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WTO Compatibility of Regional and Bilateral Emergency Actions: Implications for the CIS Countries

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All errors and omissions remain completely my own.

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.

Abstract

The paper analyses the rules on bilateral safeguards in modern RTAs in light of the WTO norms with a particular focus on the CIS region. The WTO does not prescribe a particular way of regulating regional safeguards in mutual trade between RTA partners. Nevertheless, the WTO prescribes limitations on the availability of emergency actions in bilateral or regional trade. The thesis consists of four chapters, introduction and conclusion. The first chapter analyzes the WTO prerequisites of safeguards in regional trade and evaluates the most radical interpretation of Article XXIV as mandating WTO Members to refrain from the use of emergency safeguards in mutual trade completely. The second chapter analyses the texts of the modern preferential trade agreements and seeks to reveal the tendencies in the regulation of bilateral safeguards typical of certain countries and regions. The third chapter evaluates the relevance of WTO rules for RTAs between CIS countries, many of which are not WTO Members. Finally, the fourth chapter examines the special regimes on emergency actions in the WTO, their relation to the global safeguards mechanism in Article XIX of the GATT, and the perception of those rules in the RTAs. The paper reveals certain discrepancies between the emergency actions regimes in the current RTAs and the WTO legal system and contains recommendations for harmonization and coherence between both regulatory levels.

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List of Acronyms

AoA	Agreement on Agriculture
AB	WTO Appellate Body
Article XXIV	Article XXIV of the GATT
ASG	Agreement on Safeguards
ATC	Agreement on Textiles and Clothing
BOP	Balance of payments
CIS	Commonwealth of Independent States
CRTA	Committee on Regional Trade Agreements
CU	Customs Union of EurAsEC
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EFTA	European Free Trade Association
EU	European Union
EurAsEC	Eurasian Economic Community
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICJ	International Court of Justice
IMF	International Monetary Fund
LDC	Least-Developed Country
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
ORRC	Other Restrictive Regulation of Commerce
Para.	Paragraph
QR	Quantitative Restriction
RTA	Regional Trade Agreement

SACU	South African Customs Union
SAT	Substantially All The Trade
SCMA	Agreement on Subsidies and Countervailing Measures
SES	Single Economic Space
SSG	Special Safeguard
TRQ	Tariff-Rate Quota
UK	The United Kingdom of Great Britain and Northern Ireland
US	The United States of America
VCLT	Vienna Convention on the Law of Treaties
VER	Voluntary Export Restraint
WTO	World Trade Organization

Introduction

The proliferation of regional trade agreements and the ongoing multilateral negotiations to expand and deepen trade liberalisation clearly show the global trend towards more transparent and unrestricted trade. However, along with such further trade liberalisation, domestic businesses would clearly request their governments to retain protective tools against increased imports from abroad. Such protective tools include safeguards. The global safeguard regime of the ASG, as interpreted by the AB, imposes a very high standard of proof on the safeguard-invoking WTO Member. Notably, not a single safeguard has effectively withstood the scrutiny of WTO dispute resolution process.

By contrast, the *probatio diabolica* of the ASG could be effectively avoided in regional trade agreements. Clearly, the WTO does not prescribe a particular way of regulating regional safeguards in mutual trade between RTA partners. Such partners are free to deviate from WTO paradigms, may impose their own grounds for the invocation of bilateral safeguards, and determine their own terms of safeguards application. These political economy concerns will likely inform bilateral safeguards rules in the texts of the new RTAs at least for the transition periods. However, does the WTO regime contain any rules that could ban the use of safeguards in bilateral trade? Are there any limitations on the availability of this instrument as imposed by the WTO agreements?

Regional safeguards remain a somewhat hazy and neglected area in the international trade literature. The rules of the WTO on global safeguards have been widely analysed and assessed; however, the implications of the WTO agreements for the emergency actions between the RTA partners have been only briefly touched upon by scholars. The scarcity of compulsory multilateral rules on RTAs within the GATT and the consistent reluctance of WTO adjudicators to give any definite interpretation of regional safeguards has only exacerbated this interpretative *lacuna*. The compatibility of the regional safeguards regimes with WTO rules is therefore among the central issues to be resolved in this paper.

The CIS region is one of the most rapidly developing is sense of volume (but not necessarily quality) of regional trade agreements. Thus far, regional arrangements have been mainly driven by political concerns and only recently focused more on the economic and legal sides of the deals. Nearly all major CIS regional instruments are currently being revised or amended. The interest of this author in the development of the region, a background in the legal practices within the CIS jurisdictions, and a linguistic ability to comprehend the agreements between the CIS states, have produced this particular focus of the paper on the CIS. Furthermore, some of the findings of this current research may be useful for the author in his Ph.D. research on the most contentious issues of the transition period of the CU of Russia, Belarus and Kazakhstan.

The scope of this paper is limited to the examination of WTO restrictions on the use of bilateral safeguards between the RTA partners, with additional attention to be drawn to the implications of those WTO rules for regional agreements between the CIS states. The main questions to be

resolved in the paper are the following: Do WTO agreements regulate the use of safeguard measures in the mutual trade of regional trading partners? What are the restrictions on such use imposed by the WTO? Are there special regimes on safeguards in respect of particular products as regulated within the WTO? How are such special regimes understood and implemented in modern RTAs? Do RTAs follow the patterns from the ASG when crafting their regional rules on bilateral safeguards? What do all these rules means for the RTAs between the CIS states, and are there any peculiarities related to the region?

Such a narrow scope of the paper therefore forces the author to refrain from addressing many of the interesting and debatable questions on the interaction between global safeguards and preferential obligations under RTAs. Such matters as the exclusion of RTA partners from the application of global safeguard measures and parallelism are among the most thought-provoking issues related to trade remedies. However, as long as they define the application of global (and not regional or bilateral) safeguards, they unfortunately remain of modest relevance for the analysis performed in this paper.

The architecture of this thesis fully pursues the questions of the research. Chapter 1 analyses the restrictions on the use of bilateral safeguards contained within the WTO covered agreements. It also comments on some of the most radical interpretations of Article XXIV as mandating WTO Members to refrain from the use of emergency safeguards in mutual trade completely. Chapter 2 analyses the texts of the modern preferential trade agreements and seeks to reveal the tendencies in the regulation of bilateral safeguards typical of certain countries/regions. The WTO rules on global safeguards are used as a yardstick to determine the changes adopted through regional instruments. Chapter 3 evaluates the relevance of WTO rules for RTAs between CIS countries, many of which are not WTO Members. The chapter concludes that the impact of the WTO rules on regional trade relations within the CIS region has increased significantly in recent years, thus having substantial influence on those CIS states which are not yet in the WTO. Chapter 4 analyses the special regimes on emergency actions in the WTO, their relation to the global safeguards mechanism, and the perception of those rules in the RTAs. The chapter surprisingly establishes that some of the regional rules on safeguards embrace mechanisms which could not be conceived as relevant under the multilateral rules of the WTO.

Some minor caveats should be made in respect of the terminology of the research paper. The terms ‘RTA’ and ‘PTA’ are used interchangeably to denote the established regime of preferential trade between two states. Special clarifications are also necessary in relation to the term ‘bilateral safeguards’. The term is understood to mean the emergency action against the import surge originating from a country – partner in a bilateral or regional trade agreement. In certain circumstances in respect of multilateral RTAs it is necessary to differentiate between the emergency actions taken against all other parties or against a particular trading partner only. In such circumstances the terms ‘regional’ safeguards and ‘bilateral safeguards’ are clearly separated in the text of the paper. In all other occasions the terms could be used interchangeably so as to mean an emergency action undertaken under the preferential trade agreement and targeted at a regional trading partner (partners).

The strictly limited volume of the research, as well as its legal (not economic) nature, does not allow performing a detailed comparison of the vast quantities of the regional agreements. The comparison of bilateral safeguards rules in different RTAs is worth a separate extended research. Conversely, for the purposes of the current thesis the RTAs are scrutinised very briefly. All examples used in the paper are of an illustrative nature, and the conclusions on the design of the RTA provisions do not tend to be exhaustive. Moreover, the paper does not touch upon the practices of application of bilateral safeguards across different jurisdictions. This subject, also worth a separate expanded examination, may be developed in future works by the author on this issue.

Chapter 1. WTO Restrictions on the Use of Bilateral Safeguards

There is no doubt that WTO rules do not mandate that Members follow multilateral patterns in their regional trade deals. The use of bilateral safeguards at first sight seems to be a totally internal issue of RTAs, which has nothing to do with WTO rules. However, multilateral trade rules impose certain restrictions on the use of safeguards between regional partners. For both FTAs and customs unions, Article XXIV:8 of the GATT requires the elimination of (a) duties and other restrictive regulations of commerce except, where necessary (b) those permitted under the exceptions list, with respect to (c) substantially all the trade between the constituent territories. All of these requirements have caused plentiful debates as to their interpretation both within the WTO membership and in academia. The clarification of these provisions is of highest significance to understanding the permitted limits of the use of bilateral safeguards.

This chapter analyses the terms of GATT Article XXIV:8, which regulate the use of safeguard measures in the intra-RTA trade. Subsection one below inquires into whether safeguards should fall within the category of 'duties and ORRC', and arrives at an affirmative conclusion. Subsection two evaluates the nature of the exceptions list and finds that the list should be treated as exhaustive and intentionally not mentioning safeguards. Subsection three discusses the scope of the SAT requirement and reveals the implications of bilateral safeguards application for the compliance with the SAT threshold. Finally, subsection four evaluates the scope of the 'general elimination' requirement and the alleged obligation of WTO Members to completely abolish bilateral safeguards within FTAs.

1.1. SAFEGUARDS AS 'DUTIES AND OTHER RESTRICTIVE REGULATIONS OF COMMERCE'

The first issue to be established regarding the interpretation of Article XXIV:8 in respect of safeguards is whether the expression "duties and ORRC" embraces safeguard measures. The WTO Secretariat in one of its Background notes states that "the fact that neither GATT Article XIX nor Article VI are cited in that list has given rise to the general question of whether safeguard and anti-dumping measures should be considered as «other restrictive regulations of commerce» or not".[1]

The text of Article XXIV:8 does not provide a detailed explanation of the term 'other restrictive regulations of commerce'. Moreover, the WTO jurisprudence so far has not had the chance to ascertain the meaning of this provision. However, the interpretation of the concept has been widely discussed in academia. One of the interpretative guidelines used in the literature is the comparison of Article XXIV:8 with the text of Article XXIV:5. The latter mentions the term 'other regulations of commerce', which has been construed by the Panel in *Turkey – Textiles*.

[1] Negotiating Group on Rules, Compendium of Issues Related to Regional Trade Agreements, Background note by the Secretariat, Revision (TN/RL/W/8/REV.1), para. 74.

According to that Panel, 'other regulations of commerce' would mean "any regulation having an impact on trade".[2]

Some scholars proposed to read this finding as encompassing border measures, importation and exportation restrictions and domestic regulations (fiscal or non-fiscal) that accord less favourable treatment to like imported products.[3] However, notably, the Understanding on Article XXIV requires that the evaluation of 'other regulations of commerce' be executed on the basis of "import statistics" of goods originating in third countries (and not statistics on exports to third countries). Commentators think that this demonstrates the intention of negotiators to limit 'other regulations of commerce' to a narrower category of border measures only.[4] Whatever interpretation would be chosen, safeguards seem to be clearly captured by the concept of 'other regulations of commerce'. Trade remedies remain in fact border measures in the forms of either increased duties or quantitative restrictions on particular commodities. Safeguards are therefore clearly included in the meaning of 'other regulations of commerce'. However, would trade remedies amount to 'restrictive' regulations of commerce?

There is no doubt that safeguards are 'restrictive measures', as their primary goal is to restrict imports from certain countries. Moreover, additional support for this view could be extracted from the exceptions list in Article XXIV:8 which clearly enumerates the instances of ORRC respectively exempted from the general rule. The exceptions list (save one Article XX) enumerates exactly quantitative restrictions applicable at the border. In the view of some commentators, this choice of provisions demonstrates the intention of negotiators to encompass border restrictions within the term ORRC, leaving market-place restrictions "outside the scope of that rule".[5] As stated above, safeguards are classical border restrictions.

The above demonstrates that safeguards do indeed amount to 'duties and ORRC' within the meaning of Article XXIV:8 of the GATT, subject to elimination within FTAs.

1.2. THE NATURE OF THE EXCEPTIONS LIST AND SAFEGUARDS IN BILATERAL TRADE

In respect of both customs unions and FTAs, Article XXIV of the GATT contains a number of duties and ORRC which are not made subject to the general requirement on elimination. Article XIX of the GATT is not included in the list of exceptions in Article XXIV:8. However, this

[2] Panel Report, *Turkey – Textiles*, para. 9. 120.
[3] Mathis, J. Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce', in Bartels, L. & Ortino, F. (eds.) *Regional Trade Agreements and the WTO Legal System*, New York: Oxford University Press, 2006, p. 91 and Trachtman, J. 'Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of the GATT', *Journal of International Economic Law*, 6 (2), 2003, p. 485 - 486.
[4] Lockhart, N. & Mitchell, A. 'Regional Trade Agreements under GATT 1994: an Exception and Its Limits' in Mitchell, A. (ed.) *Challenges and Prospects for the WTO*, London: Cameron May, 2005, p. 246 and Gobbi Estrella, A. & Horlick, G. 'Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free-Trade Areas Constituted Between World Trade Organization Members: Revisiting a Long-standing Discussion in Light of the Appellate Body's Turkey – Textiles Ruling', *Journal of World Trade*, 40 (5), 2006, p. 918.
[5] Estrella & Horlick, *supra* note 4, p. 919.

exclusion has often been claimed to be erroneous by some WTO Members, which has in turn caused a wide academic debate (as discussed below) on whether the provision mandates the abolition of safeguards within a free-trade area or allows their application within the FTAs without any restrictions.

a) What could make the exceptions list non-exhaustive?

The contention was initiated by the statements of the EC before the sub-group of the Committee on the European Economic Community in 1957. The EC proposed that the exceptions list could not be interpreted as exhaustive, given the fact that the most broadly-worded exception in the GATT – security exceptions in Article XXI – were not included in the listing. In the view of the EC, the availability of this exception to the GATT contracting parties could not be disputed.[6] Similar concerns have been expressed by the EC in respect of Article XVIII of the GATT, which is also excluded from the exceptions list. Though this interpretation goes contrary to the exact wording of the provision, the argument by the EC resulted in a significant confusion between WTO Members. Based on the arguments raised by the EC, Australia has asserted that "it would therefore be more profitable to consider the relevance of the list in Article XXIV:8 to other GATT articles".[7] The understanding of the list in Article XXIV:8 as non-exhaustive has been also advocated by certain scholars.[8]

On the one hand, the text of the provision leaves no room to interpret the list of exceptions as merely illustrative. Such an interpretation would make essentially obsolete and redundant both the listing and the general rule on the elimination of duties and ORRC, allowing the partners in RTAs to maintain any restrictions they may find necessary. On the other hand, the provision is apparently incomplete with no unequivocal understanding on the fate of the 'missing' articles. Some authors, advocating for the exhaustive nature of the list, tried to explain the absence of Article XXI in the exception list through the textual interpretation of the security exception clause. The chapeau of Article XXI is said to inform any provision of the GATT without the need to refer to it specifically once again ("nothing in this Agreement shall be construed...").[9] However, this argument overlooks the chapeau of Article XX, which contains the same language.

b) Proposed explanations of the discrepancy

Patently, this puzzle could not be resolved through the interpretation of Article XXIV. A way out of the impasse was proffered by the reference to the negotiations history of the provision. Non-inclusion of security exceptions in the Article XXIV:8 list is rooted in the original structure of the

[6] Twelfth Session of the Committee on Treaty of Rome, Treaty Establishing the European Economic Community, Report Submitted by the Committee on the Rome Treaty to the Contracting Parties of 20 December 1957 (GATT document L/778, BISD 6S/70), p. 27, para. 26.
[7] Committee on Regional Trade Agreements, Communication from Australia of 17 November 1997 (WT/REG/W/18), p. 3, para. 16.
[8] Volker, E. *Barriers to External and Internal Community Trade*, Boston: Kluwer Law International, 1993, pp. 26 - 27.
[9] Estrella & Horlick, *supra* note 4, p. 939.

