the Safeguard Agreement provides that “Safeguard measures shall be applied to a product being imported irrespective of its source.”

Furthermore, it is claimed that the developments such as the agreements¹⁴² between the European Coal and Steel Community and the Russian Federation (Russia) and with the Ukraine on trade in certain steel products placed restraints on steel exports from Russia and Ukraine. Finally, the report stipulates that “[a]ll of these developments, linked with overcapacity and overproduction, have had a global impact that spilled over into North American markets, placing pressure on U.S. producers as well.”¹⁴³,

In the final report on Global Safeguard Inquiry into the Importation of Bicycles and Finished Painted Bicycle Frames¹⁴⁴ in para.167, the unforeseen developments are “(1) the increase in capacity and production of China;¹⁴⁵ and (2) the increase in capacity and production of new emerging countries that did not traditionally export significant quantities of bicycles, such as the Philippines¹⁴⁶ and Vietnam.¹⁴⁷”. In the Tribunal’s view, these unforeseen developments have resulted in the significant increase in imports of bicycles that caused serious injury to the domestic producers of bicycles. The increased capacity and production of bicycles in China resulted directly in increased exports by that country to Canada.¹⁴⁸ Similarly, the expansion of bicycle industries in countries such as the Philippines and Vietnam, which historically were not major exporters of bicycles, and the increase in their production capacity and actual production resulted in significantly increased exports to Canada.¹⁴⁹ Canadian trade negotiators could not reasonably have foreseen these developments in 1994.¹⁵⁰

¹⁴². Tribunal Exhibits GC-2001-001-168.23 to 168.26 (single copy exhibit), Administrative Record, Vol. 1M at 250-369.

¹⁴³ Federal Register, Presidential Documents (7 March 2002), Tribunal Exhibit GC-2001-001-168.21 (single copy exhibit), Administrative Record, Vol. 1M at 196-201.

¹⁴⁴ Final Report, Global Safeguard Inquiry Into The Importation Of Bicycles And Finished Painted Bicycle Frames, GS-2004-001 AND GS-2004-002, September 2005, ftp://ftp.citt-tcce.gc.ca/doc/english/safeguar/global/finalrep/gs2e001_e.pdf.

¹⁴⁵ Protected Pre-hearing Staff Report, Tribunal Exhibit GS-2004-001/002-08 (protected), Administrative Record, Vol. 2.1 at 134, 139.

¹⁴⁶ Ibid, 141.

¹⁴⁷ Ibid, 142.

¹⁴⁸ Ibid, 40, 134, 139.

¹⁴⁹ Ibid, 40, 141, 142.

¹⁵⁰ Final Report, Global Safeguard Inquiry Into The Importation Of Bicycles And Finished Painted Bicycle Frames, GS-2004-001 AND GS-2004-002, September 2005, para. 168, ftp://ftp.citt-tcce.gc.ca/doc/english/safeguar/global/finalrep/gs2e001_e.pdf. (retrieved 30 October 2011)

Regarding the second type of Canada's safeguards, the safeguards on imports from China, in the single final report¹⁵¹ the Tribunal notes that, in contrast to the SA, in which GATT Art. XIX "is expressly incorporated, the Protocol makes no reference to either the Agreement on Safeguards or Article XIX of GATT 1994". In the Tribunal's view, the absence of any reference to Article XIX in the Protocol means that "the 'unforeseen developments' requirement is not pertinent to a market disruption inquiry".

3.4. European Countries' Safeguards

3.4.1. THE EUROPEAN UNION

Since 1980 the European Communities (EC)¹⁵² has been increasingly imposing the safeguard remedies and invoking GATT Art. XIX.¹⁵³ The existing rules governing safeguards procedures of the European Union (EU) were previously covered by five different regulations. Since November 2010, pursuant to the EU's notification, "the new Council Regulation (EC) No 260/2009 on the common rules for imports codifies the existing provision on EU safeguards procedures and replaces Council Regulation (EC) No 3285 of 22 December 1994, as well as the four Regulations that amended some of its articles and annexes between 1996 and 2004"¹⁵⁴. The new Council Regulation does not change the previous provisions, whereas "makes formal amendments". The stipulated legislation is silent of the "unforeseen developments" requirement, and, thus, the EU Commission and the Council, who are entitled to impose the safeguard measures, are not obliged to argue the requirement according to the EU regulations. The prerequisites for the adoption of safeguard measures

¹⁵¹ Final Report, Market Disruption Safeguard Inquiry into Barbeques Originating in the People's Republic of China, Safeguard Inquiry No. CS-2005-001, October 2005, ftp://ftp.citt-tcce.gc.ca/doc/english/safeguar/marinq/finalrep/cs2f001_e.pdf. (retrieved 30 October 2011)

¹⁵² Before 1 December 2009 "European Communities" was the official name in WTO business for legal reasons, and that name continues to appear in older material. However, since then "European Union" has been the official name in the WTO. (http://www.wto.org/english/thewto_e/countries_e/european_union_or_communities_popup.htm, (retrieved 30 October 2011). Thus, for the purpose of this research, the name will be used according to the discussed time: prior to 1 December 2009 will be entitled as the EC, after – the EU.

¹⁵³ Stewart, T. Stewart, T. The GATT Uruguay Round: a negotiating history (1986-1992), Deventer; Boston: Kluwer Law International, 2003, p.1740.