ITO Charter, which separated Chapter IV on commercial policy (including the provisions on RTAs and sister-provisions of the current Article XX of the GATT) and Chapter IX on the general provisions applicable to all other chapters (containing the security exception).[10] This reasoning appears convincing and able to resolve the concerns of the Members on Article XXI of the GATT. It also confirms the intention of the drafters to include safeguard measures in the list of duties or ORRC in Article XXIV, as the provision on safeguards was inscribed in the same Chapter IV of the ITO Charter (see Article 40).

There are two ways to introduce this interpretation into the WTO legal system (other than a renegotiation of the GATT text). The first option is an authoritative interpretation under Article IX:2 of the WTO Agreement. The second, much easier option is the implementation of such a reading by the DSB in a particular case. Though formally adopted reports only settle in a binding manner an instant dispute between two WTO Members, in practical terms, "prior decisions are not lightly departed from".[11]

It has been proposed by some commentators that the AB in the *Turkey – Textiles* case adopted the 'exhaustive' interpretation of the exceptions list.[12] The AB in that case suggested that the Member may preserve "certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX".[13] This statement is a mere retelling of the text of Article XXIV:8 and is too evanescent to be treated as a mindful finding of the AB. The WTO Members have not recognised it as the position of the DSB. That could be evidenced by the further disputes involving the same question. The AB report on *Turkey – Textiles* was adopted by the DSB on 19 November 1999. In the *US – Line Pipe* case, the request for consultations was filed significantly later, on 13 June 2000. If there was an interpretative finding on the issue by the AB in *Turkey – Textiles*, it would have been taken as guidance by the parties and the Panel in the *US – Line Pipe* case. However, that did not happen, as discussed in more detail below. The parties again crossed swords on the question of the exhaustive nature of the exceptions list. Unfortunately, in *US – Line Pipe* the controversy received no proper resolution as well.

c) Procedural notions of the controversy on the nature of the exception list

For at least two reasons it seems incomprehensible and fallacious that the issue has not yet been clearly resolved by WTO adjudicators. The first reason is the need for stability and uniformity in the application of multilateral trading rules. However, also significant, is the need to conform to the procedural requirements of the objective case examination. The following section assesses the procedural implications of this long-standing debate and the repeated reluctance of WTO Panels to finally resolve it.

[10] Ibid., p. 940.
[11] Lennard, M. 'Navigating by the Stars: Interpreting the WTO Agreements', *Journal of International Economic Law*, 5(1), 2002, p. 33.
[12] Estrella & Horlick, *supra* note 4, p. 939.
[13] Appellate Body Report, *Turkey – Textiles*, para. 48.

The best opportunity possible to end the debate was granted to the Panel in *US – Line Pipe*. The Panel, however, confined itself to a very hollow reasoning. It concluded that the safeguard measure was implemented by the US in the form of a TRQ and "since the line pipe measure introduces a tariff quota, we consider that the line pipe measure constitutes a "dut[y] [or] other restrictive regulation[…] of commerce" within the meaning of Article XXIV:8(b)."[14] As long as the measure at issue formed part of the elimination of duties and ORRC between NAFTA members, it was found by the Panel to fall in line with Article XXIV of the GATT.

This conclusion could not suffice in this particular dispute. In its first Written Submission, the US insisted that the absence of any reference to GATT Article XIX in Article XXIV:8(b) shows that safeguard measures "may or must be made part of the general elimination of 'restrictive regulations of commerce' under any FTA".[15] This argument was discussed by the Panel in its questions (Questions 2 and 4 to all). The EC, third party to the dispute, responded with a radically different opinion. The EC emphasized that it was "unconvincing to conclude that the list of trade restrictive measures whose continuation between FTA partners is expressly permitted by Article XXIV:8(b) is meant to be exhaustive".[16] So, the matter was widely discussed before the Panel, but did not find any reflection in the Report. Should the cited finding be construed as the *'qualified omission'* on behalf of the Panel?

The Panel's reasoning again impliedly endorses the 'exhaustive list' approach, but does it in a way, as if there was no debate on this matter between the parties to the dispute and generally within the WTO membership. There are several questions that rise in this respect. Can the Panel leave the scope of this exceptions list unresolved, as was done in the case at hand? Should the Panel itself clarify whether safeguards fall within the general duties and ORRC elimination imperative? Is it for the respondent to refer to the exceptions list as defence and thus bear the respective burden of proof (as it is the case with Article XX of the GATT)? Could the Panel complete the analysis without the resolution of the controversy on the exhaustive nature of the exceptions list? The answers to these questions do not seem clear-cut.

One could suggest that the Panel in *US – Line Pipe* was not obliged to rule on the exhaustive nature of the exceptions list simply because the justification of a safeguard under this list was not sought by the respondent. Obviously, in the given case it was contrary to the interests of the respondent to treat safeguards as a mistakenly non-mentioned exception. However, it is proposed that it was the duty of the Panel to assess the exceptions list and decide on its exhaustive (or non-exhaustive) nature irrespective of any arguments by the parties thereon.

The Article XXIV:8 exceptions list should be read as the provision that excludes the application of the general rule on the compulsory elimination of duties and ORRC, and thus be treated as an 'excluding provision'.[17] The distinction between 'exceptions provisions' and 'excluding

[14] Panel Report, *US – Line Pipe*, para. 7.141.
[15] First Written Submission of the US, *US – Line Pipe*, para. 216,
[16] European Communities' Answers to Questions from the Panel to Third Parties, *US – Line Pipe*, para. 22 - 28.
[17] The terminology used is proposed by Grando, M.T. *Evidence, Proof, and Fact-finding in WTO Dispute Settlement*, New York: Oxford University Press, 2009. p. 392.

provisions' is rooted in WTO jurisprudence since the *US – Wool Shirts and Blouses*, further developed in *EC – Hormones*, *EC – Tariff preferences* and *India – Additional import duties*. However, the most lucid comparison could be made with the *Brazil – Aircraft* case. The case dealt with the claims of import substitution subsidies prohibited under Article 3.1(b) of the SCMA, and the relevance of Article 27.3 of the SCMA was revealed. The text of the latter provision reads:

> "The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement".

Canada argued that it was for Brazil to establish its eligibility for and compliance with Article 27.3 of the SCMA exception. The Panel stringently rejected this argument, stating:

> "Part and parcel of asserting the affirmative of a particular claim is to demonstrate that the legal provision forming the basis for that claim applies to the Member against whom that legal provision is being invoked. Naturally, there will be no inconsistency with a given provision if a Member is explicitly excluded from its scope of application or *a situation is explicitly identified in the text of the Agreement as falling outside the scope of application of a particular provision*" (emphasis added).[18]

The Panel distinguished between two different legal relations in the case at hand, which were found "qualitatively different". The relation between GATT non-discrimination principles and general exceptions in Article XX could not be confused with the relation between Articles 3.1(b) and 27.3 of the SCMA. The first relation is treated as 'affirmative defence'. On the contrary, the second enumerates the conditions for the exclusion from the scope of application of a particular obligation, and defines the scope of the provision.[19] Thus it was decided that Canada bore the burden of proof of the applicability of Article 3.1(b) to Brazil. The AB agreed with the Panel on the burden of proof allocation and agreed with the distinction between the two types of the provision, a '*positive obligation*' of an exemption under Article 27.3 of the SCMA as opposed to '*affirmative defence*' of the general GATT exceptions.

The Article XXIV:8(b) list of exceptions should be interpreted in light of the findings observed above. Article XXIV:8(b) itself does not grant any 'affirmative defence'. On the contrary, it specifically establishes a 'positive obligation' on the limitation of the scope of the provision. As long as the nature of the exceptions list keeps causing controversy within the WTO membership and no unequivocal interpretation is adopted, the need to establish the inapplicability of the exceptions list to safeguards (and thus the need to eliminate safeguards as any ORRC) should form "part and parcel" of the complainant's *prima facie* case.

[18] Panel Report, *Brazil – Aircraft*, para. 7.50.
[19] Ibid., para. 7.54.

More importantly, according to Article 11 of the DSU, the panel should "make an objective assessment of the matter before it, including an objective assessment of […] the *applicability of and conformity with the relevant covered agreements*" (emphasis added). As long as the interpretation of the nature of the exceptions list remains unclear, the panel is unable to execute its function under Article 11 of the DSU. The objective assessment is disabled as it remains ambiguous whether safeguard measures may be potentially allowed as such or, on the contrary, fall within the general category of ORRC. It is evident that any due decision could not be rendered unless the nature of the exception list is clearly determined. This procedural shortcoming should be corrected at the first possible opportunity, otherwise no legal analysis of Article XXIV:8 is feasible.

To conclude, the exceptions list in Article XXIV:8 should be interpreted as exhaustive and intentionally excluding safeguards from its scope. This conclusion is supported by the negotiations history of the provision. The long-standing failure of WTO jurisprudence to adequately resolve the debate on the nature of the list is pernicious for the stability of the trade rules and goes contrary to the obligations of the Panel on the objective assessment of the matter before it. So long as the exceptions list is an 'excluding provision' it remains the *prima facie* duty of the complainant to establish its inapplicability to the case at hand and the duty of the Panel to rule on the applicability of the exception *in casu*.

1.3. 'SUBSTANTIALLY ALL THE TRADE' REQUIREMENT

As discussed above, safeguards fall within the category of duties and ORRC within the meaning of Article XXIV:8 of the GATT. Moreover, it has been proven above that the exception list in the provision should be read as exhaustive and intentionally excluding safeguards. Thus, bilateral safeguards in RTAs should be eliminated with respect to substantially all the trade between the constituent territories.

The specific content of the SAT requirement has triggered extensive discussions over the years. The Members were unable to agree on the percentage of trade to be liberalised under the regional deal and the coverage of such liberalisation for the SAT clause to be fulfilled. Nor have luminous clarifications emerged within the jurisprudence. The disparity of views across different Members is so imposing that the EC has once reasonably declared that if a Working Party could not advance "the precise definition of [an FTA] and in particular the fraction which constituted 'substantially all' the trade", the Working Party was not in a position to claim that a small volume of trade liberalised violates SAT requirement.[20]

The SAT assessment has been proposed to be performed through two separate approaches – quantitative and qualitative. Both approaches derive from the preamble of the Understanding on the Interpretation of Article XXIV of the GATT. The preamble recognizes that the RTA's

[20] Twelfth Session of the Committee on Treaty of Rome, Treaty Establishing the European Economic Community, Report Submitted by the Committee on the Rome Treaty to the Contracting Parties of 20 December 1957 (GATT document L/778, BISD 6S/70), p. 28, para. 29.

contribution to world trade expansion diminishes if liberalisation does not cover all trade and if any major sector of trade is excluded. In *Turkey-Textiles* the AB confirmed findings by the Panel that the "ordinary meaning of the term "substantially" in the context of Article XXIV:8 appears to provide for both qualitative and quantitative components".[21]

The quantitative test deals with the percentage share of trade between the two RTA Members in which duties and ORRC should be eliminated. In *US – Line Pipe* it was demonstrated that NAFTA covers 97 per cent of the Parties' tariff lines, which was found sufficient to meet the Article XXIV:8 conditions.[22] The EC insisted that its agreements with the Faroe Islands, which "accounted for about 80 per cent of the trade", also met the SAT threshold.[23] New Zealand has even proposed to 'remove' the word 'substantially' completely from the text of the provision so as to avoid interpretation difficulties.[24] The disagreement between the WTO Members has not reduced during the last decade. WTO Panels have been consistently reluctant to establish any certain threshold in order not to act *ultra vires*: the AB in *Turkey – Textiles* only stated that SAT would mean "something considerably more than merely *some* of the trade".[25] Thus, no definite percentage has been specified; however, it is generally agreed to denote no less than 80 per cent of the total volume of trade.[26]

The qualitative approach rests on the elimination of duties and ORRC in all the major sectors of economies irrespective of their total percentage share in mutual trade. The classical example of the qualitative criterion is the reported failure of the EFTA Stockholm Convention to meet the SAT threshold. Articles 3 and 10 of the Convention relating to the elimination of trade barriers did not apply to trade in agricultural products. In February 1961 the Working Party noted that the percentage of trade covered, "even if it were established to be 90 per cent, was not considered to be the only factor to be taken into account". The "exclusion of a major sector of economic activity" impedes the fulfilment of the SAT requirement.

RTAs not meeting the SAT requirement could not enjoy Article XXIV MFN exemption and thus all advantages and benefits under such RTAs should be immediately and unconditionally extended to the whole corpus of the WTO Members. As discussed above, safeguards should be regarded as duties or ORRC subject to the general rule on elimination. The imposition of a safeguard measure therefore potentially challenges the compliance of an RTA with the qualitative threshold. If bilateral safeguards were imposed on a considerable percent of trade, the question could arise whether remaining trade circulating freely within an FTA amounts to SAT. The probable influence of bilateral safeguards on the qualitative thresholds is much more moderate, as the imposition of safeguards on all commodities produced by a certain sector of the economy is highly unlikely.

[21] Appellate Body Report, *Turkey – Textiles*, para. 49.
[22] Panel Report, *US – Line Pipe*, para. 7.144.
[23] Committee on Regional Trade Agreements, Note on the Meetings of 16-18 and 20 February 1998 (WT/REG/M/16), para. 118.
[24] Ibid., para. 115.
[25] Appellate Body Report, *Turkey – Textiles*, para. 48.
[26] Gantz, D. *Regional Trade Agreement: Law, Policy and Practice*, Durham: Carolina Academic Press, 2009, p. 36.

1.4. FREEDOM TO PRESERVE BILATERAL SAFEGUARDS IN RTAS

As long as duties and ORRC, including safeguards, are to be eliminated with respect to 'substantially all', but not 'all' or 'completely all' the trade between RTA Members, it appears that bilateral safeguard measures should be permitted if the remaining parts of trade between parties not subject to safeguard actions still constitutes 'substantially all the trade'. This view has been widely supported in the literature.[27] Moreover, this interpretation has been impliedly endorsed by the AB in *Turkey – Textiles*:

> Sub-paragraph 8(a)(i) of Article XXIV establishes the *standard* for the internal trade between constituent members *in order to satisfy* the definition of a "customs union". It *requires* the constituent members of a customs union to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" between them (emphasis added).[28]

However, some scholars find this interpretation of the provision incorrect. They suggest that Article XXIV:8 effectively prescribes the *mandatory abolition* of bilateral safeguards in customs unions and FTAs. In a nutshell, that means that for "the internal trade requirements [...] to be met, duties and ORRC must be abolished, and that the intra-RTA trade to which any type of duty or ORRC remains applicable cannot be counted towards the fulfilment of the SAT threshold even where no duty or ORRC is effectively imposed".[29] This interpretation signifies that under Article XXIV:8 no safeguard measures could be applied *per se*, even if the amount of trade free from a safeguard does constitute SAT.

There are several arguments suggested in support of this reading. Firstly, it is claimed that the phrase '*are excluded*' (instead of '*are not applied*') could not be interpreted otherwise than requesting a full removal and exclusion of duties and ORRC. Secondly, attention is called to the precise wording of the clause: duties and ORRC are requested to be '*eliminated with respect to SAT*', and not just '*substantially eliminated*', thus leaving no room for different grades of an ORRC elimination. Thirdly, it is submitted that, by implication, RTA conformity to Article XXIV:8 could not be variable and uncertain depending on the number of bilateral safeguards applied at a particular moment. Therefore safeguards, being a threat to SAT-compliance, shall be eliminated.[30]

This reading of Article XXIV:8 is by all means interesting and thought-provoking. However, it appears excessively restrictive and too focused on the linguistic details of the provision. The tendency to rely heavily on the textual and grammatical interpretation of the provisions is indeed reflected in the AB's and Panels' practice. However, Article 31 of the Vienna Convention

[27] Choi, W.-M. 'Regional Economic Integration in East Asia: Prospect and Jurisprudence', *Journal of International Economic Law*, 6(1), 2003, pp. 67–9; Pauwelyn, J. 'The Puzzle of WTO Safeguards and Regional Trade Agreements', *Journal of International Economic Law*, 7(1), 2004, p. 109.
[28] Appellate Body Report, *Turkey –Textiles*, para. 48.
[29] Estrella & Horlick, *supra* note 4, p. 935.
[30] Ibid., pp. 934 – 938.

provides for a treaty to be construed *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in the light of its *object and purpose.* The AB has been frequently criticized for its strong reliance on the text and failure to "situate its legal analyses within a framework which firmly articulates both the normative and policy considerations and consequences of its decisions".[31] *Raison d'être* of a clause and policy implications behind it could not be undermined through a restrictive reading of the text.

The restrictive approach is not supported by the negotiations history of Article XXIV:8. In this respect, conclusions by *Chase* in her comprehensive analysis of the archive records and the political circumstances around Article XXIV:8 text gain high significance. The researcher concludes that the driving force of the Article XXIV:8 text was the secretly negotiated treaty between the US and Canada, and the current text was pushed by US trade officials into the ITO Charter so as to accommodate their trade deal with Canada.[32] The relevant historical evidence on that US–Canada FTA clearly suggests that the SAT requirement, instead of 'all the trade', was purposely drafted to preserve trade remedies in the US-Canada bilateral trade.[33] Thus, trade remedies in bilateral trade were intended to be preserved subject to SAT conditions. Mandatory abolition of trade remedies (including safeguards) in bilateral trade, as interpreted by *Estrella and Horlick*, would therefore go contrary to the intentions of the drafters of the provision.

Moreover, the suggestion on the mandatory abolition of bilateral safeguards seems to be totally indifferent to the abundant state practice of the RTAs drafting and Article XXIV:8 interpretation. Article 31.3(b) of the VCLT provides that together with context an interpreter should take into account any subsequent practice in the application of a treaty which establishes agreement between the parties regarding its interpretation. Even the brief overview of the FTA provisions in force obviously demonstrates that the states have not interpreted Article XXIV:8 of the GATT as obligating them to abolish safeguards in FTAs and customs unions. However, should this state practice be taken into account for the interpretation of Article XXIV:8 of the GATT?

Notably, international law does not require subsequent practice to be unanimous among all the parties to the treaty. The provision requires active practice of some of the states, which has been acquiesced to by the other parties with no other party raising a direct objection.[34] Subsequent state practice has been also recognised by WTO adjudicators. The classical WTO DSB approach towards subsequent state practice has been proposed by the AB in *Japan – Alcoholic Beverages*:

> "Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and

[31] Horn, H. & Weiler, J. 'EC-Trade Description of Sardines: Textualism and its Discontent', in Horn, H. & Mavroidis, P. (eds.), *The WTO Case Law of 2002*, Cambridge: Cambridge University Press, 2005, p. 248.
[32] Chase, K. 'Multilateralism Compromised: The Mysterious Origins of GATT Article XXIV', World Trade *Review*, 5(1), 2006, pp. 14-19.
[33] Ahn, D. 'Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules', *Journal of International Economic Law*, 11(1), 2008, p. 121, referring to the 'Proposed Trade Pact between the United States and Canada', Memo, 22 March 1948, RG 59, 611.422/10-2649.
[34] 'Waldock Report VI', *Yearbook of the International Law Commission*, 1966, vol. II, p. 99, para. 18. See also 1977 Beagle Channel Arbitration, *International Law Reports*, vol. 52, 1979, p. 224, para. 169 – 172.

> consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant".[35]

However, the AB has proposed a highly limited space for subsequent state practice in the interpretation of the covered agreements. In the same *Japan – Alcoholic Beverages* case, the AB stipulated that, according to Article IX:2 of the WTO Agreement, the exclusive authority in interpreting the Multilateral Trade Agreements was conferred to the Ministerial Conference and the General Council. This leads the AB to a pervasive conclusion that "the fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere".[36] That clearly means the refusal of any further practice, establishing the agreement between the parties on the interpretation of the covered agreements, unless such practice originates from an act of the Ministerial Conference or the General Council.

One could not consider this situation satisfactory. The overwhelming majority of the assessed RTAs had specific provisions on safeguards. However, based on the narrow interpretation of the AB, such representative state practice could not be taken into account together with the context of Article XXIV:8.

Recourse could potentially be made to Article 31.3(c) of the VCLT, which mentions any relevant rules of international law applicable in relations between the parties. However, this provision seems inapplicable as those relevant rules should be binding on all the parties to the GATT.[37]

The current narrow interpretation of Article 31.3(b) of the VCLT by the AB leads to a manifestly unconvincing situation when the indicative and relevant state practice of the application of Article XXIV:8 on nearly global basis cannot even be examined as allegedly establishing an agreement between WTO Members on the interpretation of the provision. However, it should be emphasised that international law operates on the presumption that states do not intend to act inconsistently with their previous obligations.[38] Thus, necessary deference should be paid to globally shared approaches on the interpretation of the provisions of the WTO Agreements. The universal practice of the inclusion of trade remedies provision in FTAs should at least give certain colour and texture to the interpretation of Article XXIV:8, thus excluding any extreme readings of the provision, such as, *inter alia*, absolute obligation to abolish safeguards provisions in FTAs and customs unions.

[35] Appellate Body Report, *Japan – Alcoholic Beverages*, pp. 12-13.
[36] Ibid., p. 13.
[37] Villiger, M. *Commentary to the Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff Publishers, 2009, p. 433.
[38] International Law Commission Report 1964, *Yearbook of the International Law Commission*, 1964, vol. II, p. 202, para. 11.

The most plausible argument among those listed by the proponents of the restrictive approach remains the potential variability of the WTO-compliance of an RTA in case of applied safeguards. It would be reasonable to expect that the compatibility of an RTA with the WTO rules should be established once. The examination of RTAs on their WTO-compatibility, its process and results remains one of the most unclear issues within the whole Article XXIV.[39] In any case it seems far from obvious that the decision of a Committee on Regional Trade Agreements on the fulfilment of the SAT test precludes the Member from the imposition of safeguards and that the liberalising effect could not change (both increase and reduce) over time. To begin with, we refer to the unclear scope of SAT threshold itself, as discussed above in subsection 1.3. Even if an 80-percent threshold was taken as a yardstick, would NAFTA partners, having liberalised 97 percent of mutual trade, be precluded to apply safeguards in the frames of the remaining 17 percent margin?[40] Should NAFTA partners be given more flexibility than the partners to any other RTA which covers 80 percent of mutual trade only?

All these difficulties – as well as the implausible work of the Committee on Regional Trade Agreements on WTO-compatibility of RTAs - leads to a conclusion that the fulfilment of SAT thresholds in any case could only remain a *bona fide* obligation of WTO Members, which cannot be confirmed as fulfilled by WTO bodies once and forever. On the contrary, WTO adjudicators can and should evaluate the complaints of non-parties on the failure of an RTA to meet the legal requirements of Article XXIV, including the SAT test.[41] The economic evaluation of an RTA by the CRTA could not preclude the legal analysis of the RTA compatibility at a certain moment by WTO adjudicators. Thus, it is for the Members to ensure that their RTAs are in line with WTO requirements; however, if they fail, such RTAs should not be granted MFN-exemptions under Article XXIV with the immediate violation of Article I of the GATT by such an RTA.

To conclude, it is suggested that the restrictive interpretation of Article XXIV:8 as mandating RTA partners to abolish bilateral safeguards completely cannot be accepted. It goes contrary to the *travaux préparatoires* of the provision and does not take into account the relevant subsequent state practice. Further, it is suggested that there should be no implication on the 'permanent' WTO-compatibility (in the context of the SAT test) of an RTA. Fulfilment of this requirement remains a *bona fide* obligation of each and every WTO Member – party to an RTA. However, failure to perform such an obligation could result in a legal action brought by the other Members under Article XXIII of the GATT. Thus, Members should be permitted to apply bilateral safeguards as long as the remaining part of liberalised mutual trade meets SAT requirements.

The chapter above has scrutinised the restrictions on the use of bilateral safeguards in RTAs, enshrined in the text of Article XXIV of the GATT. It has been shown that safeguard measures

[39] Committee on Regional Trade Agreements, Synopsis of "Systemic" Issues Related to Regional Trade Agreements, Note by the Secretariat of 02 March 2000 (WT/REG/W/37), p. 10.
[40] No decision on NAFTA compatibility with the rules of the WTO has been rendered by far, so NAFTA example is used *ab abstractio*.
[41] On these rights of the WTO panels in light of *Turkey – Textiles* decision, see Marceau, G. & Reiman, C. 'When and How Is a Regional Trade Agreement Compatible With the WTO', *Legal Issues of Economic Integration*, 28(3), 2001, p. 320.

fall within the category of ‘duties and ORRC’ and thus are subject to the general elimination requirement under Article XXIV:8 of the GATT. It has also been suggested that there is nothing in the text of the GATT which could defend the position of the EC that the list of exceptions in Article XXIV:8 should be regarded as non-exhaustive. The failure of the drafters to include Article XXI of the GATT in the exceptions list originates from the negotiations and drafting history of the provision at hand. Finally, the application of bilateral safeguards to intra-RTA trade is possible only to the extent that such application does not question the compliance of such an RTA with the SAT test. The restrictive interpretation of the provision, mandating the parties to RTAs to abolish safeguards *per se*, irrespective of the level of trade liberalisation, appears too restrictive and formalistic. RTA trading partners are therefore free to implement bilateral safeguard measures as long as the remaining share of liberalised trade constitutes SAT.

Chapter 2. The major approaches to bilateral safeguards in modern RTAs

The majority of RTAs do not outlaw the use of safeguard measures between Members and, on the contrary, contain numerous provisions on the application of safeguards. The analysis performed by the WTO Economics Research and Statistics Division has revealed only five RTAs which have ruled out the use of safeguard measures amongst regional partners: Australia – Singapore, Canada – Israel, the EC, Mercosur and New Zealand – Singapore. On the contrary, the great majority of RTAs contains specific rules on safeguard measures (65 RTAs surveyed).[42] Even though the survey dates back to September 2007 and many new RTAs have since been concluded, the trend is self-evident.

The texts of the FTAs do not always follow the provisions of the WTO Agreements. Some of the FTAs introduce additional prerequisites for the imposition of safeguards, limit the term of application and venues for renewal. Other agreements either do not add anything to the WTO safeguard disciplines or even allegedly simplify the invocation and application of safeguard measures between regional partners. Commentators have revealed two regional tendencies in the design of safeguards provisions across RTAs. It was proposed that the RTAs with American countries and Australia generally tend to set out more detailed and rigid disciplines on safeguards. FTAs with the EU, on the contrary are considered more lax and non-specific in respect of safeguards regulation.[43]

Based on the underpinning of these two 'regional trends', this chapter examines the practice of states in the design of safeguards provisions in their RTAs. The first sub-section evaluates some of the most indicative examples of the so-called 'American type' of safeguards regulation. The subsection observes that the regional rules on safeguards of this category do indeed introduce stricter disciplines on safeguards between RTA parties. Sub-section two outlines the 'European type' RTAs which allegedly simplify the imposition of bilateral safeguards within regional partners or weaken the corresponding rules as compared to the WTO framework.

In chapter three of this paper we will try to find out if the RTAs concluded by the CIS countries followed any of these two trends. Finally, it should be noted that the analysis below examines the most interesting and indicative provisions in relevant RTAs based on the author's own judgement and is by no means intended to be exhaustive.

2.1. 'AMERICAN TYPE' OF BILATERAL SAFEGUARDS REGULATION

[42] Teh, R., Prusa, Th. & Budetta, M. 'Trade Remedy Provisions in Regional Trade Agreements', WTO Staff Working Paper ERSD-2007-03, September 2007, p. 22.
[43] Kotera, A. & Kitamura, T. 'On the Comparison of Safeguard Mechanisms of FTAs. Research Institute of Economy, Trade and Industry', RIETI Discussion Paper Series 07-E-017, 2007, p. 20.

This type of safeguards regulation is mainly reflected in trade agreements concluded between the US, Mexico, Canada, Chile, Australia and Singapore. Generally, the RTAs with the participation of these countries seem to be more exacting and specific in terms of the requirements on safeguard measures and investigations. Below we observe three major trends of the bilateral safeguard regimes in the FTAs of these jurisdictions: a) stricter prerequisites of the safeguards; b) more rigid rules on bilateral safeguards invocation; and c) the time limitations of the safeguards under the FTAs, as compared to the WTO regime on 'global' safeguards. Some of the FTAs of this region contain other 'stricter' provisions or additional procedural guarantees for the parties undertaking the safeguard investigation (see, e.g., the detailed NAFTA provisions on the institution of a safeguard proceeding, the contents of a petition or complaint, public notice requirements, etc.). However, so long as those clauses did not represent the general trend of the region, they were omitted.

a) Stricter prerequisites of bilateral safeguards

A substantive number of RTAs involving the US, Canada, Mexico, Chile, Australia and Singapore prescribe the use of safeguards in bilateral trade only in the course of the FTA transitional period.[44] For this period such RTAs allow the trading partners to suspend the gradual tariff reduction or even increase the agreed preferential tariff rate to the basic MFN level.

Indicative could be the language of Article 9.1 of the US – Australia FTA. The provision allows the imposition of safeguard measures "*during the transition period*, if as a result of the reduction or elimination of a customs duty under this Agreement, an originating good of the other Party is being imported into the territory of a Party in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that the imports of such originating good from the other Party constitutes a substantial cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good". A similar limitation of the safeguards availability term can be found in the US – Singapore FTA and the Canada – Peru FTA.

More stringent prerequisites for the imposition of bilateral safeguards are not only limited to the term of availability. The cited provision of the US – Australia FTA is also of particular interest as it incorporates the need to demonstrate that the import surge was actually caused by the reduction of tariffs under RTA commitments. The safeguard measure is available against a surge which is "a result of the reduction or elimination of a customs duty under this Agreement". The language of Article XIX is far less clear: it requires the import surge to happen due to "the effect of the obligations incurred by a Member under [GATT], including tariff concessions". There may be at least two different readings of this provision. The first interpretation was proposed by the AB in *Korea – Diary*, where it was stated that "this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations

[44] Teh, Prusa & Budetta, *supra* note 42, p. 22 - 23.

under the GATT 1994, including tariff concessions".[45] This view was further confirmed by the AB in *Argentina – Footwear*, where the AB proposed to take into account "any concessions or commitment in Member's Schedule".[46] However, such an understanding appears flawed and allegedly contrary to the fundamental principles of treaty interpretation. As explained by the AB in *US – Gasoline*, "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[47] The principle of effective interpretation is claimed to be part of customary international law on treaty interpretation.[48] However, the view of the AB towards "effect of the obligations incurred" clause under Article XIX of the GATT seems to go contrary to this principle. The AB considers the WTO obligations of the Members, including tariff bindings, as having *ex post* effects (after the import charge has occurred) preventing the affected Member from raising import duties so as to reduce the imports.[49] This would lead to nearly automatic fulfilment of the "effects of obligations incurred" clause of Article XIX, thus making the requirement nearly redundant.

A different interpretation of the requirement is advocated by *Pauwelyn*. He proposes that prior GATT obligations should be construed as *ex ante* cause which actually triggers the import charge.[50] Such an interpretation is surely much more arduous: it must be demonstrated that the reduction of tariffs on the product actually caused the import surge. This reading may have crucial significance for regional trade arrangements. If the product concerned has been covered by an RTA liberalisation scheme, the impact of such regional liberalisation, triggering an import surge, would preclude a WTO Member from the imposition of the safeguard measure.

No doubt, the negotiators of the US – Australia FTA have taken all these controversies into consideration. Article 9.1 of the FTA clearly rectifies the fuzzy language of Article XIX of the GATT and explicitly limits the availability of safeguards to import surges resulting out of the reduction or elimination of a customs duty under the FTA. As discussed above, such a prerequisite is rather exacting compared to the current interpretation of similar language in Article XIX of the GATT by the AB. The similar language could also be found in Article 702 of the Canada – Peru FTA.

b) Stricter rules on the invocation of bilateral safeguards

Some of the 'American type' FTAs notably limit the conditions of the bilateral safeguard measures invocation. For instance, safeguard mechanisms in NAFTA furnish a more severe regulation on the conditions for invocation than its sophisticated counterparts in the GATT. In Article 801.1 of the NAFTA the increase in imports is required "in absolute terms". The corresponding Article 2.1 of the ASG refers to increased quantities, "absolute or relative to

[45] Appellate Body Report, *Korea – Diary*, para. 84.
[46] Appellate Body Report, *Argentina - Footwear*, para. 91.
[47] Appellate Body Report, *US – Gasoline*, para. 21.
[48] Van Damme, I. *Treaty Interpretation by the WTO Appellate Body*, New York: Oxford University Press, 2009, p. 282.
[49] Pauwelyn, *supra* note 27, p. 112.
[50] Ibid.

domestic production". The same higher standard was adopted in other regional deals, for example, in Article 18 of the Japan – Singapore EPA and Article 53 of the Agreement between Japan and The United Mexican States for the Strengthening of the Economic Partnership.