¹⁵⁴ G/SG/N/1/EEC/2, 12 November 2010.

pursuant to the EU legislation are the following: injury test, causality test and community interest test, however, they do not include the “unforeseen developments” requirement.¹⁵⁵

Turning to the analysis of the notifications, in the EC’s safeguard investigation on mandarins and other citrus fruits¹⁵⁶ the analysis of the “unforeseen developments” was comprised of the following factors: “the unprecedented increase in Chinese production capacity ... leading to high pressure to export; the possibility that US retaliatory measures in the hormones dispute would exclude the EU product from the US, encouraging an increase in PRC's capacity and consequently production; a change in consumer preferences ...; and the exchange rate policy of the Chinese government coupled with the unexpected fall of the US\$ since October 2000.”¹⁵⁷

In the analysis of the EC’s notification of 2004 concerning the application of the provisional safeguard measure on imports of farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen¹⁵⁸, the “unforeseen developments” were explained as the “erroneous forecast of [the Norwegian increased salmon] production, combined with the development of world consumption”. Moreover, the EC claimed that “the extent of the fall in prices (exacerbated by the problem of overproduction) and the vicious circle which that created because of the operation of the banking system” was strengthened by “the rise in the value of the euro which made the Community market as a whole a more attractive destination for Norwegian exports.”¹⁵⁹

Additionally, based on the analysed Minutes of the Committee on Safeguards, the EU was often opposing to countries’ definitions of the “unforeseen developments” and consequent interpretations. For instance, the EC did not agree with the interpretation adopted by South Africa for the notion of the “unforeseen developments”. South Africa interpreted that “developments would be unforeseen if they could not be anticipated at the conclusion of the Uruguay Round or at China's accession to the WTO”¹⁶⁰. However, the EC argued that “this would make virtually every case as an unforeseen development today”¹⁶¹.

Obviously, in case of EC’s notifications other countries as well opposed to the EC’s interpretation of the “unforeseen developments”. Regarding the initiation of an

¹⁵⁵ Business guide to trade remedies in the European Community / International Trade Centre, Geneva, 2004, pp.67-72

¹⁵⁶ G/SG/N/7/EEC/2, G/SG/N/11/EEC/2, 6 November 2003.

¹⁵⁷ G/SG/N/7/EEC/2, G/SG/N/11/EEC/2, 6 November 2003.

¹⁵⁸ G/SG/N/7/EEC/3, G/SG/N/11/EEC/3, 16 August 2004.

¹⁵⁹ Ibid.

¹⁶⁰ Minutes of the regular meeting held on 24 October 2007, G/SG/M/32, 19 March 2008, p.6.

¹⁶¹ Ibid.

investigation on salmon in 2004¹⁶², the US representative asked if “the EC considered the withdrawal of countervailing duty measures or anti-dumping measures to be an unforeseen development that would justify the imposition of a safeguard measure.”¹⁶³ In response, the EC delegate stated that the United Kingdom and Ireland in their request for the initiation of an investigation “alleged the existence of unforeseen developments”¹⁶⁴ and no conclusion had been made on this matter yet.

Regarding the EC’s definitive safeguard measure against imports of farmed salmon in 2005¹⁶⁵, which was challenged by Chile¹⁶⁶, the US claimed that the EC “entirely failed to notify by whom the decision that developments were “unforeseen” had been made”¹⁶⁷. The representative of the EC was unsure “if the issue of whether the development must be unforeseen by someone had been addressed in recent jurisprudence or in the Committee” and stated that “the EC preferred to receive the question in writing”. The position of the EC was “that Article XIX of the GATT did not seem to provide clearly to whom the ‘unforeseeability’ of the developments must be attributed”¹⁶⁸.

Moreover, the issue of timing was raised by the US delegate, particularly: “when the unforeseen development test should have been decided: if it was dating back to the time of the Uruguay Round, or from 2002 when [the EC] decided to eliminate this minimum import price on salmon.”¹⁶⁹ Supporting the US, Norway at another meeting claimed that “the EC's reasoning regarding “unforeseen developments” was largely based on assertions”.¹⁷⁰ The outcome of the dispute was Chile’s withdrawal on May 12, 2005 of its request for consultations due to the termination of the safeguard measure.¹⁷¹

¹⁶² G/SG/N/6/EEC/3.

¹⁶³ Minutes of the regular meeting held on 19 April 2004, G/SG/M/25, 4 August 2004, Para. 79, p.12.

¹⁶⁴ Ibid. Para. 80.

¹⁶⁵ Commission Regulation (EC) No. 206/2005 of 4 February 2005 imposing a definitive safeguard measure against imports of farmed salmon; Notifications, G/SG/N/8/EEC/3, G/SG/N/10/EEC/3 and G/SG/N/11/EEC/3/Suppl.1.

¹⁶⁶ European Communities - Definitive Safeguard Measure on Salmon - Request for Consultations by Chile, G/L/728, G/SG/D32/1, WT/DS326/1, February 14, 2005.

¹⁶⁷ Minutes of the regular meeting held on 25 October 2004, G/SG/M/26, 14 March 2005, Paras. 44-46, p.7

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Minutes of the regular meeting held on 4 APRIL 2005G/SG/M/27, 12 September 2005, para.57, p.8.

¹⁷¹ On April 27, 2005; http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds326_e.htm (retrieved 30 October 2011).

3.4.2. UKRAINE

Ukrainian manufacturers are still (after the WTO accession in 2008) behaving in the old-fashioned manner as it was done before the Ukraine's accession to the WTO by abusing their right to initiations of safeguard investigations¹⁷² for adoption of protectionist measures not in compliance with the WTO requirements. The statistics shows the abuse of the right to initiation of safeguard investigations by Ukrainian manufacturers, which begin with these initiations instead of anti-dumping and countervailing investigations despite the fact that safeguard measures should only be applied in exceptional cases pursuant to the WTO rules, and, therefore, are inappropriate to begin with.

Current tendency to misuse safeguard investigations by national manufacturers in Ukraine is due to the fact that subject of proof for initiating safeguard investigations is much simpler whereas in anti-dumping and countervailing investigations complex calculations of dumping margins or the level of illegitimate subsidies are to be conducted. Instead, it is enough to provide simple customs statistics showing the "increase of imports and to compare it with the alleged injury caused to domestic producers"¹⁷³ and safeguard remedies allows domestic producers to limit or block all channels of imports for a set period of time.

The Law of Ukraine "On the application of special measures to imports into Ukraine"¹⁷⁴ stipulates that special (safeguard) investigations are special administrative procedures that exist to temporarily protect national domestic industries from a surge of imports (regardless of country) of a specific product which is causing, or which is likely to cause, them serious damage.¹⁷⁵ At the same time, after Ukraine's accession to the WTO, the WTO Agreements have direct effect in Ukraine and most WTO provisions were "mirrored" in new legislation. The safeguard regulation does not contain the requirement of GATT Art. XIX regarding the "unforeseen developments" clause. Thus, Ukrainian manufacturers and authorized bodies are ignoring direct effect of the GATT and SA provisions and do not bother to look for and explain in their initiations that the alleged increase in imports resulted from the unforeseen developments.

¹⁷² According to the official web-site of the Ministry of Economy of Ukraine.

¹⁷³ Ukraine: Learning From Mistakes Or Why The Recent Safeguard (Special) Investigations Were Terminated Without The Application Of Safeguard (Special) Measures, Makhinova,A., Kulyk, D., 03 March 2011, <http://www.kisilandpartners.com/knowledge/articles/839/> (retrieved 30 October 2011).

¹⁷⁴ The Law of Ukraine "On the application of special measures to imports into Ukraine", of 16 April 1991, No. 959-XII.

¹⁷⁵ Ibid.

Pursuant to the Laws of Ukraine “On foreign economic activity”¹⁷⁶ and “On Amendments to the Law of Ukraine “On the Unified Customs Tariff”, a special duty is “a safeguard measure to protect national producer in case of imports of product to Ukraine in the volumes and/or under conditions, which cause or threaten to cause serious injury to the national industry;...”¹⁷⁷. The imposition of the special duties shall be based on the decisions on application of special safeguard measures¹⁷⁸ made pursuant to the Law of Ukraine “On Application of Safeguard (Special) Measures Against Imports to Ukraine”.¹⁷⁹

In 2009, Ukraine has notified the WTO Committee on Safeguards of its investigation findings on injurious imports of matches, however, no reference was made to the “unforeseen developments” requirement in the notification.¹⁸⁰ Neither on the official website of the relevant authorities¹⁸¹, nor in the Official Legislative database¹⁸² one cannot find the official investigation reports of the investigating authorities of Ukraine. The available data on the existence of safeguard investigations and adopted safeguard measures can be obtained from the notices of the decisions on application of measures¹⁸³, which just inform of the start, conduction or end of the investigations, but do not provide any argumentation or discussions, including the ones on “unforeseen developments” prerequisite.

As of October 2011 there are 13 anti-dumping and 2 special measures applicable, as well as three anti-dumping and two special (safeguard) investigations being conducted in Ukraine. Current Ukrainian safeguard investigation is on the import of motor cars to Ukraine, which started on July 2, 2011. On January 29, 2011 started the new investigation on imports of certain oil processing products (petrol A-76 (A-80), A-92 A-95, diesel fuel, fuel oil, stove fuel, liquefied gas, road asphalt, oil) to Ukraine and was recently prolonged until December 20, 2011. The safeguard measures application on imports of seamless casing and tubing pipes was also recently prolonged for 3 more years. Regarding the safeguard investigation on imports of refrigerating and freezing equipment into Ukraine, it was terminated on April 6, 2011 and decided that national interests do not require application of special measures.

¹⁷⁶ The Law of Ukraine “On foreign economic activity”, April, 16, 1991 with latest amendments of February, 4, 2009, www.rada.gov.ua (retrieved 30 October 2011).

¹⁷⁷ No.334-XIV, December 22, 1998, Art. 12.

¹⁷⁸ Ibid, Art. 15.

¹⁷⁹ The Law of Ukraine “On Application of Safeguard (Special) Measures Against Imports to Ukraine”, December 22, 1998, with last amendments of April 10, 2008.

¹⁸⁰ G/SG/N/8/UKR/2, G/SG/N/10/UKR/2, 23 October 2009.

¹⁸¹ <http://me.kmu.gov.ua/control/en/index>. (retrieved 30 October 2011)

¹⁸² <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?user=annot>. (retrieved 30 October 2011)

¹⁸³ http://me.kmu.gov.ua/control/en/publish/category/main?cat_id=162104. (retrieved 30 October 2011)

3.5. The Asian Region

3.5.1. INDONESIA

The Association of Southeast Asian Nations (hereinafter – “ASEAN”) members signed the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Agreement (AFTA) on January 28, 1992 in Singapore. AFTA Art. 6 provides for emergency measures by stipulating that “[f]our (4) elements must be proven: product comparability, increasing imports (due to the unforeseen developments and the grant of concessions), serious injury or threat thereof, and causal linkage.” Thus, the petitioners must submit data or evidence on the above elements.

All the available analyzed documents¹⁸⁴ do not specifically argue the “unforeseen developments” prerequisite as such. In the initiation of investigation on February 05, 2010 on imports of stranded wire, ropes and cables for locked coil, flattened strands and non-rotating wire ropes¹⁸⁵ it was stated that: “[o]ne can consider “critical circumstances” as an equivalent to “unforeseen developments”, however, not in the sense of interpretation given to these terminology by the AB”. This statement is unclear and does not provide an idea of Indonesia’s approach to interpretation of the “unforeseen developments”.