Some of the regional trade agreements substantially strengthen the rules on the origin of products, imported in increased quantities, which could be taken into account for the determination of a serious injury (or threat of it). In its analysis of Article XIX of the GATT, the AB has emphasised that "not just any increased quantities will suffice. There must be 'such increased quantities' as to cause or threaten to cause a serious injury".[51] The AB has also proposed the characteristics the import surge should meet so as to cause or threaten to cause serious injury. In the view of the AB, the increase in imports should be "recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury".[52] In *US – Steel Safeguards* the AB further added that the use of the word 'such' links the import surge to its "ability to cause serious injury or the threat thereof".[53] In a nutshell, that means that the import surge from all the WTO Members must be of such nature as to be able to cause a serious injury or a threat of it.

Some RTAs have limited the origin of imports to be taken into account for the establishment of the required import surge presence. For instance, the FTA between Japan and Singapore requires in Article 18.1 that such increased quantities of imported products from the regional partner should "*alone* constitute a substantial cause". The clause becomes a significant burden in case of multilateral regional trade agreements. The identical wording can be found in Article 801 of NAFTA. Thus, for the imposition of a safeguard within NAFTA by the US against imports from Canada, the US should establish that it was particularly the import surge of goods from Canada (and not take into account the imports from Mexico) that could cause the injury. If guided by the AB jurisprudence, 'recent, sudden, sharp and significant' increase in imports limited to the goods originating from the territory of a single country within the FTA is a much higher requirement to meet than the one contained in Article XIX in respect of the global safeguards. Finally, even if the interpretation of the AB is not taken as guidance, one could construct situations in which imports are increasing from many sources, FTA and non-FTA members alike. Therefore a higher threshold imposed by the mentioned agreements on imports of particular origin clearly aims at the reduction of the incidence of the safeguard actions.

c) Limitation of the application periods

The practice in respect of the terms of initial and repeated applications of safeguards is very diverse across RTAs. In this respect the agreements with the participation of the same countries (US, Canada, Mexico, Australia, Singapore) tend to limit the respective terms compared to the provisions of the ASG and hamper the extension of bilateral safeguards.

[51] Appellate Body Report, *Argentina – Footwear*, para. 108.
[52] Ibid., para. 131.
[53] Appellate Body Report, *US – Steel Safeguards*, para. 346.

The general rule in Article 7 of the ASG allows the application of safeguard measures for no longer than four years. The total period of application of a measure, including the period of application of provisional measures, initial application and any further extension thereof, cannot exceed 8 years. In any case, the safeguard measure should be applied only for the period necessary to prevent or remedy serious injury and facilitate respective industry adjustments.

The shortest determined period of initial application of a bilateral safeguard measure is inscribed in the EC – Mexico FTA. Article 15 of this Agreement states that safeguard measures "shall not be taken for a period exceeding one year. In very exceptional circumstances, measures may be taken up to a total maximum period of three years". Article 7.2.6 of the US – Singapore FTA prescribes that the measure cannot be maintained for a period exceeding two years with the maximum extension of two more years (bearing in mind the limitation of safeguards in bilateral trade for the transitional period only). Finally, NAFTA limits the period of a safeguard application to a maximum of three years with the possible extension of one year and explicitly excludes further reapplication.

The analysis above supports the views of some commentators that FTAs with the participation of Australia, Canada, Chile, Mexico, Singapore and the US tend to be more restrictive regarding the invocation and application of regional safeguards measures.[54]

2.2. 'EUROPEAN TYPE' OF BILATERAL SAFEGUARDS REGULATION

As stated above, commentators detect the tendency of the EU and EFTA-centric RTAs to contain much broader grounds for the invocation of safeguards. The reasons behind this tendency can be traced in the EC approach toward the regulation of safeguard measures over the years. The negotiations history of ASG and Article XIX amendments reflects that the other GATT Contracting Parties widely criticised the EC safeguards regime due to the lack of transparency and predictability, silence as to duration of time limits and inadequate investigation process.[55] In the course of the failed Tokyo Round negotiations on safeguards the EC remained one of the major opponents of the stringent criteria of injury.[56] In the course of the Uruguay Round the EC continuously called for maximum flexibility in the invocation of safeguard measures and the rigid rules on how such measures should be applied so as to minimise their negative impact on trade.[57]

This approach has also been reflected in the terms of the FTAs concluded by the EC. Article 15.1 of the EC – Mexico Economic Partnership, Political Cooperation and Cooperation Agreement goes far beyond "serious injury to domestic producers" or threat thereof as the

[54] Such conclusions could be found in Teh, Prusa & Budetta, *supra* note 42, p. 22; Kotera & Kitamura, *supra* note 43, p. 28 - 29.
[55] Stewart, T. *The GATT Uruguay Round: a negotiating history (1986-1992)*, Boston: Kluwer Law and Taxation, 1993, p.1741.
[56] Ibid., p. 1751.
[57] See, e.g., Negotiating Group on Safeguards, Submission by the European Communities (MTN.GNG/NG9/W/24/Rev.1).

grounds for the invocation of emergency action. The Article refers to “serious disturbances in any sector of economy,” and “difficulties which could bring about serious deterioration in the economic situation of a region of the importing Party” as the grounds for a safeguard measure. Article 24 of the EU – South Africa Agreement on Trade, Development and Cooperation, in addition to language borrowed from Article XIX of the GATT, permits the EU to have recourse to safeguard measures in cases of “serious deterioration in the economic situation of the European Union's outermost regions”.

A similar approach has been recognized in the EFTA-centred RTAs. The Convention Establishing EFTA, concluded in 1960 and later amended in 2001, introduces a unique regional safeguard mechanism. Article 40.1 of the Convention reads:

> “If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Member State may unilaterally take appropriate measures under the conditions and procedures set out in Article 41.”

The provision, setting out the general rule for safeguards invocation, is strikingly vague and unclear. It only states that trade restrictive measures otherwise prohibited under the EFTA Convention are justified so long as one of the three types of difficulties of a “sectorial” or “regional” nature exists. The Convention does not provide for any further elaboration on the scope and nature of such “economic,” “societal” or “environmental” difficulties, as well as the required degree of “seriousness”. It would not be much of an exaggeration to say that EFTA Members are granted colossal discretion regarding the invocation of safeguard measures.

This wide discretion appears even more perplexing taking into the account that the original safeguard mechanism in the 1960 EFTA Convention. Article 20 thereof counterbalanced the inarticulate grounds for safeguards invocation with the compulsory advance authorization procedure and the limitation of time frame of safeguards application. No similar rules were created by the 2001 edition of the Convention. The reasons behind this regulatory change could be rooted both in the gradual changes in EFTA membership and the formation of the European Economic Area. The safeguard rules in the 2001 EFTA Convention therefore effectively apply only in the relations between Switzerland and the three remaining Scandinavian EFTA states. Some commentators suggest that “the other three member countries did not readily have the incentives to negate the argument for more flexible safeguard mechanisms, thus leading to the unusually lax conditions for the invocation and the application of the safeguard measures”.[58]

This “European approach” towards bilateral safeguards has been preserved over decades; however, there are certain signs that the classical division between the “more stringent” and “European” safeguards regulatory techniques is increasingly irrelevant. Notably, the recent EU – Korea FTA goes contrary to the previous trend. Article 3.1 of the Agreement limits the grounds of the safeguards invocation to the classical serious injury to domestic industry or threat thereof. The Agreement prohibits the imposition of safeguards after the expiry of the transitional period

[58] Kotera & Kitamura, *supra* note 43, p. 19.

and generally limits the period of initial application of safeguards to two years, with a maximum extension of two more years (Article 3.2.5). Should this agreement bring to an end the era of broader grounds for safeguard measures in EU FTAs? Does this agreement demonstrate the EU turn towards the WTO language on safeguards or was it introduced as a result of the negotiating clout of Korea? It appears to be too early to make far-reaching conclusions on the EU policy on bilateral safeguards. This agreement is the first step back from the intentionally blurry provisions on safeguards invocation in EU FTAs and thus, for the general trend to be reversed, additional trade deals with similar wording should be concluded.

To sum up, there are two approaches towards bilateral safeguards in modern RTAs. The so-called ‘American type’ of RTAs tends to be more rigid and restrictive on the availability of safeguard in bilateral trade, grounds for their invocation and the timelines of their applicability. The ‘European type’ of FTAs, on the contrary, introduces wide and vague grounds for the invocation of safeguards. As demonstrated by the most recent EU – Korea FTA, this trend may no longer be valid; however, it is yet too early to ascertain the end of the long-standing difference between the ‘European’ and ‘American’ type of bilateral safeguards regulation.

Chapter 3. The use of bilateral safeguard measures in the CIS

3.1. THE CURRENT STATE OF REGIONAL TRADE AGREEMENTS IN THE CIS

The CIS regional economic integration is the best illustration of Bhagwati's '*spaghetti bowl*': there are literally hundreds of trade agreements between the CIS states. Most attempts to secure regional economic cooperation were dysfunctional, while those which seemed promising suffered substantially from political contradictions between the states. A table with all current RTAs establishing free trade regimes between the CIS states is provided on page 42 at the end of this chapter. The information on those RTAs has been collected by the author from various sources – the WTO website, the national legal databases of the CIS countries, websites of the ministries of external trade of different CIS states, as well as through personal links with lawyers or traders in those jurisdictions. The table incorporates only those agreements which establish full or partial free trade regimes; agreements on economic cooperation and agreements only somehow enhancing bilateral trade were not included. In those few instances when the presence or absence of a bilateral FTA between the two states could not be successfully verified, a question mark was put into the corresponding square.

As evident from the table, the tools of economic integration were developed by CIS countries both on a bilateral and multilateral level. It appears reasonable to differentiate between the two generations of such regional arrangements – the agreements concluded shortly after the collapse of the Soviet Union and the more recent trade arrangements which implement schemes of deeper integration.

The first generation of RTAs in the CIS comprise the bilateral deals between the states and the general CIS FTA of 15 April 1994. The bilateral FTAs are all based on the same template with very minor, if any, changes introduced. Bilateral agreements have a framework nature and are accompanied with annexes on the exclusions from free trade regimes. Those exclusions are usually very substantial both quantitatively and qualitatively (for more information and examples see section 3.2(a) below). All of the analysed bilateral agreements (those mentioned on page 42) did not introduce any disciplines on bilateral safeguards. Even more, the bilateral agreements do not contain any specific rules relating to trade defence measures at all.

In parallel with the proliferation of bilateral arrangements, all the CIS countries agreed on the CIS FTA, which came into operation on 14 April 1994. The agreement covers trade in goods only and provides for the removal of customs duties, taxes and other charges, as well as QRs on importation and exportation of goods. However, the signatories have thus far failed to work out a single list of goods to be embraced by the free trade regime.[59] In addition, the CIS FTA

[59] Shadikhodjaev, Sh. 'Trade Integration in the CIS Region: A Thorny Path Towards A Customs Union', *Journal of International Economic Law*, 12(3), 2009, p. 556.

has not yet been ratified by Russia, the major economic actor of the region.[60] The Agreement set out the general framework of the operation of trade within the region, but failed to address trade remedies at all. The extensive list of exclusions from the free trade regime (as well as the very limited and vague language of the agreement) made it nearly inoperative.[61]

The need to reform the CIS FTA has been declared by most of the CIS states throughout the last decade. For a long time an agreement on the issue appeared unfeasible. However, on 21 October 2011 it was reported that 8 of the CIS states (excluding Azerbaijan, Uzbekistan and Tajikistan) provisionally agreed to revise the text of the CIS FTA. The Draft of the new text was released on the CIS website.[62] However, the Draft does not necessarily demonstrate the current state of the text as discussed between the States, and changes are especially possible since 3 other CIS states did not refuse to participate in the new FTA, but were not satisfied with the current terms of the Draft and requested time until the end of 2011 to hold necessary internal and external consultations. The new Draft reserves the right of the CIS countries to apply safeguards in bilateral trade (Article 10). The Article is entitled 'Selective safeguards in mutual trade' and literally copies the relevant provisions of the ASG as to the invocation and application of global safeguards. However, any analysis of these provisions in the current paper is premature, as the chances of this text to be adopted without further changes are minimal.

Examples of 'second generation' agreements include the EurAsEC and SES Agreements. In 1995 Russia and Belarus signed an association agreement, establishing the Customs union and the Single Economic Space, later joined by Kazakhstan, Kyrgyzstan and Tajikistan. On 26 February 1999 the five countries concluded the Treaty on the Customs Union and the Single Economic Space, which aimed at the creation of a single customs territory and the gradual full abolition of the customs borders between the five signatories. The deeper integration goals of creating a single market of the "four freedoms" between the five countries were inscribed in the Treaty on the Establishment of the Eurasian Economic Community (EurAsEC). By now EurAsEC remains the only regional agreement, prescribing the rules on bilateral/regional safeguards, which are specifically analysed in subsection 3.3 below.

The third attempt to foster trade collaboration multilaterally was the 2003 Single Economic Space (SES) Agreement. The Agreement was concluded between Belarus, Kazakhstan, Russia and Ukraine and intended to simplify trade regimes between these four major CIS players and specifically improve Russia – Ukraine trade linkages. However, in the aftermath of the Ukrainian presidential elections in 2004, the foreign trade policy of Ukraine changed, with the CIS trade arrangements being no longer a priority.[63] With the reluctance of Ukraine to use the capacities of the SES, the major political and economical rationale behind the agreement became devoid of sense. Thus far there have been no new developments in the operation of the SES.

[60] On the ratification instruments see: http://www.zaki.ru/pagesnew.php?id=57948 (last visited 31 September 2011).
[61] Shadikhodjaev, *supra* note 59, p. 558 - 559.
[62] The draft is available at: http://cis.minsk.by/page.php?id=13922 (last visited on 31 September 2011).
[63] Ibid., p. 564.

3.2. NOTIFICATION OF THE CIS RTAS TO THE WTO BY THE CIS COUNTRIES – WTO MEMBERS

Interestingly, all of the trade agreements of the region already notified to the WTO by its CIS Members (Table 1 at the end of this Chapter) were notified to the Organization under Article XXIV of the GATT. For example, Georgia has notified its Free Trade Agreement with Kazakhstan of 11 November 1997 under Article XXIV, the same ground of notification was chosen by Armenia to notify the WTO on its Free Trade Agreement with Russia of 30 September 1992. It is suggested that this approach could not be considered WTO-compatible. All the RTAs concluded with non-WTO Members could not benefit from the MFN exception in GATT Article XXIV. As discussed below, the CIS countries – Members to the WTO could only apply for the MFN waivers to make their agreements with non-Members WTO-compatible. Such waivers shall have significant implications for safeguards in the mutual trade of the CIS countries which are Members and non-Members to the WTO: requirements of Article XXIV (including the general obligation of elimination of bilateral safeguards) will be no longer applicable, should waivers be granted.

a) Inapplicability of Article XXIV for the RTAs with WTO Non-Members

Article XXIV:5 clearly states that "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or a free trade area". The phrase "as between the territories of contracting parties" in this sense is of utmost importance. It stipulates that the justification of an MFN violation, available under the provision, is applicable only to regional trade agreements concluded between the 'Contracting parties'. Such a conclusion is fully supported by the negotiations history of the provision. In the earlier draft of the ITO Charter the corresponding provision availed the MFN violation justification to "a single customs territory for *two or more customs territories*, so that all tariffs and other restrictive regulations of commerce as *between the territories of members of the union* are substantially eliminated" (emphasis added).[64] In the view of some commentators, the switch to the current wording was made by the negotiators intentionally, so that the proposed customs union of France and Italy (at that time not party to the GATT negotiations) did not erode the automatic MFN benefits expected by the other Contracting parties.[65]

All that denotes that the Article XXIV:5 justification is not available to RTAs between WTO Members and Non-members. Following the general MFN requirement in GATT Article I:1, any advantage, favour, privilege or immunity granted by a WTO Member to such non-members, must be immediately and unconditionally accorded to all the WTO Membership. Put differently, all the advantages and privileges arising out of RTAs between ex-USSR countries – WTO Members and non-members notified under Article XXIV should be automatically extended to all WTO Members.