The notification of Indonesia on finding of a serious injury resulting from imports of wire nails, under subsection entitled “c) Unforeseen Development” holds that due to the existing sharp competition between domestic and imported product concerned and the increase of national consumption, mostly taken by imports, the unpredicted situation occurred. Moreover, Indonesia claimed that “when the global economy recession happened, a lot of the orders were cancelled and the Chinese exporters had to reroute their cargoes from the US and European markets to other destinations in Asian market, particularly Indonesia.”¹⁸⁶

The latest Indonesian notification in 2011 on certain stranded wire, ropes and cables¹⁸⁷ stated the following factors as the “unforeseen” and “unpredicted”: the increase of national consumption by two hundred forty four (244) per cent “due to the rapid domestic demand associated to certain development activities in Indonesia”, economic crisis of 2008

¹⁸⁴ The investigation documents, submitted to the Committee on Safeguards by Indonesia, were examined, as well as the the Presidential Decree on the Safeguard of the Domestic Industry Against The Impact of Increased Imports (Presidential Decree No. 84/2002 dated 16 December 2002), G/SG/N/1/IDN/2, 1 April 2003).

¹⁸⁵ Pengumuman Komite Pengamanan Perdagangan Indonesia, 05.02.2010

¹⁸⁶ G/SG/N/8/IDN/3, G/SG/N/10/IDN/3, G/SG/N/11/IDN/3, 14 October 2009, Para. B(3), p.4.

¹⁸⁷ G/SG/N/8/IDN/6, G/SG/N/10/IDN/6, G/SG/N/11/IDN/5, 12 April 2011.

resulting in an oversupply of the major supplier's countries and a massive exports to Indonesia.

In the notification on certain wire of iron or non-alloy steel, plated with zinc¹⁸⁸, Indonesia claimed that increased imports could not be predicted “by a number of FTA Agreements that has been agreed upon the Government of Indonesia with other countries”, “economic and financial crisis in 2008, which effected the global economy to slow down”, resulting in over-supply to Indonesia, and the low price of imported subject good.

In the subsequent notification of Indonesia on certain wire of iron non-alloy steel¹⁸⁹, the Indonesian authorities claimed that the “accelerated activities of construction industries in the area of building construction resulted in surge of imports” and was not anticipated by the domestic industry.

In the notification on bleached and unbleached woven fabric of cotton¹⁹⁰ “[t]he unforeseen rapid decline in global demand and excess supplies in textile sector of certain major suppliers” as well as FTA Agreements resulting in elimination of import tariffs comprised the “unforeseen developments”. Moreover, Indonesia claims that “would this situation had been predicted, the subject goods would be excluded from these [FTA] agreements”.

The notification regarding stranded wire, ropes and cables, excluding locked coil, flattened strands and non-rotating wire ropes¹⁹¹ described the “unforeseen development” as increased volume of imports and the lower prices, FTA Agreement, the increase in the world production of steel and the decrease in the global demand of the subject good leading to an oversupply, which was not anticipated.

The Indonesian notification on Dextrose Monohydrate (DMH)¹⁹² explained the “unforeseen development” as the sharp decline in tariff , resulting in “sharp competition between domestic producers and third country suppliers”.

¹⁸⁸ G/SG/N/8/IDN/7, G/SG/N/10/IDN/7, G/SG/N/11/IDN/6, 12 April 2011.

¹⁸⁹ G/SG/N/8/IDN/8, G/SG/N/10/IDN/8, G/SG/N/11/IDN/7, 12 April 2011.

¹⁹⁰ G/SG/N/8/IDN/9, G/SG/N/10/IDN/9, G/SG/N/11/IDN/8, 12 April 2011.

¹⁹¹ G/SG/N/8/IDN/5, G/SG/N/10/IDN/5, G/SG/N/11/IDN/4, 11 April 2011.

¹⁹² G/SG/N/8/IDN/2, G/SG/N/10/IDN/2, G/SG/N/11/IDN/2, 9 October 2009.

3.5.2. MALAYSIA

Pursuant to the Safeguards Act 2006¹⁹³ a petition to the Malaysian Government for initiation of a safeguard investigation “shall contain the following information: ... (j) an explanation on unforeseen developments that have resulted in increased imports causing or threatening to cause serious injury to domestic industry”.

3.5.3. PHILIPPINES

The notified Tariff Commission Orders of Philippines authority¹⁹⁴, obtained from the WTO Committee on Safeguards, are silent on the matter of the “unforeseen developments”.¹⁹⁵ However, in the Order regarding figured glass¹⁹⁶ Philippines stated that “[a]lthough these circumstances [unforeseen developments] need not be demonstrated for the reason that figured glass is not the subject of any Philippine concession under the WTO Agreement”, the unforeseen development is comprised by the “recent, sharp and significant” increased imports, resulting from “the slow down in demand for glass products due to the excess capacity within the Asian region”.

Philippines stated that “the circumstance of “as a result of unforeseen developments” need not be demonstrated” as such inquiry “is governed by the national legislation (RA 8800) and the terms and conditions of the WTO Agreement on Safeguards”¹⁹⁷.

¹⁹³ The Safeguards Act 2006, Act No. 657, 30 August 2006, section 3(1)(j). Additionally, the Government is the authority, which initiates the investigation. G/SG/N/1/MYS/2, 9 January 2008.

¹⁹⁴ Republic Act No. 8800, entitled "The Safeguard Measures Act", as well as its Implementing Rules and Regulations embodied in Joint Administrative Order No. 03 (2000), G/SG/N/1/PHL/2, 9 July 2001. The Secretary ("Secretary" shall refer to either the Secretary of the Department of Trade and Industry in the case of non-agricultural products or the Secretary of the Department of Agriculture in the case of agricultural products;) shall apply a general safeguard measure upon a positive final determination of the Tariff Commission. Additionally, the Rules and Regulations to govern conduct of formal investigation by the tariff commission on the withdrawal and/or suspension of concessions under section 402 of the tariff and customs code of the Philippines, were issued by the Tariff Commission Order no. 02-01, 14.11.2002.

¹⁹⁵ The Order on Steel Angle Bars, 19 April 2010; The Order on Testliner Boards, 05 May 2010; Staff Report Formal Investigation of Safeguard Measure Case Against Importation of Testliner Boards from Various Countries (Ahtn Codes 4805.24.00, 4805.25.10 and 4805.25.90) (SG Investigation No. 01-2010) 20 August 2010, <http://www.tariffcommission.gov.ph/comorder02-01.htm> (retrieved 30 October 2011).

¹⁹⁶ The Order on Figured Glass, 14.04.2004.

¹⁹⁷ Staff Report on Formal Investigation of Safeguard Measure Case Against Importation of Testliner Boards from Various Countries (Ahtn Codes 4805.24 00, 4805.25 10 and 4805.25 90) (SG Investigation No. 01-2010), 24 November 2010, p.6.

3.5.4. CHINA

In the notification on initiation of an investigation on steel products¹⁹⁸ neither China¹⁹⁹, nor participating Members argued the “unforeseen developments” issue. Chinese legislation as well as national jurisprudence is silent on this matter.

3.5.5. JAPAN

In the investigation on acetylene black, Japan²⁰⁰ pointed out that, “the preliminary finding of injury by India did not refer to the requirement of injury ‘as a result of unforeseen developments’, because the Indian law did not require this test.”²⁰¹

3.5.6. ISRAEL

Pursuant to the notification of Israel on steel rebars²⁰² the “unforeseen developments” are explained as “the global collapse of demand and prices of steel rebars and the consequent desperate offloading of the piled-up stocks, leading to increased import to Israel, and since June 2008 - at fallen prices”. Moreover, it was stated that “the unprecedented uneven recession in many countries has led to increased import of steel rebars to Israel”.

¹⁹⁸ G/SG/N/6/CHN/1, G/SG/N/7/CHN/1, G/SG/N/11/CHN/1, 23 May 2002.

¹⁹⁹ Regulations of the People's Republic of China on Safeguards (Promulgated by Decree No. 330 of the State Council of the People's Republic of China on 26 November 2001, and revised in accordance with the Decision of the State Council on Amending the Regulations of the People's Republic of China on Safeguards promulgated on 31 March 2004). The Ministry of Commerce examines the application of safeguard measures, initiates and conducts investigations and issues a final determination. G/SG/N/1/CHN/2/Suppl.3, 20 October 2004.

²⁰⁰ The safeguard legislation of Japan is as follows: "Customs Tariff Law (Law No. 54 of 1910)", "Cabinet Order Relating to Emergency Duty, etc. (Cabinet Order No. 417 of 1994)", "Import Trade Control Order (Cabinet Order No. 414 of 1949) " and "Regulations to Govern Emergency Measures to be taken in Response to an Increase in the Importation of Goods (Notification No. 715 of 1994 of the Ministry of International Trade and Industry)", Guidelines inacted and notified on 17 August 2009 (G/SG/N/1/JPN/2/Suppl.2). Evidence shall be submitted to the Office for Trade Remedy Investigations of the Trade Control Department of the Trade and Economic Cooperation Bureau, Ministry of Economy, Trade and Industry. The Minister of Economy, Trade and Industry initiates and conducts the investigation.

²⁰¹ Minutes of the regular meeting held on 22 April 1998, G/SG/M/11, 29 July 1998, para.38, p.18.

²⁰² G/SG/N/7/ISR/1, G/SG/N/11/ISR/1, 26 June 2009, para. 5 (b).

3.5.7. PAKISTAN

The safeguards legislation of Pakistan²⁰³ is silent on the “unforeseen developments” definition and refers mainly to the “serious injury or threat of serious injury and causation” at all discussed stages (initiation, investigation, application).²⁰⁴

There has been only one initiation of safeguard investigation against alleged surge in imports of footwear into Pakistan on June 17, 2005.²⁰⁵ Although there was surge in imports, Pakistan government terminated SG investigation as it refused to go into cumbersome process of fulfilling the WTO conditions for application of safeguard measures. The Pakistan's understanding is explained as follows: “[n]oting that the product in question was ‘unbound’, it was when the conditions of Article XIX of the GATT were met that safeguard measures could be applied.”²⁰⁶ In the given case, the government could anyway increase the tariff since Pakistan government did not commit bound duty on footwear under the WTO. However, there is no reference to “unforeseen developments” in the available investigation documents and in safeguards legislation of Pakistan.

3.5.8. INDIA

India²⁰⁷ has initiated the maximum number of safeguard investigations and applied the highest number of safeguard measures against imports from the WTO members since the agreement on safeguards was implemented on January 1, 1995. According to statistics on safeguard actions notified by the WTO members (see Annex 2), India notified a total of 26 initiations, and applied 12 safeguard measures.

²⁰³ The Safeguard Measures Ordinance, 2002 (SG Ordinance) and framed there under the Safeguard Measures Rules, 2003; Islamabad, July 20, 2002, F.No. 2(1)/2002-Pub.-; The Federal Government apply a safeguard measure on an investigated product imported into Pakistan “if, it has been determined by the Commission pursuant to an investigation conducted by it in accordance with the provisions of this Ordinance that as a result of unforeseen developments and of the effect of WTO obligations assumed by Pakistan, the investigated product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause serious injury or threat of serious injury to domestic industry producing like or directly competitive products.”

²⁰⁴ G/SG/N/1/PAK/3, 10 October 2003; G/SG/N/1/PAK/2, 1 October 2003; <http://www.ntc.gov.pk/SFevent.asp> (retrieved 20 October 2011).

²⁰⁵ <http://www.ntc.gov.pk/sgint.asp> (retrieved 20 October 2011); The documents and decisions on the investigation in Pakistan are open to public. Thus, it is worth noting that, in practice, the decisions were provided on the request through contacting (as stated on the website) the Secretary of National Tariff Commission.