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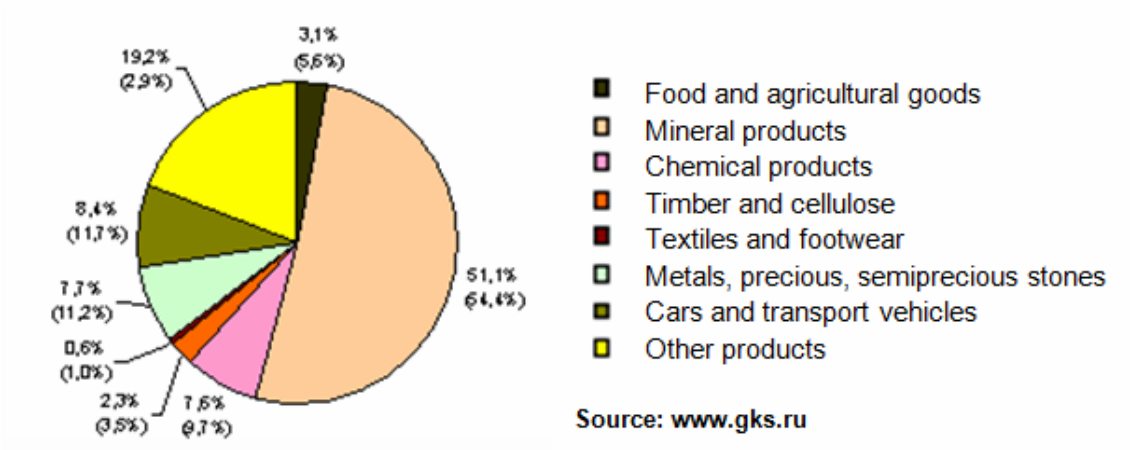
[64] Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, 20 January to 25 February 1947, New York, p. 78.
[65] WTO Secretariat, *Guide to GATT Law and Practice: Analytical Index*, 6th edition, Volume 2, Geneva, 1995, p. 798.

If *arguendo* Article XXIV was applicable to the FTAs, notified by the CIS countries under Article XXIV, such FTAs should therefore meet all the requirements of the provision, namely, duties and ORRCs (including, as discussed above, safeguards) should be eliminated on SAT (qualitatively and quantitatively). Should the level of trade liberalisation furnished by such FTAs be as low as the SAT threshold, any application of safeguards between the Members would be barred.

Most of the notified CIS bilateral FTAs and the CIS FTA itself contain a boilerplate clause on the exemption from free trade of "goods subject to export tariffs, licensing and quotas" under the domestic laws of the parties.[66] Varying in scope between the CIS countries, such export tariffs, licences and quotas tend to cover the most sensitive sectors in mutual trade. As a vivid example, one could simply enumerate the list of products, covered at the moment by export tariffs, licences and quotas between two of the CIS jurisdictions – Russia and Ukraine: crude oil, gasoline and other oil products, petroleum and natural gas, coal and lignite, carbohydrates, electricity, precious and semiprecious stones, precious metals, non-ferrous metals, ammonia, mineral fertilizers, timber, sulphur, rubber, cellulose, fish products and grain.[67] According to the Committee on State Statistics of Russia, for the first six months of 2011 the structure of Russian exports to CIS looked as follows (figures in brackets show the share of trade in the commodity for the first six months of 2010):



Even a fleeting glance can determine that the major segment both in the sense of volume of trade and sectorial coverage were exempted from the free trade of Russia and Ukraine. That would put in doubt the conformity of the Russia – Ukraine FTA of 24 January 1993 with the SAT test. In any case, it would obviously bar the application any additional restrictive regulations of commerce, such as safeguards, in bilateral trade. Such safeguards – if applied - will

[66] See, *inter alia*, Article 1 of the Protocol to the Free Trade Agreement between the Government of the Russian Federation and the Government of Ukraine of 24 June 1993 or Article 1 of the Protocol of 06 June 2006 to the Free Trade Agreement between the Government of the Republic of Belarus and the Government of the Republic of Armenia of 18 January 2000.
[67] See the Decree of the Government of the Russian Federation of 06 November 1992 No. 854 and the Decree of the Cabinet of Ministers of Ukraine of 28 December 1992 No. 16-92.

undoubtedly raise additional issues of the conformity of the Russo-Ukrainian FTA with Article XXIV, under which it has been notified to the WTO.

b) Notification of FTAs under the Enabling Clause

Para. 2(c) of the Enabling Clause grants a justification for an MFN violation originating from:

> "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the Contracting Parties, for the mutual reduction or elimination of non-tariff measures, on products imported from one another"

The language obviously differs from Article XXIV:5 of the GATT as it does not cover ORRCs and refers to the reduction of *tariffs* (as opposed to *duties* in the GATT). The provision creates flexibility for developing countries when it comes to reduction of tariffs *or* NTBs which have to be reduced in accordance with guidelines of WTO Members. Furthermore, the additional criterion for such regional arrangements in para. 3(a) in the current wording is not legally enforceable ("shall be designed to facilitate and promote"), while para. 3(b) will be met nearly automatically in all cases. The Enabling Clause is often considered to be an alternative legal basis for the formation of RTAs.[68]

All of the CIS countries are developing (less-developed) countries. All the FTA agreements between them cover only trade in goods. Notification of the CIS Agreements under the Enabling Clause would resolve most of the issues addressed above. As long as all the FTAs are targeted at mutual reduction (partial elimination) of tariffs, the invocation of the Enabling Clause would allow the CIS Members to implement safeguard instruments (as well as other trade remedies) in their mutual trade relations without violating the WTO provisions. The Enabling Clause manifestly does not require elimination of ORRCs, which would include safeguards. Thus, by notifying the CIS RTAs under the Enabling Clause, the CIS countries would gain the right to impose emergency actions in their mutual trade without any limitations. Finally, there is no required SAT threshold in the Enabling Clause, allowing more substantive exceptions from the free trade regime to be preserved. However, just like Article XXIV, the Enabling Clause refers to the arrangements of the "contracting parties", making arrangements with non-members *de jure* not eligible for this MFN-violation justification.

As stated by the representative of Oman, "the Transparency Mechanism for RTAs provided clearly that it was the right of the parties to an RTA to determine the basis for the RTA notification to the WTO. He recalled in particular paragraph 4 of the TM, which stipulated that, "in notifying their RTA, the parties would specify under which provision or provisions of the WTO

[68] Yuqing, Zh. 'Regionalism under the WTO and the prospects of an East Asian free trade area', in Taniguchi, Ya., Yanovich., A & Bohanes, J. (eds.) *The WTO at the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia*, New York: Cambridge University Press, 2007, p. 472.

Agreements it was being notified".[69] In WTO practice the Members have even withdrawn and re-notified their RTA notifications. On 03 October 2006, the Gulf Cooperation Council notified its customs union agreement under Art XXIV of the GATT[70], but on 19 November 2007 it withdrew the notification and notified under the Enabling Clause.[71] Re-notification of the RTAs under the Enabling Clause seems to avail the CIS WTO Members the higher flexibility and wider effective rights to employ trade defence instruments against regional partners. This move would not bring the preferential trade regime into compliance with the MFN obligation, but may *de facto* grant the Members wider elasticity of trade policy tools and freedom in the application of safeguards against their RTA partners.

c) Overcoming the impasse

The only way for those agreements to remain MFN-compatible is to obtain a respective MFN waiver in accordance with the GATT. As discussed above, the waiver under Article XXIV is not available to agreements with non-Members. The only medication left lies therefore in XXV:5 of the GATT.

A similar understanding was put forward by the contracting parties in the course of the GATT Working Party review of the EFTA-founding Stockholm Convention:

> "It was stated by certain members of the Working Party that they had, so far, the greatest difficulty in accepting the contention of the member States and that, even if Article XXIV were applicable, they could not see how the Contracting Parties could consider the Convention under any provisions other than paragraph 10 of that Article, if only because all parties to the Convention were not contracting parties to GATT as defined in Article XXXII. Some members of the Working Party took the view that the provisions of Article XXIV were not applicable in the case of the Convention and that the member States should have recourse to a 'waiver' under Article XXV".[72]

It would not be much of an exaggeration to say that the waivers under GATT Article XXV have been granted by the Contracting Parties rather easily. "Exceptional circumstances not elsewhere provided for in this Agreement" have been interpreted as not only covering specific and transitory problems of a particular economy, as it was first established in *Jamaica – Margins of Preference*.[73] The waivers have been granted by the Contracting Parties, for instance, to permit the maintenance of preferential trade regimes with former colonies (French Trading

[69] Committee on Trade and Development, Seventy-Fourth Session, Note on the Meeting of 11 May 2009 (WT/COMTD/M/74), pp. 5-6.
[70] Committee on Regional Trade Agreements, Gulf Cooperation Council Customs Union, Notification from Saudi Arabia of 20 November 2006 (WT/REG222/N/1).
[71] Committee on Trade and Development, Notification of Regional Trade Agreement between Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates of 21 March 2008 (WT/COMTD/N/25).
[72] Report adopted by GATT Contracting Parties "Customs Unions and Free Trade Areas: European Free Trade Association" BISD Supp. 9, 1960, para. 58.
[73] GATT Panel Report, *Jamaica – Margins of Preference*, adopted on 2 February 1971 (L/3485 - 18S/183).

Agreements with Morocco)[74] or to deepen the systematic economic cooperation of the States (coal and steel products waiver).[75] With the advent of the WTO, the new more stringent rules on waivers were implemented in Article IX of the WTO Agreement, which nonetheless did not reduce the incidence of granted waivers.[76] No waivers of the kind were requested and correspondingly obtained by the CIS WTO-Members. The existence of such an MFN contradiction has huge systemic implications and thus should be somehow harmonised within the WTO.

Getting an MFN waiver under Article XXV of the GATT could also significantly simplify the application of bilateral and regional safeguards between the CIS countries, as those would not be subject to the general elimination requirement as they are now. Taking into account the high level of exemptions from the free trade regime between the CIS states, as discussed above in subsection 3.2(a), no bilateral safeguards could be imposed in mutual trade with the CIS countries – non-members to the WTO. In order to activate this remedy the CIS states – WTO members should apply for the appropriate waiver as discussed above.

3.3. THE REGIONAL SAFEGUARD MECHANISM IN THE EURASEC CUSTOMS UNION

The sole agreement between the CIS countries on the implementation of special bilateral safeguards was achieved under the auspices of EurAsEC. On 17 February 2000 the five constituent EurAsEC states signed the Protocol on the mechanism of the application of safeguards, antidumping and countervailing measures in the trade between the states – Members to the CU further reviewed in 2003.[77] Thus far the Parties have never invoked a bilateral safeguard mechanism, enshrined in the Protocol.

a) The legal characteristics of the mechanism

The grounds for the imposition of bilateral emergency actions determined in the Protocol are similar to those prescribed by the ASG: products should be imported from the territory of one CU Member to the territory of the other in such increased quantities, absolute or relative, so as to cause or threaten to cause serious injury to the domestic industry.[78] The relevant factors to be evaluated by the investigating authority for the injury determination as specified in the Protocol mirror the provisions of Article 4.2(a) of the ASG. The very same grounds for the invocation have been fixed for the 'global safeguards' as applied by the CU against third

[74] GATT Contracting Parties, Seventeenth Session, French Trading Agreements with Morocco, Draft Decision, W.17/36, 18 November 1960, granted on 19 November 1960 with no expiry date.
[75] Waiver Granted in Connection with the European Coal and Steel Community, Decision of 10 November 1952, BISD 1S/17.
[76] Forlati, S. 'Article XXV GATT', in: Wolfrum, R., Stoll, P.-T. & Hestermeyer, H.P. (eds), *WTO – Trade in Goods, Max Planck Commentaries on World Trade Law*, Leiden: Koniklijke Brill, 2011, 677 - 678.
[77] The Protocol is available at: http://tsouz.ru/Docs/IntAgrmnts/Pages/evrazes_17022000.aspx (last visited on 31 October 2011).
[78] Article 5 of the Protocol on the mechanism of the application of safeguards, antidumping and countervailing measures in the trade between the states – Members to the CU.

countries.[79] In this respect there is no difference between the grounds for global and regional safeguards in the CU. The CU, therefore, did not follow the 'European model' of the bilateral safeguards regulation, characterised by the broad and vague grounds for the application of bilateral safeguards (see section 2.2 above).

The disciplines of the Protocol greatly resemble the text of the ASG. Nevertheless, there are some noteworthy differences discussed below. Two of those modifications could be praised as an attempt to make the system of regional safeguards more transparent and less frequently used. The other two changes, on the contrary, beget difficulties with the understanding of the safeguard regime under the Protocol.

Endeavours to minimise the use of bilateral safeguards resulted in an additional requirement on the safeguards investigation. According to Article 4 of the Protocol, a Member wishing to impose a safeguard against other CU Members shall invite the interested Parties to consultations *and* propose alternatives for "settling the situation without the imposition of a safeguard". The Protocol does not define which alternatives could be proposed.

The most evident alternative that could remedy an import surge is a voluntary export restraint on behalf of the exporters. VERs, however, should be implemented by the exporting CU Members with particular caution. The exporting Members should bear in mind the reasoning of the Panel in *Japan - Semiconductors*, where the Government of Japan did also request private parties to voluntarily perform certain actions. However, Japanese requests (in the form of persuasion) not to export semi-conductors at prices below company-specific costs were found a '*coherent system*' restricting the exports of semi-conductors due to the sophisticated surveillance mechanisms – the statutory requirement to submit information on export prices and the systematic monitoring of product-related costs.[80] Thus, for a VER not to amount to an export restraint, prohibited under Article XI and subject to general elimination under Article XXIV:8 of the GATT, the design of the measure and its application practice should clearly demonstrate the voluntary nature of the restrictions.

Though the final decision on the application of a regional safeguard is taken by the Members, the Protocol provides for an additional examination of the final determination by the Commission of the CU. The investigating authorities of the invoking Member forwards the results of their investigations to the Commission no later than 45 days prior to the expected application of the measure.[81] The decision of the Commission should contain the recommendations for "settling the situation without the imposition of a safeguard measure".[82] Though the decision of the Commission is not binding on the Parties, it provides an additional hurdle regarding the implementation of a regional safeguard measure. This additional mechanism should also be

[79] Article 5 of the Agreement on the application of safeguards, antidumping and countervailing measures against third countries.
[80] GATT Panel Report, *Japan - Semiconductors*, p. 132.
[81] Article 4a of the Protocol on the mechanism of the application of safeguards, antidumping and countervailing measures in the trade between the states – Members to the CU.
[82] Ibid.

commended as an additional tool to increase transparency in the application of regional safeguards within the CU.

Significant differences between 'global' (ASG) and 'regional' (EurAsEC) safeguards could be found in the rules on the application of the *provisional* safeguard measures. The grounds of application of provisional safeguards in both global and mutual trade were copied from Article 6 of the ASG: provisional measures could be imposed 'in case of critical urgency' ('critical circumstances' in the ASG) where delay would cause or threaten to cause 'damage which it would be difficult to repair'.[83] The ASG limits the duration of a 'global' provisional measure to 200 days. However, no limitation of the duration of regional measures can be found in the Protocol. Taking into account the absence of any rules on the time limit of the regional safeguard investigation (to be decided in the domestic laws of the CU Members), such an omission appears truly unfortunate. The Members seem to be provided excessive leeway in the imposition of provisional safeguard measures in mutual trade.

Finally, and most importantly, the Protocol does not require regional safeguards to be applied on an MFN basis to all CU Members. In other words, nothing in the Protocol prohibits the imposition of a bilateral safeguard in respect of imports from one particular Member of the CU. Unlike NAFTA, the Protocol does not resolve the question on the sources of import surges to be taken into account for the application of a regional safeguard (see section 2.1(b) above). There is no MFN-rule of application, Members are granted extensive discretion to include or exclude other CU Members in the application of the measure. As far as all the CU Members are developing countries, it appears reasonable to limit this discretion through the introduction of disciplines similar to Article 9.2 of the ASG. As long as a Member's share of interest does not exceed a prescribed level (for instance, 3 percent), such a Member could be excluded from the application of a regional safeguard. The failure of the drafters to address these concerns could be explained by the absence of the general non-selectivity rules for regional safeguards. Nonetheless, the introduction of *de minimis* thresholds could reduce the incidence of unnecessary impediments in mutual trade without any significant reduction of the level of protection available to the CU Members. Rules on 'individual' and 'cumulative' thresholds, similar to rules in Article 9.1 of the ASG, could be enacted for the additional security of the importing Members. Remarkably, such thresholds (equal to those of the ASG) were fixed in the 'global safeguards' regime of the CU.[84]

b) Relevance of Article XXIV:8 of the GATT for regional safeguards in the CU

On 19 May 2011, the Interstate Council of EurAsEC (the Supreme Body of the CU) agreed on a monumental step towards the harmonisation of the CU rules with the rules of the WTO. The Interstate Council delivered an instrument called the Agreement on the Functioning of the CU

[83] Article 6 of the Agreement on the application of safeguards, antidumping and countervailing measures against third countries, Article 12 of the Protocol on the mechanism of the application of safeguards, antidumping and countervailing measures in the trade between the states – Members to the CU.
[84] See Article 4.2 of the of the Agreement on the application of safeguards, antidumping and countervailing measures against third countries.

within the multilateral trading system. According to Article 1 of this Agreement, upon the accession of any of the CU Members to the WTO, the rules of the WTO (read in light of the Accession Protocol) become the part of the legal system of the CU. The common external customs tariff shall be adjusted to the levels specified in the Accession Protocol of the exceeded Member. Article 2 of the Agreement contemplates that in case of any conflict between the WTO provisions and the rules of the CU, the former shall be granted precedence.

As explained by the Economic Adviser of the President of Russia Arcady Dvorkovich, this agreement was requested by the WTO Members as a condition of Russian accession.[85] The Agreement is subject to ratification by all the three parties to the CU. Russia ratified the Agreement on 20 October 2011.[86] The ratification procedures in Belarus and Kazakhstan are still ongoing.[87]

The impact of this Agreement on the system of trade remedies in the CU cannot be overestimated. According to Article 4.3 of the Constitution of the Kazakhstan, Article 15.4 of the Constitution of Russia and Articles 8.3 and 116(4) of the Constitution of Belarus, ratified international treaties have priority over domestic laws and are applied directly. Moreover, authors rightfully notice the tendency of the courts in the CIS countries to effectively give precedence to international law in case of conflicts with domestic legislation.[88] In other words, in the case of a successful ratification of the Agreement of 19 May 2011, WTO rules will not only become part of the legal system of the CU. Through the mediation of the CU legal system, WTO rules will get introduced into the national legal systems of Russia, Belarus and Kazakhstan, will obtain precedence over domestic laws on trade remedies, and will be directly enforceable before domestic courts.

For the rules on bilateral safeguards it automatically makes Article XXIV:8 disciplines relevant to regional and bilateral safeguards between the CU Members. Specifically, the CU will have to comply with the 'internal requirement' of Article XXIV:8, as discussed above in Chapter 1. Accordingly, even CU Members – non-Members of the WTO will have to refrain from safeguards against their CU partners in case those safeguards go contrary to Article XXIV.

As suggested in subsection 1.4 above, Article XXIV does not oblige parties to RTAs to completely eliminate regional safeguard measures. However, as argued above, bilateral or regional safeguards could not be imposed if the volume of free trade not influenced by a safeguard measure does not meet the SAT thresholds. Unfortunately, it is not possible to determine the exact volume of trade liberalisation within the CU at the moment. Given that the CU is still in the transition phase of formation, and the single customs territory has been introduced only partially, some of the temporary exemptions still exist. On 05 July 2010, the

[85] 'RF expects Belarus and Kazakhstan to Agree on the WTO Promptly', *News of Belarus*, 31 October 2011, available at http://www.interfax.by/news/belarus/101193 (last visited 31 September 2011).
[86] The ratification instrument is available at: http://graph.document.kremlin.ru/page.aspx?1;1577749 (last visited 31 October 2011).
[87] 'RF expects Belarus and Kazakhstan to Agree on the WTO Promptly', *supra* note 87.
[88] Danilenko, G. Implementation of International Law in CIS States: Theory and Practice, *European Journal of International Law*, 10, 1999, pp. 54-56.

Members of the CU agreed on the Protocol on separate temporary exemptions from the functioning of the single customs territory of the CU.[89] Until the end of the transition phase and due to the lack of a clear economic assessment of the coverage of the CU free trade area, the parties should refrain from the application of bilateral safeguards so as to secure the conformity of the CU with the 'internal requirement' in Article XXIV:8.

The only question remaining in this context is the general inapplicability of the Article XXIV justification to RTAs with non-WTO Members, discussed above in section 3.2. In case of the successful accession of one of the CU Members to the WTO, such a Member should therefore apply for an MFN waiver under Article XXV to be allowed to preserve the preferential trade regime within the CU. If such a waiver is granted, Article XXIV 'internal requirement' will no longer be a hurdle to the application of bilateral safeguards under the Protocol even if the level of liberalised trade will be too low to meet the SAT test.

To conclude, within the current CIS framework, the only trade agreement providing for the use of safeguards in bilateral trade remains the EurAsEC Protocol of 17 February 2000. The protocol generally resembles the disciplines of the ASG; however, it contains some significant changes. The establishment of additional procedural guarantees on the thorough consideration of all available alternatives to safeguards is a clear improvement of the ASG regime. On the other hand, the Protocol contains a number of shortcomings, which should be corrected. No limitation on the duration of the provisional safeguards is clearly contrary to the interest of stable and predictable trade in the region. The failure of the Protocol to introduce *de minimis* thresholds could be potentially corrected in the practice of the investigating authorities, which are not bound with any obligation to apply regional safeguards non-selectively. However, to institute the development concerns respective changes should be introduced into the Protocol. Finally, upon Russian accession to the WTO, the Protocol (as well as most of the CIS RTAs in force) could not be notified to the WTO under Article XXIV. Russia should seek the general MFN waiver for such arrangements with Kazakhstan and Belarus valid until the WTO accession of both. The CIS RTAs with non-Members already notified to the WTO should be also justified via a waiver under Article XXV of the GATT, not through Article XXIV or the Enabling Clause.

[89] Protocol on separate temporary exemptions from the functioning of the single customs territory of the CU of 05 July 2010, available at: http://www.tsouz.ru/Docs/IntAgrmnts/Documents/%D0%9F%D1%80%D0%BE%D1%82%D0%BE%D0%BA%D0%BE%D0%BB%20%D0%BE%D0%B1%20%D0%B8%D0%B7%D1%8A%D1%8F%D1%82%D0%B8%D1%8F%D1%85.pdf (last visited 31 September 2011).

Regional agreements establishing free-trade areas between the CIS countries **Table 1**

	Armenia	Azerbaijan	Belarus	Georgia	Kazakh	Kyrgyz	Moldova	Russia	Tajikistan	Turkmen	Ukraine	Uzbek
Armenia	x	x	FTA 18.01.2000	FTA 14.08.1995	FTA 02.09.1999	FTA 04.07.1994	FTA 24.12.1993	FTA 30.09.1992	FTA 02.03.1994	FTA 03.10.1995	FTA 07.10.1994	x
Azerbaijan	x	x	?	FTA 08.03.1996	FTA 10.06.1997	?	FTA 26.05.1995	FTA 30.09.1992	FTA 26.01.2008	?	FTA 28.07.1995	x
Belarus	FTA 18.01.2000	?	x	x	FTA 23.09.1997	FTA 30.03.1999	FTA 16.06.1993	CU 06.01.1995	FTA 20/\.11.1998	x	FTA 17.12.1992	x
Georgia	FTA 14.08.1995	FTA 08.03.1996	x	x	FTA 11.11.1997	?	FTA 28.11.1997	FTA 03.02.1994	x	FTA 20.03.1996	FTA 09.01.1995	x
Kazakh	FTA 02.09.1999	FTA 10.06.1997	FTA 23.09.1997	FTA 11.11.1997	x	FTA 22.06.1995	FTA 26.05.1995	FTA 22.10.1992	FTA 22.11.1995	ECA 28.05.2007	FTA 17.09.1994	FTA 01.06.1997
Kyrgyz	FTA 04.07.1994	?	FTA 30.03.1999	?	FTA 22.06.1995	x	FTA 26.05.1995	FTA 08.10.1992	FTA 19.01.2000	?	FTA 26.05.1995	FTA 24.12.1996
Moldova	FTA 24.12.1993	FTA 26.05.1995	FTA 16.06.1993	FTA 28.11.1997	FTA 26.05.1995	FTA 26.05.1995	x	FTA 09.02.1993	x	FTA 24.12.1993	FTA 13.11.2003	FTA 30.03.1995
Russia	FTA 30.09.1992	FTA 30.09.1992	AA 08.12.1999	FTA 03.02.1994	FTA 22.10.1992	FTA 08.10.1992	FTA 09.02.1993	x	ECA (FTA) 10.10.1992	FTA 11.11.1992	FTA 24.01.1993	x
Tajikistan	FTA 02.03.1994	FTA 26.01.2008	FTA 20/\.11.1998	x	FTA 22.11.1995	FTA 19.01.2000	x	ECA (FTA) 10.10.1992	x	x	FTA 06.06.2001	FTA 10.01.1996
Turkmen	FTA 03.10.1995	?	x	FTA 20.03.1996	x	?	FTA 24.12.1993	FTA 11.11.1992	x	x	FTA 05.11.1994	x
Ukraine	FTA 07.10.1994	FTA 28.07.1995	FTA 17.12.1992	FTA 09.01.1995	FTA 17.09.1994	FTA 26.05.1995	FTA 13.11.2003	FTA 24.01.1993	FTA 06.06.2001	FTA 05.11.1994	x	FTA 29.12.1994
Uzbek	x	x	x	x	FTA 01.06.1997	FTA 24.12.1996	FTA 30.03.1995	x	FTA 10.01.1996	x	FTA 29.12.1994	x
CIS	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994	FTA 15.04.1994
CU	x	x	CU 06.10.2007	x	CU 06.10.2007	x	x	CU 06.10.2007	x	x	x	x
EurAsEC	x	x	CU 26.02.1999	x	CU 26.02.1999	CU 26.02.1999	x	CU 26.02.1999	CU 26.02.1999	x	x	x
SES	x	x	FTA 19.09.2003	x	FTA 19.09.2003	x	x	FTA 19.09.2003	x	x	FTA 19.09.2003	x

RTAs notified to the WTO

Chapter 4. Special emergency actions

Emergency regimes in the WTO covered agreements are not limited to ASG and Article XIX of the GATT. Provisions on emergency actions are also found in other WTO agreements. Clearly, those safeguards were introduced in order to address the most peculiar and contentious issues. Logically, similar provisions could be traced in the modern regional trade agreements. However, the regulatory differences in these special safeguards regimes are much more extensive than those discussed in Chapter 2 above. There are three regimes on emergency actions in goods trade, reflected in the WTO covered agreements, in addition to GATT Article XIX and the ASG. Those regimes are prescribed by the ATC, AoA and the Understanding on Balance-of-Payments. Emergency safeguard measures are also to be negotiated under GATS Article X.

The chapter below briefly outlines the WTO rules regarding these special emergency actions. Each mechanism is analysed separately in order to evaluate the perception of those rules in the texts of modern RTAs. Within the WTO emergency actions under the BOP concerns form a separate legal regime. Emergency actions on BOP grounds could by no means be confused with safeguards. Nevertheless, the two regimes share certain similarities, which resulted in some of the RTAs not drawing clear differences between the two. Based on the logic of those RTAs, restrictions due to BOP problems were conditionally included in the scope of this chapter, though such an inclusion would go contrary to the logic of the GATT. The RTA analysis is aimed to be illustrative and by no means exhaustive; the choice of examples was made upon the author's judgement solely to compare RTA rules with WTO paradigms. Finally, each of the sections demonstrates the relevance of such special emergency actions for the CIS RTAs. Insofar as none of the current CIS RTAs was granted a comprehensive services coverage, and in absence of any mutually agreed solution on emergency safeguards under Article X of the GATS, those issues are left without additional examination.

4.1. SPECIAL SAFEGUARDS IN TEXTILES

The ATC terminated upon the expiry of the ten-year transition period on 10 January 2005. Trade in textiles and clothing is nowadays subject to the general rules of the WTO and, respectively, general rules on safeguards in Article XIX of the GATT and the ASG. However, Article 6 of the ATC, introducing the 'transitional safeguard' mechanism, despite its short life, has been both widely invoked by the WTO Members and discussed before the WTO panel.[90] The AB in *US – Cotton Yarn* very concisely described the legal test under Article 6 of the ATC:

> "[W]e have to distinguish three different, but interrelated, elements under Article 6: first, *causation* of serious damage or actual threat thereof by increased imports; second, *attribution* of that serious damage to the

[90] Kim S.J. & Reinert, K.A. *Textile and Clothing Safeguards: From the ATC to the Future*, 19 September 2006, available at: http://mason.gmu.edu/~kreinert/paperspdf/texsafefut.pdf (last visited 03 October 2011), pp. 2 – 5.

> Member(s) the imports from whom contributed to that damage; and third, *application* of transitional safeguard measures to such Member(s)".[91]

The disciplines of Article 6 of the ATC notably reflected the corresponding provisions of the ASG. The invoking criteria ('such increased quantities as to cause serious damage or actual threat thereof'), as interpreted by the Panel in *US – Underwear*, are very similar to Article 2.1 of the ASG.[92] The causal link requirement in Article 6.2 of the ATC is generally similar to its ASG counterpart, Article 4.2. The most evident difference of the ATC regime was the absence of an explicit rule on MFN application, specific rules on quotas determination and its growth level, shorter term of application (three years) with no extension options, no provisions similar to Article 8.1 of the ASG on compensation and retaliation. Finally, Article 6 is free from such additional burdens of Article XIX of the GATT as the '*unforeseen developments*' clause, which interlaced into the ASG through the AB ruling in *Argentina – Footwear*.[93] With the termination of the ATC, textile safeguards therefore face a much higher standard both in the sense of invocation and application.

The current WTO rules still contain certain traces of special safeguards on textiles, however, on a country-specific basis. The Accession Protocol of China conferred WTO Members with a right to apply special China textile safeguards until 2008 and China product-specific safeguards until 2013.[94] As to still available product-specific safeguards against China, their grounds of invocation have been fuzzily worded as "such increased quantities *or* under such conditions as to cause or threaten to cause *market disruption*".[95] The mechanism neither specifies the duration of such measures nor provides China with any rights to compensation or retaliation. Obviously, these mechanisms were introduced by WTO Members who feared that they would suffer immediate and devastating import surges from China upon its accession. The product-specific safeguards under the mechanism were first imposed against Chinese textiles by Peru in 2003. The measures stood for 200 days and were withdrawn due to strong political pressure from China.[96] Peru then attempted to apply global non-discriminatory safeguards on the same textile products, which met concerns from the EU[97], so non-discriminatory safeguard measures were never invoked. The other users of the Chinese product-specific safeguards mechanism were Argentina, Brazil, Colombia, South Africa and Turkey.[98] All of this clearly demonstrates that trade in textiles remains a very sensitive issue for many countries, increasing their interest in specific rules on textile safeguards.

However, unexpectedly, one could not talk of the wide proliferation of special textile safeguards within modern RTAs. The major jurisdictions still seeking specific textile safeguards are the US

[91] Appellate Body Report, *US – Cotton Yarn*, para. 109.
[92] Panel Report, *US – Underwear*, para. 7.55.
[93] Appellate Body Report, *Argentina – Footwear*, para. 84.
[94] Kim & Reinert, *supra* note 90, p. 5.
[95] Article 16.1 of the Accession Protocol of the People's Republic of China.
[96] Committee on Safeguards, Transitional Product-Specific Safeguard on Imports of Textile Products and Clothing into Peru from the People's Republic of China of 02 May 2005 (G/SG/N/16/PER/1/Suppl.1/Rev.1).
[97] Committee on Safeguards, Minutes of the Regular Meeting, 14 March 2005 (G/SG/M/26), para. 46.
[98] Kim & Reinert, *supra* note 90, p. 15.

and Canada. Bilateral textiles and apparel safeguards actions in Article 5.9 of the US – Singapore FTA are available only in the course of the transition period (i.e., until 2014). The provision nearly copies the language of Article 6 of the ATC on the invocation grounds, however, limiting the period of availability of such measures to two years with a two-year extension available. Moreover, Article 5.9.5 obligates the invoking party to provide compensation for the affected counterparty in the form of substantially equivalent trade concessions. The provision seems to be a result of the cross-fertilisation of Articles 6 of the ATC and the ASG. The same could be said about the specific textiles safeguards in the Canada – Chile (Annex C-OO-B Section 3) and the Canada – Costa-Rica (Annex III.1 Section 4) FTAs.