²⁰⁶ Minutes Of The Regular Meeting held on 23 April 2007, G/SG/M/31, 19 September 2007, p.7.

²⁰⁷ The India's safeguard legislation includes: Safeguard Provisions under the Customs Tariff Act, 1975 (Section 8B); Safeguard Duty Rules under the Customs Tariff Act, 1975; Transitional Safeguard Provisions under the Customs Tariff Act, 1975 (Section 8C); Transitional Safeguard Duty Rules under the Customs Tariff Act, 1975; <http://www.dgsafeguards.gov.in/newversion/Legal-framework.html> (retrieved 30 October 2011).

The Customs Tariff Act, 1975, authorizes the application of safeguard measures. However, it does not stipulate any requirement of the “unforeseen developments”. The Director General of Safeguards is obliged to the “finding of existence of ‘serious injury’ or threat thereof as a consequence of increased imports”.²⁰⁸ Thus, one may doubt that such India’s safeguard measures, when challenged in the WTO Dispute Settlement Body would pass the test settled by the AB.²⁰⁹

In the current safeguard investigation findings²¹⁰ the “unforeseen developments” are explained as “a rising trend of export of PAN from Korea and Taiwan to India in the wake of coagulation of demand in China and Pakistan”, resulting from the “slowdown in the end markets of Europe and America from 2009 onwards, and worsening in the last 5 months due to the crises in Spain, Italy, Portugal, Greece, and Ireland” and “[the] anti-dumping duty on imports from Korea and Taiwan imposed by China and Pakistan, restricting imports of Phthalic Anhydride”.

There is no mention of the “unforeseen developments” in India’s numerous notifications to the WTO Safeguards Committee, except for the following two notifications.

In the notification on Dimethoate Technical²¹¹ India refers to GATT Art.XIX and points out that the “use of plural term 'developments' implies that there could be more than one development whose combined effect ... of resonance of all such developments which impact the business dynamics and tilt the odds from one to another” may be considered. India takes the “holistic view” and states that “the unprecedented and uneven recession has destabilized domestic industries of various nations including the nations who had very high production capacities”. Moreover, India considered the recession, which resulted in “unexpected fall in demand worldwide”, as an unforeseen development.

The notification on Phthalic Anhydride²¹², when considering the “unforeseen developments”, equals it to “the sudden fall in import prices of PAN triggered by the collapse of domestic market in Korea and ...China and US and the consequent desperate offloading of

²⁰⁸ Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997, para. 4.1.; G/SG/N/1/IND/3, 23 September 2011.

²⁰⁹ Raychaudhuri, T. The Unforeseen Developments Clause in Safeguards under the WTO: Confusions in Compliance, *The Eastey Center Journal of International Law and Trade Policy*, Volume 11 Number 1, Canada, 2010, p. 315; www.eastreyjournal.com (retrieved 30 October 2011).

²¹⁰ Preliminary findings in Safeguard investigation concerning imports of Phthalic Anhydride (PAN), 23rd September, 2011, para. 5(f), <http://www.dgsafeguards.gov.in/newversion/coated-paper-dd.html#> (retrieved 30 October 2011).

²¹¹ G/SG/N/7/IND/2, G/SG/N/8/IND/16, G/SG/N/11/IND/3, 27 February 2009.

²¹² G/SG/N/7/IND/1/Suppl.1, G/SG/N/11/IND/2, 20 January 2009.

the piled-up stocks”. India further notes that “the unprecedented uneven recession” resulted in increased import of PAN to India.

With regards to the concluded Indian investigations, in the examination and findings on the safeguard investigation concerning imports of Linear Alkyl Benzene into India²¹³, the authorities did not refer to the “unforeseen developments”, despite parties’ stipulating certain arguments on this issue. In the findings on safeguard duty investigation against imports of Caustic Soda in to India²¹⁴ it was stated that “the financial meltdown and recession faced by the economy is unparalleled in recent history”²¹⁵. It is argued that “the global recession caused sudden deceleration in the manufacturing sector all over the world”, which is an unexpected and ‘unforeseen development’.

Importantly, the AB found that the national authorities must demonstrate the unforeseen developments before imposing a safeguard measure. As ruled in US-Lamb, it is not sufficient for the national authorities merely to describe certain new developments.²¹⁶ However, many members (the SA drafters) did not perceive the demonstration of the unforeseen developments to be a legal requirement for the application of safeguard measure as analysed above. Thus, it can be argued that the AB erred in reaching the latest decision and could have made a legal mistake.

In conclusion, the national laws of most regimes, e.g. US and India’s Customs Tariff Acts, do not contain the requirement of the “unforeseen development”. However, as soon as the safeguard measures of these countries will be challenged before the WTO, it is highly doubtful whether such measures would pass the test prescribed by AB. In addition to stipulated different analytical approaches of WTO Members, the challenge that they face now can be resolved through more flexible WTO standards for safeguard protection, particularly: elimination of “unforeseen developments” requirement or amendment of SA by providing precise detailed definition and outlining the parameters of the term.

The SA Art. 3.1 stipulates that “[the] competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law”. Additionally, SA Art. 4 states that “[t]he competent authorities shall publish promptly,

²¹³ Notification of Final Findings on Safeguard investigation concerning imports of Linear Alkyl Benzene into India, 18th November, 2009.

²¹⁴ Final Findings on Safeguard Duty investigation against imports of Caustic Soda in to India, 9th April, 2010.

²¹⁵ Ibid, p.49, para. 351.