No special rules on textiles safeguards are present in any of the FTAs concluded thus far among the CIS countries. With the global trend of bringing textile trade into the general safeguards framework and the temporary nature of bilateral safeguards in textiles across the major RTAs, there is little possibility that specific textile safeguards will appear between the CIS states.

4.2. SPECIAL SAFEGUARD MEASURES ON AGRICULTURAL PRODUCTS

Agricultural commodities are one of the most sensitive sectors in many jurisdictions, therefore there it is no surprise that a special safeguards regime applies to agricultural products under WTO rules. Many of the regional trade agreements also contain specific provisions on agricultural safeguards. Is there any concordance in the regulation and application of special safeguards on agricultural products within the WTO and RTAs? How do special agricultural products relate to general rules on safeguards in the WTO and in RTAs? Finally, have the CIS countries provided for emergency action in respect of agricultural products in their FTAs?

a) Special safeguard provisions in the Agreement on Agriculture

Special safeguards for agricultural commodities are regulated in Article 5 of the AoA. SSG could be invoked in respect of agricultural imports covered by the AoA for which the Member has *'tariffied'* (i.e. converted into tariffs fixed in its schedule) the restrictive measures listed in footnote 1 to the AoA. The AB in *Chile – Price Band* emphasised the exceptional nature of Article 5, which remains the only possible deviation from the general *tarrification* requirement:

> "the existence of a market access exemption in the form of a special safeguard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards".[99]

[99] Appellate Body Report, *Chile – Price Bands*, para. 217.

The special safeguard provision can be invoked only in respect of agricultural products for which the sign "SSG" is included in its tariff schedule corresponding to the agricultural product concerned. Only 39 countries that agreed to bind *and* reduce their tariff rates in the Uruguay Round have access to the SSG.[100] The incidence of the application of SSG has been even less frequent: one merely needs to mention that from 1995 to 2001 only 10 Members had recourse to the Special safeguards provision "in one or several years".[101]

An SSG may be imposed if (1) the volume of imports of an agricultural product during a year exceeds a certain trigger level *or* (2) the price at which imports may enter falls below a certain trigger price. These two alternative conditions have created the so-called 'volume-based SSG' and 'price-based SSG'.[102] From 1995 to 1999 over twice as many price-based safeguard were invoked by WTO members as volume-based safeguards.[103] As to volume-based SSGs, under Article 5.4 of the AoA, they could not exceed 30 percent of the ordinary rate of duty and could not be applied to imports under a TRQ.[104] The price-based SSG may be triggered by the fall of the c.i.f. import prices below the notified averages of the 1986-1988 reference period. As clarified by the AB in *EC – Poultry*, the c.i.f. import price should be determined with the exclusion of export duties.[105] Finally, under Article 5.4 of the AoA, the SSG may only take the form of a tariff duty, applicable only until the end of the year in which it has been imposed.

The most evident difference between Article 5 of the AoA and Article XIX of the GATT is the absence of an injury requirement for the agricultural safeguards. In imposing an SSG, WTO Members therefore face an easier legal test as compared to the test in Article XIX of the GATT and the ASG. Even though SSGs have not been applied widely, due to the highly sensitive nature of agricultural products, their trade-distorting effect have been widely criticised by WTO Members.[106] Some WTO Members (e.g., the US) and some experts have proposed to eliminate SSG provisions for good.[107] Even those WTO Members which have remained apologists of the SSG regime have stressed the need to reform the current mechanism.[108]

An attempt to reform SSGs has been performed in the course of the Doha Development Round. The proposal aims at the enhancement of the rights to special agricultural safeguards of the developing countries, who generally were not allowed to inscribe SSGs into their tariff

[100] Van Tongeren, F. Special safeguard for agricultural products: concerns and options for developing countries, Agricultural Economics Research Institute (LEI), available at http://www.lei.dlo.nl/wever/docs/WTO/SSG_general.pdf (last accessed on 30 October 2011), p. 3.
[101] Committee on Agriculture, Special Session, Special Agricultural Safeguard: Background Paper by the Secretariat, Revision of 19 February 2002 (G/AG/NG/S/9/Rev.1), para. 3.
[102] Ingco, M. & Croome, J. 'Trade Agreements: Achievements and Issues Ahead', in Ingco, M. & Nash, D. *Agriculture and the WTO: Creating a Trading System for Development*, Washington: copublication of the World Bank and Oxford University Press, 2004, p. 38.
[103] Committee on Agriculture, *supra* note 101, tables, p. 2.
[104] Van Tongeren, *supra* note 100, p. 3.
[105] Appellate Body Report, *EC – Poultry*, paras. 143-145.
[106] Desta, M.G. Legal issues in international agricultural trade. FAO Legal Papers Online No. 55, available at: http://www.fao.org/legal/prs-ol/lpo55%20.pdf (last visited on 30 October 2011), p. 17.
[107] See, *e.g.*, Committee on Agriculture, Special Session, WTO Negotiations on Agriculture, Cairns Group Negotiating Proposal on Market Access of 10 November 2000 (G/AG/NG/W/54).
[108] See, *e.g.*, Committee on Agriculture, Special Session, Negotiating Proposal by Japan on WTO Agricultural Negotiations of 21 December 2000 (G/AG/NG/W/91), paras. 14 - 15.

concessions on agro-products. The long-debated Special Safeguard Mechanism (SSM) also distinguishes between volume-based and price-based special safeguards.[109] For volume-based safeguards various WTO Members proposed to introduce remedy caps (not present under the current SSG regime), exclude negligible and preferential trade and introduce the cross-check. As to price-based safeguards, it was proposed to review the remedy caps, strengthen the cross-check disciplines and – most notably – exclude price-based SSMs from covering *en route* shipments (what would de facto bring the price-based SSM to inutility). Some other proposed changes would implement the disciplines less favourable to developing countries than the current SSG (*inter alia*, cumbersome notification procedures or yearly limits on the tariff lines to which the SSM could be implemented).[110] Watered down development goals and obscure proposals by the Members have resulted in what was called by the observers a "conceptual failure" with no agreement reached on the SSM thus far.[111]

One remaining unresolved question is the interplay of general safeguards and the SSG in the AoA. Some authors consider it quite transparent that "Article 5.8 of the AoA precludes recourse to both the special safeguard under that agreement and global safeguards under Article XIX of the GATT 1994."[112] However, such a plain reading of Article 5.8 of the AoA appears shallow. According to Article 5.8 of the AGA, where measures are taken in conformity with Article 5, Members undertake not to have recourse, *in respect of such measures*, to the provisions of paragraphs 1(a) and 3 of Article XIX of GATT 1994 or Article 8.2 of the ASG. In other words, the cited provision contains a conditional obligation for WTO Members affected by the imposition of a SSG not to retaliate against that measure and not to treat it as unforeseen developments for the purpose of initiating a general safeguard investigation.[113] Therefore, the text of the AoA does not explicitly prohibit the imposition of a SSG and a general safeguard measure simultaneously on the same product. The Cairns group, for instance, concluded that "such a special safeguards mechanism would have no relationship to Article XIX".[114]

Thus, it could not be concluded that the WTO rules prohibit the simultaneous application of both a global safeguard and a SSG. No doubt, each of the remedies could be legitimately invoked only in cases in which the requisites prescribed for their invocation are present. To the best of the author's knowledge, since the entry into force of the WTO Agreement, no Member has

[109] Committee on Agriculture, Special Session, Revised Draft Modalities for Agriculture of 06 December 2008 (TN/AG/W/4/Rev.4).
[110] 'Comparing the Special Safeguard Provision (SSG) and the Special Safeguard Mechanism (SSM)', South Center Analytical Note (SC/TDP/AN/AG/11), available at: http://www.southcentre.org/index.php?option=com_content&view=article&id=1372%3Aanalytical-note-comparing-the-special-safeguard-provision-ssg-and-the-special-safeguard-mechanism-ssm-special-and-differential-treatment-for-whom&Itemid=1&lang=en (last visited on 30 October 2011), p. 3.
[111] Wolfe, R. The special safeguard fiasco in the WTO: The perils of inadequate analysis and negotiation, available at: http://gem.sciences-po.fr/content/publications/pdf/Wolfe_SSMFiasco10022009.pdf (last visited on 30 October 2011), p. 4.
[112] Voon, T. Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements, available at: http://www.law.harvard.edu/news/spotlight/ils/events/voon_10.16.09.pdf (last accessed 30 October 2011), fn. 74.
[113] Yilmaz, M. The Legal Relationship between Special Safeguard Mechanism on Agricultural Products and General Safeguard Measures, *Global Trade and Customs Journal*, 4 (3), 2009, pp. 87-96.
[114] Group of Negotiations on Goods, Negotiating Group on Agriculture, Clarification and Elaboration of Elements of Detailed Proposals Submitted Pursuant to The Mid-term Review Decision, Note by the Secretariat of 04 April 1990 (MTN.GNG/NG5/W/161), p. 54.

applied an SSG and a general safeguard measure simultaneously on the same product. No dispute on the relation of the two regimes has been referred to the WTO by far.

b) Bilateral safeguards on agricultural products in regional trade agreements

The text of modern RTAs tends to preserve special safeguard rules applied to regional trade in agricultural products. Nevertheless, not all modern RTAs provide for details on the conditions and application of bilateral SSGs. As demonstrated below, the regulatory practice of agricultural safeguards in RTAs is very versatile and nearly no general trends can be detected. The sub-section below illustrates the most remarkable differences regarding special agricultural safeguards with Article 5 of the AoA. The choice of examples is based on the author's own judgement and is by no means exhaustive.

Scholars claim that most current RTAs utilise the volume-based SSGs with a very marginal use of price-based mechanisms.[115] One of the rare price-based bilateral SSG regimes is contained in the US – Morocco and US – Chile FTAs. Interestingly, Article 3.5 of the US – Morocco FTA provides different opportunities in the sense of bilateral SSG for Morocco and the US: Morocco is allowed to apply quantity-based safeguards on chickpeas, lentils, almonds, dried prunes, poultry and turkey, while the US is granted the right to price-based safeguards on certain fruits, vegetables and fruit juices if the price of those imports fall below the threshold, specified in the Schedules to the Agreement. This example shows that FTAs do not necessarily grant equal remedy tool kits for both RTA partners.[116] Evidently, such differentiation in means of emergency defence between the partners does not appear feasible within the multilateral trading system SSG mechanism.

The US – Chile FTA also introduces a price-based agricultural safeguard mechanism, available on 50 tariff lines. According to Article 3.18, those safeguards could be invoked by both Chile and the US in case the prices on certain agricultural commodities fall below the specified reference prices. Any differences between the price and reference price are used for the calculation of the additional duty, which could be applied up to the level of the MFN duty. Both parties may have recourse to the agricultural safeguards mechanism only during the transitional period of 12 years. It is interesting to compare Article 3.18 with the similar provision of the US – Morocco FTA, which states that the *sum* of the additional duty *and any other customs duty* shall not overcome the MFN rate. The US – Chile FTA makes no reference to the inclusion of any other customs duties into the duty margin calculation.

However, many RTAs do not contain detailed provisions on agricultural safeguards. The EFTA – SACU FTA does not specifically separate agricultural products, introducing the mechanism of emergency actions "on imports of particular products" (Article 19). The provision enacts volume-based safeguards only and, unlike the WTO rules on SSG, introduces the need to demonstrate

[115] Kruger, P., Denner, W. & Cronje, JB. Comparing safeguard measures in regional and bilateral agreements. ICTSD Programme on Agricultural Trade and Sustainable Development, 2009, p. 26.
[116] Hufbauer, G.C. & Baldwin, R. The Shape of the Swiss-US Free Trade Agreement, Washington: Institute for International Economics, 2005, p. 53.

the presence of serious injury or threat thereof as a prerequisite for a special safeguard. Other RTAs also include additional qualifications of the impact of the import surge on the domestic agricultural market, e.g., Article 16 of the EU – South Africa Trade, Development and Cooperation Agreement requires that the surge must "cause or threaten to cause a serious disturbance to the markets in the other Party".

Though it happens rather rarely, some of the RTAs allow the use of special safeguards in agro-trade without any limitations of the particular product imports which could be the subject of a safeguard measure.[117] Such broad application of SSG is most typical of the RTAs with the participation of the EU. The indicative instances of this approach are the already mentioned Article 19 of the EU – South Africa TDCA and Article 73 of the EU – Chile Association Agreement. The latter sets out an emergency safeguard clause for all agricultural goods if imports "cause or threaten to cause serious injury or a disturbance in the markets" of the importing country. This way to regulate bilateral agricultural safeguards seems to be based more on the provisions of Article XIX of the GATT and the ASG than on the AoA: the safeguard is not applied in an automatic fashion, does not define a trigger for its implementation and can cause compensation for the affected party.

Finally, there is no uniformity between RTAs on the interaction between bilateral 'general' safeguards and special agricultural safeguards in bilateral trade. Some RTAs explicitly provide for the availability of special safeguards on agriculture irrespective of the application of the general bilateral safeguard on the same product. Such possibility is prescribed by Article 13 of the Turkey – Croatia FTA and Article 16 of the Romania – Turkey FTA. The same interpretation could be inferred from the text of Article 3.12 of the Korea – Chile FTA: the special safeguards could be applied 'notwithstanding Chapter 6 of this Agreement' on bilateral safeguards. On the contrary, other RTAs exclude the simultaneous application of both regimes. One merely needs to mention Article 509.9 of the Thai – Australia FTA, which explicitly prohibits the use of special safeguards in respect of products "subject to a measure that the Party has applied pursuant to Article XIX of GATT 1994 and the WTO Safeguards Agreement or any other relevant provisions in the WTO Agreement or to a measure set forth in Articles 502-508 (general bilateral safeguards)".

The analysis above clearly demonstrates that the regulatory practice of special agricultural safeguards in RTAs is very diverse. No clear regional trends could be revealed, as the substance of SSG regimes in RTAs is usually tailored to reflect the most sensitive concerns of domestic farm producers. The Members do not usually tend to strictly follow the language of Article 5 of the AoA and sometimes significantly change the underlying principles of the SSG when implemented in a regional deal, such as the automatic application of an SSG or the limitation of the SSG grounds to volume-related reasons only. The failure of multilateral negotiations on SSM demonstrates the variation of views of the Members on the future of SSGs and thus the reluctance of RTA partners to harmonise their regulatory approaches regarding bilateral SSGs on agriculture.

[117] Kruger, Denner & Cronje, supra note 115, p. 29.

c) Agricultural safeguards in the CIS countries regional trade deals

None of the analysed 'first generation' bilateral FTAs, as well as the current CIS agreement, contain any disciplines on special agricultural safeguards in mutual trade. Articles 7-9 of the CU Agreement on the application of safeguards, antidumping and countervailing duties against third countries of 25 January 2008 have introduced nearly identical provisions on SSG to the provisions of Article 5 of the AoA. The 2003 Protocol on the application of safeguards, antidumping and countervailing duties in the mutual trade of the CU Members contains no specific rules on agricultural products.

The recent project of the new CIS FTA, released on 18 October 2011, has not introduced special agricultural safeguards in regional trade. The only specific rule on regional agricultural safeguards can be found in Article 10 of the Draft, which establishes the general framework of bilateral safeguards within CIS Members. Article 10.6 enshrines a shortened 15-day term for comments to be submitted by interested parties in a safeguard investigation in respect of agro-products (the term for non-agricultural goods is 30 days). In the same fashion, Article 10.7 shortens the time span between the public notice and consultations on the imposition of a bilateral agricultural safeguard to 30 days (60 days for non-agricultural products). These provisions clearly mean that the only defence from import surges in agricultural products available to CIS Members is the general regime on bilateral safeguards.

Interestingly, the Draft has touched upon the application of SSG by CIS countries – Members to the WTO. The proposed Article 3.5 reads as follows:

> "If a Party – Member to the WTO in accordance with Article 4.2 of the Agreement on Agriculture has converted the restrictive regulations of commerce into ordinary customs duties in its trade with the other WTO Members, such Party may apply special safeguards provisions of the Agreement on Agriculture. The order of the application of such special safeguard provisions between the Party and other parties to the current agreement – non-WTO Members shall be additionally settled by all parties to this agreement".

Among the potential parties to the new Draft, only Armenia, the Kyrgyz Republic, Moldova and Ukraine are WTO Members and thus would be eligible for this provision. Among these four, only the Kyrgyz Republic managed to reserve the right to apply Article 5 SSGs on wool products.[118] The other three WTO Members did not inscribe SSG.[119] The inclusion of this provision into the

[118] Schedule of Concessions of the Kyrgyz Republic, annexed to the Working Party Report on the Accession of the Kyrgyz Republic of 20 December 1998 (WT/ACC/KGZ/26).

[119] See, e.g., Working Party Report on the Accession of Ukraine of 16 May 2008 (WT/ACC/UKR/152), para. 391: "He also confirmed that Ukraine would not seek recourse to the special safeguard provisions (SSGs) of Article 5 of the Agreement on Agriculture." See also Schedule of Concessions of the Republic of Moldova, annexed to the Working Party Report on the Accession of the Republic of Moldova of 26 July 2001 (WT/ACC/MOL/37) and Schedule of Concessions of the Republic of Armenia, annexed to the

current version of the new CIS FTA may mean that the draft of the Accession protocol of the Russian Federation in its respective Schedules of Concessions has inscribed SSG symbol in respect of a number of agricultural products. Russian accession to the WTO and the need to prepare the regulatory framework for the Russian SSG regime in the CIS will ultimately result in CIS rules on special agricultural safeguards. Taking into account the current state of the Russian accession to the WTO, enactment of such CIS-wide rules may rise to the top of the agenda during the upcoming rounds of regional negotiations.

The above section analysed WTO rules on special agricultural safeguards and the practice of their implementation in modern RTAs. As seen above, the rules on regional agricultural SSG often differ from the rules of Article 5 of the AoA. As clear from the analysis above, WTO Members tailor the relevant provisional of their RTAs in order to effectively address the most sensitive issues of domestic agricultural policy. Further rounds of negotiations are likely to bring regional rules on SSG into existence in the CIS. However, in the current regulatory framework the CIS countries do not have any regional SSG regimes in force.

4.3. EMERGENCY ACTIONS ON BALANCE OF PAYMENTS GROUNDS

Balance of payments emergency actions (which go contrary to the general prohibition of quantitative restrictions in Article XI of the GATT) were first authorised by Article XII of the GATT. Article XII:1(a) of the GATT limits the available import restrictions to those necessary a) "to forestall the imminent threat of, or to stop, a serious decline in the monetary reserves" of the Member or b) in case of low monetary reserves available to an invoking Member. Both the GATT and the WTO institutionally incorporated the BOP Committee, which confirms the presence of the necessary preconditions to warrant the BOP restrictions. BOP restrictions do not form part of trade remedies. From an economic point of view, such measures are intended to give WTO Members additional instruments of fiscal and monetary policy to address BOP difficulties.[120] However, the history of the GATT demonstrates instances when BOP restrictions were used as a form of protection from increased imports instead of a safeguard.[121]

Both the original text of Article XII and its place in the GATT (between the two provisions on quantitative restrictions) favour the reading of the proviso as allowing BOP measures only in the form of quantitative restrictions. Increases in tariffs or import surcharges were not intended to be covered by the drafters of the Article.[122] However, between 1950 and 1970 several developed countries, including the US, Canada, France and the UK, implemented import surcharges to

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Working Party Report on the Accession of the Republic of Armenia of 05 February 2003 (WT/ACC/ARM/23).

[120] Jackson, J. World Trade and the Law of GATT, New York: Bobbs-Merrill Company, 1969, p. 674.

[121] General Council, Minutes of Meeting held in the Centre William Rappard on 31 January 1995 (WT/GC/M/1), sec. 7.A(1).

[122] Ibid., p. 313.

offset their BOP difficulties.[123] The GATT Contracting Parties responded to those moves in 1979 with the implementation of Declaration on Trade Measures Taken for BOP purposes, where the use of other trade restrictions (including tariff surcharges) for BOP goals was approved.[124] The Declaration has also determined the rules on the application of such BOP restrictions. According to para. 1, Members are obliged to apply only BOP measures of one type and are allowed to exclude 'less-developed' countries (LDCs and developing countries) from the measures.

Article XII establishes the preference of "those measures, which have the least disruptive effect on trade". The ground for the BOP measure invocation is determined to be an 'imminent threat' of a decline in monetary reserves or the need to reasonably increase the very low monetary reserves of a Member. Most notably, despite the nature of BOP threats, the GATT does not "require that the restrictions be applied across the board to all third countries or all imported products".[125] Finally, an alternative procedure to introduce BOP restrictions for developing countries was also fixed in Article XVIII Section B of the GATT. Though the procedures under Article XII and Article XVII do not differ fundamentally, the procedures of verification and justification of monetary reserve threats are less restrictive under Article XVIII.[126]

BOP rules are included in the list of the exceptions under Article XXIV:8 of the GATT; thus, RTA partners are allowed to preserve BOP restrictions in their mutual trade. That also means that the imposition of a BOP measure between RTA partners will not bring into question the SAT-compliance of the agreement.

Notably, all RTAs, which contain BOP concerns in regional trade, tend to use less stringent preconditions for the use of such measures as compared to the GATT. In addition, the BOP disciplines in most RTAs do not set out clear procedural rules on the verification of the existence of such preconditions. For instance, Article 60 of the Additional Protocol (Annex I) of the EU – Turkey Customs Union Agreement permits the application of 'protective measures' between the Parties if "*serious disturbances* occur in a sector of the [...] economy or prejudice its external financial stability, or if *difficulties* arise which adversely affect the economic situation in a region (emphasis added)".

Unlike the clear-cut distinctions between BOP measures and safeguards within the WTO, this distinction appears far less clear within a number of RTAs. The FTA between the Faroe Islands and Iceland in Article 22 states that "in case of serious balance of payments difficulties or imminent threat thereof for the Faroe Islands or Iceland the Contracting Party concerned may take appropriate measures under the conditions and in accordance with the procedures laid down in Article 23". Article 23 of the Agreement in turn establishes the procedure for the

[123] Horlick, G. & Dubec, E. 'Article XII GATT', in: Wolfrum, R., Stoll, P.-T. & Hestermeyer, H.P. (eds), *WTO – Trade in Goods, Max Planck Commentaries on World Trade Law*, Leiden: Koniklijke Brill, 2011, p. 305.
[124] Declaration on Trade Measures Taken for Balance-of-Payments Purposes of 28 November 1979 (L/4904).
[125] Horlick & Dubec, *supra* note 123, p. 307.
[126] Jessen, H. 'Article XVIII GATT', in: Wolfrum, R., Stoll, P.-T. & Hestermeyer, H.P. (eds), *WTO – Trade in Goods, Max Planck Commentaries on World Trade Law*, Leiden: Koniklijke Brill, 2011, p. 420.

imposition of bilateral safeguards. There is no explanation of the term 'BOP difficulties' there, nor does the provision introduce any additional prerequisites for the BOP restrictions. The same could be said about Article 26 of the Romania – Moldova FTA and Article 24.01 of the Panama – El Salvador FTA.

Finally, some of the RTAs extend bilateral BOP restrictions to trade in services only. Article 73 of the New Zealand – Singapore Closer Economic Cooperation Agreement allows the parties "in the event of serious balance of payments and external financial difficulties or threat thereof" to adopt restrictive measures in *trade in services* only, while restrictions on trade in goods in such occasions are allowed solely if those restrictions are allowed in accordance with the GATT 1994. A similar provision may be found in Article 86 of the Japan – Thailand FTA.

Restrictions for BOP purposes are also regulated within the CIS FTA. According to Article 13 of CIS FTA (noteworthy entitled General exceptions), nothing in the Agreement prejudices the right of any of the Contracting Parties to adopt restrictive trade measures related to the BOP concerns. The CIS FTA, as well as the RTAs discussed above, do not determine the concept of 'BOP concerns', nor refer to international standards (WTO or IMF). Furthermore, unlike in the WTO Declaration on Trade Measures Taken for BOP purposes, there are no limitations on the types of measures available and the combinations thereof. Finally, no obligation to hold consultations or even send notifications on the intentions to impose such measures is contained.

Nevertheless, the abuse of BOP-related emergency measures in bilateral trade remains a very tempting way to secure the protectionist actions. If such abuse happened, there would be no legal and institutional way to react to it. This concern has been most evident in the recent BOP restrictions imposed by Ukraine. On 04 February 2009 the Law of Ukraine "On Introducing Changes to Some Laws of Ukraine to Improve the Balance-of-Payments of Ukraine in Connection with the Global Financial Crisis" No. 923-VI introduced a temporary surcharge at the rate of 13% of the customs value of goods brought into the customs territory of Ukraine as imports, except for critical imports. In less than two weeks, on 18 March 2009, Ukraine eliminated the surcharge measures, except for imports classified under Ukrainian Customs Classification codes 8418 (refrigerators) and 8703 (passenger cars).[127] The WTO Members in the course of consultations held by the Committee on BOP restrictions noticed that "that the measures were not applied to the general level of imports but were restricted to only two product groups, refrigerators and motor vehicles, which accounted for 0.6% of Ukraine's tariff lines and 7.3% of its 2008 imports".[128] In view of the Members, "such a targeted application of import restrictions was difficult to justify and appeared to be a form of industrial policy aimed at protecting producers of refrigerators and motor vehicles".[129] The Committee concluded that the measures were not justified by Ukraine's BOP problems, in light of the Article XII of GATT 1994

[127] Committee on Balance-of-Payments Restrictions, Notification under Paragraph 9 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994, Communication from Ukraine of 09 March 2009 (WT/BOP/N/66).
[128] Committee on Balance-of-Payments Restrictions, Report on the Consultations with Ukraine of 29 June 2009 (WT/BOP/R/93), p. 13.
[129] Ibid.

prohibiting the imposition of BOP restrictions with protectionist aims.[130] As a result of fierce criticism of such BOP restrictions by WTO Members, on 07 September 2011 Ukraine eliminated the measures.[131]

The structure of the CIS FTA does not allow any institutional opposition to be raised against the restrictive BOP measures applied as *de facto* safeguards against selective products. The only leverage available within the CIS remains diplomatic and political.

Given all the political complexities of the region, it appears most beneficial to strengthen the BOP regulation in the text of the RTA. This understanding has been reflected in Article 16 of the recently released Draft of the new CIS FTA. The proposed provision is generally based on Article XII of the GATT: the provision introduces a compulsory notification system, and requires consultations to be held. Moreover, the Draft considers BOP trade restrictions to be the last resort, available only in case other measures to improve the financial situation (including foreign credits) were either not available, or did not help. All this demonstrates the desire of the drafters to avoid the abuse of BOP restrictions. However, the creation of an institutional body to monitor and/or approve such measures could provide additional security and contribute to the rule of law in the application of BOP restrictions within the CIS.

[130] Ibid, para. 32.
[131] Committee on Balance-of-Payments Restrictions, *supra* note 127.

Conclusions

Throughout the last decade regional trade agreements continued to multiply at a quick pace. Due to political, economical, legal and cultural reasons, regulatory differences in those RTAs kept growing equally quickly. The multilateral trading system has no tools to secure coherence between RTAs. However, in order to minimise the trade-distorting effects of regional arrangements, the multilateral trading system does establish a number of requirements an RTA should meet to be WTO-compatible. Emergency actions in the mutual trade of regional partners at first sight seem to have nothing in common with the multilateral trading system: they concern only RTA partners, and therefore should not trigger any concerns of all non-parties to an RTA. However, as discussed in this paper, this view is illusive and misleading.

The availability of bilateral safeguards in regional trade remains subject to the mandatory 'internal test' in Article XXIV:8 of the GATT. There is no doubt that bilateral safeguards do amount to 'duties and other restrictive regulations of commerce' subject to general elimination within the regional agreements. However, the exhaustive nature of the exceptions list has not been clearly established in WTO jurisprudence, which seems highly regrettable from both a substantive and procedural point of view. It is suggested that the list of exceptions should be treated as exhaustive, with bilateral safeguards intentionally excluded from it.

The text of Article XXIV:8 limits the general elimination requirement to the SAT threshold, which has been interpreted by WTO jurisprudence to have both quantitative and qualitative aspects. The current paper does not agree with some scholars, proposing that bilateral safeguards (as well as all other trade defence instruments) should be eliminated in the mutual trade of RTA partners for good. This formalistic interpretation is not supported by the negotiations history of Article XXIV:8. Moreover, it overlooks the vast state practice on the inclusion of bilateral safeguards in the texts of their RTAs. The paper argues that this state practice cannot be disregarded and should be taken into account under Article 31.3 (b) of the VCLT.

The horizontal analysis of the provisions on bilateral safeguards within RTAs has confirmed that there are two general tendencies in the regulation of such measures. One trend, typical of the US, Canada, Australia, Chile and Singapore, is strengthening the disciplines on regional safeguards as compared to Article XIX of the GATT and the ASG. Such agreements contain stricter prerequisites for the invocation of bilateral safeguards and limit the period of their applicability. Bilateral safeguard mechanism in EU-centred RTAs, on the contrary, tend to provide maximum flexibility to the parties in respect of bilateral emergency actions.

Chapter 3 of the paper analysed the implications of WTO rules for RTAs between the CIS states. The CIS region remains a tricky entanglement of different rules and regimes, most of which were instituted based on political and not economic rationales. The only regional agreement, containing specific rules on safeguards in mutual trade of the Parties is the 2000 Protocol agreed upon under the auspices of the EurAsEC CU. The Protocol generally copies the disciplines of the ASG; however, it introduces both positive and negative changes.

Additional requirements to consider all available alternatives before imposing a safeguard measure should be praised as a viable attempt to reduce the incidence of trade-distorting bilateral safeguard measures. However, there is no limitation on the time span for the provisional measures application, as well as no due deference given to the developing status of regional partners. These shortcomings should be corrected in the further work on the review of the Protocol.

It is also suggested in this paper that regional agreements between WTO Members and WTO non-Members cannot be notified to the WTO under Article XXIV, and are not eligible for the MFN-exemption provided there. Notification of these agreements under the Enabling Clause could benefit the RTA partners as giving them more freedom in the imposition of bilateral safeguards. Nonetheless, the Enabling Clause also appears inapplicable to RTAs with non-Members. The current paper advocates the view that all such RTAs should be examined by WTO Members and justified under Article XXV of the GATT. The history of the application of this provision demonstrates that WTO Members were generally liberal in granting MFN waivers to the preferential arrangements between countries maintaining long-standing historical, cultural and economic and political linkages. For the RTAs between the CIS countries – WTO Members, it is proposed to re-notify such bilateral agreements under the Enabling Clause in order to escape the high SAT test of Article XXIV of the GATT and have additional flexibilities to employ safeguards in bilateral trade.

RTAs, as well as the WTO Agreements, establish special safeguards regimes applied to the most sensitive sectors of mutual trade. Those special rules have not been reflected in any of the CIS Agreements but may emerge there with further trade liberalisation as a way to secure the adaptation of domestic business to the new trade environment. An example of the special regime being phased out both on a multilateral and on a regional level are special safeguards rules for trade in textiles and clothing. Within the WTO, special safeguards in textiles were abolished in 2005. Some of the RTAs still contain special rules on textiles trade, but most of these rules have been deemed to lapse with the expiry of the transition periods of these RTAs. Special safeguards on agricultural products, on the contrary, are proliferating within RTAs worldwide, with the regulatory practices differing significantly in different RTAs. As shown above, Members do not tend to restrict the use of agricultural safeguards in mutual trade in the same way it was done for global trade in Article 5 of the AoA. With further trade liberalisation, agricultural safeguards are likely to emerge in the CIS bilateral trade, and their design would predominantly depend on the most responsive agricultural businesses, lobbying to obtain added protection from governments. Finally, contrary to the logic of the GATT, some RTAs do not differentiate significantly between general safeguards and emergency actions for BOP reasons. This situation is regrettable. The protectionist use of BOP-related restrictions as *de facto* safeguards should be specifically prohibited by RTAs. Such a prohibition appears distinctively relevant to the CIS region, taking into account the recent BOP emergency measures imposed by some of the major regional players.

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