²¹⁶ United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US-Lamb), WT/DS/178/AB/R, para.73.

in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors considered”. Despite stipulated obligations, the majority of the WTO Members’ authorities do not provide publicly and keeps confidential the reasoned conclusions resulting from the conducted investigations. In contrast, if countries complied with these obligations, the panels and the AB will easily “find fault with the decisions that fail to persuade them of their soundness”²¹⁷. For instance, as the AB stated in *US - Wheat Gluten*, the very fact that the Panel had to require clarification from the U.S. implied that there were no “reasoned and adequate” explanation for its conclusion in the published report of the USITC.²¹⁸

Some scholars consider the reform of domestic legal systems and institutions, which will give “equal rights of market access to foreign products and reducing the biased in favour of producers’ interests”.²¹⁹ However, at the same time “such a reform in fact entails some loss of national sovereignty”, and, thus, it is doubtful that countries will agree to make such a step.²²⁰

²¹⁷ Sykes, A. *The WTO Agreement on Safeguards: A Commentary*, Oxford University Press, Oxford, 2006, p.90.

²¹⁸ *US-Wheat Gluten*, WT/DS166/AB/R, adopted 19 January 2001, paras. 156-163.

²¹⁹ Nicolaides, P. *The Hydra of Safeguards: An Intractable Problem for the Uruguay Round?* RIIA Discussion Paper No.21, Royal Institute of International Affairs, 1989, p. 18.

²²⁰ *Ibid.*

CONCLUSIONS

When ruling on the relationship between the Agreement on Safeguards and GATT Art. XIX, the WTO Appellate Body denied the sole authority of the SA and affirmed the cumulative applicability of the two agreements. The SA governs the imposition of safeguard measures only to one exception, which is the “unforeseen development clause”. Based on the discussed historical backgrounds and the evolution of the escape clause in the history of the GATT/WTO system, in the author’s view, such an exception runs counter to the intentions of the Uruguay Round negotiators.

Having researched the case law at issue, the author asserts that the AB decisions were correct as a logical matter. Although, as many members (drafters) did not perceive the demonstration of the unforeseen developments to be a legal requirement for the application of a safeguard measure, the AB erred in reaching the decision and could have made a legal mistake. Moreover, from a conceptual perspective, the AB created the situation when the “unforeseen developments” prerequisite has proven practically impossible to satisfy.

According to the practice established by the panels and the AB in respect of the application of GATT Art. XIX: 1(a), the list of the following standards of adherence to the “unforeseen developments” requirement has been established in the paper. Therefore, the unforeseen developments shall be:

- (1) unexpected;
- (2) demonstrated as a matter of fact and provide a logical connection with the conditions for imposition of safeguard measures;
- (3) identified and examined by the competent authorities before the safeguard measure is actually imposed;
- (4) resulting in the increased imports;
- (5) performed for each kind of product subject to a safeguard measure;
- (6) supported by a reasoned and adequate explanation of the competent authorities;
- (7) not foreseen or expected when it incurred the obligations under the GATT 1994;
- (8) as a minimum, subject to a discussion by the competent authorities as to why they were unforeseen at the appropriate time, and why conditions providing grounds for safeguard measures’ application occurred as a result of such circumstances;
- (9) resulting in unforeseen or unexpected imports, namely: recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury;

(10) foreseen at the time when the relevant tariff concession was negotiated, and, thus, shall be interpreted to mean developments occurring after the negotiation of the relevant tariff concession.

The approach of the WTO institutions, particularly, the Committee on Safeguards, is based on “encouraging”, however, not “binding” the WTO Members to submit relevant documents with national decisions made by the competent authority. Thus, the author asserts that it is impossible to access and examine the existing relevant national decisions, except for those few voluntarily submitted by the WTO Members. The practice of the application of the “unforeseen developments” requirement can only be found in the DSB jurisprudence, discussions at the Committee on Safeguards and scholars’ writings regarding particular countries.

Based on the thorough analysis of all the available WTO Members’ notifications, investigation reports and determinations, the key findings of the paper provide for the following five groups of factors, which are most often considered to constitute the “unforeseen developments”:

- 1) recession, economic and financial crisis;
- 2) over-production and increased consumption;
- 3) liberalization of trade under the FTAs;
- 4) imposed trade remedies; and
- 5) fiscal policies.

First, the WTO Member’s frequently claim the financial meltdown and the existence of the global unprecedented and uneven recession leading to the collapse of the domestic market, which is unparalleled in recent history, as the “unforeseen developments” (e.g. argued by India in 2010). Moreover, it was also argued that the impact of the recession had outweighed the impact from the injurious imports (particularly, by the US), and, thus, the safeguard measure should have been imposed. Regarding the arguments on the economic and financial crisis, the Asian crisis (in 1997 as stipulated by Brazil), the Japanese economic slowdown and the collapse of the Russian and Commonwealth of Independent States economies (as claimed by Canada), the crises in Spain, Italy, Portugal, Greece, and Ireland (argued by India in September 2011) are specified in the investigation documents as unexpected factors.

Second, the unprecedented record world over-production, particularly, the increase in Chinese production capacity, and the change in consumer preferences (as argued by the EU); the increase of national consumption (e.g. by the 244 per cent) and the unforeseen rapid decline in global demand and excess supplies (as stated by Indonesia) are considered the

“unforeseen developments”. Not only the increase in production as such, but also the erroneous forecast of potential production is considered the “unforeseen development” (particularly, by the EU). Additionally, the existing sharp competition between domestic and imported product and the accelerated activities of certain industries can also be regarded as the “unforeseen developments”.

Third, the liberalization of trade under the FTAs, resulting in elimination of import tariffs, and preferential trade agreements, linked with overcapacity and overproduction (as stated by Indonesia, Canada, Dominican Republic and others) comprised the “unforeseen developments”. Interestingly, even the unforeseen rupture of the licensing agreement with particular company was considered as the unexpected consequence (by Argentina).

Fourth, the “unforeseen developments” are determined by the certain fiscal policies, such as: the fluctuation of exchange rate and the change of the main domestic producer from producer to importer (as argued by the Dominican Republic) as well as the exchange rate policy of the Chinese government coupled with the unexpected fall of the US\$ since October 2000 and the rise in the value of the euro which made the Community market a more attractive destination for exports (as stipulated by the EU).

Fifth, the discriminatory and selective imposition of export duties (as argued by Chile), the existing trade remedies and the withdrawal of the countervailing duty measures or anti-dumping measures (as stated by the EU, India), and even the possibility of the retaliatory measures resulting from the dispute, may be considered as the “unforeseen developments”.

Apart from the stipulated five groups of factors, WTO Members also declare the technological developments and the accession of China to the WTO in order to satisfy the “unforeseen developments” requirement.

However, as soon as the safeguard measures of the countries, based on the arguments considering stipulated factors as the “unforeseen developments”, will be challenged before the WTO, it is highly doubtful whether such measures would pass the test prescribed by AB, as none of the Members had succeeded in proving this requirement yet. It is at the discretion of the WTO Panel and, especially, the AB, which does not seem likely to change its decisions. The challenge that the WTO Members face now can be resolved through more flexible WTO standards for safeguard protection, particularly: elimination of the “unforeseen developments” requirement or amendment of the SA by providing precise detailed definition and outlining the parameters of the term.

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ANNEX 1

Official GATT and WTO Report Citations

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, 575
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , WT/DS238/R, adopted 15 April 2003, DSR 2003:III, 1037
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, 3127
<i>Hatters' Fur</i>	Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, GATT/CP/106, adopted 22 October 1951
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, 49
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
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<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Steel Safeguards</i>	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R / WT/DS249/R / WT/DS251/R / WT/DS252/R / WT/DS253/R / WT/DS254/R / WT/DS258/R / WT/DS259/R, and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, 3273
<i>US – Tyres (China)</i>	<i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, 5 September 2011.
<i>US – Tyres (China)</i>	<i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/R, 13 December 2010.
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, 779

ANNEX 2

Notifications and safeguard measures of the WTO Members (March 29, 1995 - October 31, 2010)

WTO Member	Number of initiations	Number of safeguard measures
Argentina	6	4
Australia	2	0
Brazil	3	2
Bulgaria	6	2
Canada	3	0
Chile	12	7
China, People's Republic	1	1
Colombia	3	0
Costa Rica	1	0
Croatia	1	1
Czech Republic	9	5
Dominican Republic	5	1
Ecuador	8	3
Egypt	4	4
El Salvador	3	0
Estonia	1	0
European Union	5	3
Hungary	3	3
India	26	12
Indonesia	12	3
Israel	1	0
Jamaica	1	0
Japan	1	0
Jordan	15	7
Korea, Republic of	4	2
Kyrgyz Republic	3	1
Latvia	2	2
Lithuania	1	1
Mexico	2	0
Moldova	2	1
Morocco	5	2
Pakistan	1	0
Panama	1	1
Peru	2	0
Philippines	9	6
Poland	5	4
Slovak Republic	3	2
Slovenia	1	0
South Africa	1	1
Tunisia	2	0
Turkey	15	12
Ukraine	8	2
United States of America	10	6
Venezuela	6	0
Viet Nam	1	0

Source: http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm#statistics

ANNEX 3

The investigating authorities of the WTO Members and their official websites

WTO Member	Investigating authority	Official website
Argentina	<i>Ministry of the Economy and Production</i>	http://noticias.mecon.gob.ar/
Brazil	<i>Brazilian-American Chamber of Commerce</i>	http://www.brazilcham.com/default.asp?id=222
Canada	<i>Canada International Trade Tribunal</i>	http://www.citt.gc.ca/
Chile	<i>International Economic Relations Directorate</i>	http://www.direcon.gob.cl/
Czech Republic	<i>Ministry of Industry and Trade of the Czech Republic</i>	http://www.mpo.cz/
Dominican Republic	<i>American Chamber of Commerce in the Dominican Republic</i>	http://www.amcham.org.do/en/
Ecuador	<i>Foreign Affairs, Trade and Integration Ministry</i>	http://www.mmrree.gob.ec/
European Union	<i>European Commission</i>	http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/safeguards/
India	<i>Ministry of Commerce and Industry, Department of Commerce</i>	http://commerce.nic.in/traderemedies/safeguard.asp?id=9
Indonesia	<i>Ministry of Trade</i>	http://www.kemendag.go.id/
Malaysia	<i>Ministry of International Trade and Industry</i>	http://www.miti.gov.my/cms/index.jsp
Nicaragua	<i>Ministry of Development, Industry and Trade</i>	http://www.mific.gob.ni/
Pakistan	<i>Ministry of Commerce</i>	http://www.commerce.gov.pk/
Peru	<i>Ministry of Foreign Trade and Tourism</i>	http://www.mincetur.gob.pe/newweb/
Philippines	<i>Department of Trade and Industry</i>	http://www.dti.gov.ph/dti/index.php?p=134
Switzerland	<i>State Secretariat for Economic Affairs SECO</i>	http://www.seco.admin.ch/themen/00513/00514/index.html?lang=en
Thailand	<i>Ministry of Commerce</i>	http://www2.moc.go.th/main.php?filename=index_design4_en
Turkey	<i>Undersecretariat for Foreign Trade</i>	http://www.ekonomi.gov.tr/index.cfm?sayfa=indexandCFID=76238andCFTOKEN=64769164
Ukraine	<i>Interdepartmental International Trade Commission, Ministry of Economic Development and Trade of Ukraine</i>	http://me.kmu.gov.ua/control/en/index
United States	<i>International Trade Commission</i>	http://www.usitc.gov/
Viet Nam	<i>Chamber of Commerce and Industry</i>	http://antidumping.vn/