Regional Safeguard Measures: An Incentive to sign Regional Trade Agreements without taking into consideration the special needs for Developing Countries

Elenor Lissel, PhD Student, Faculty of Law, Lund University
September, 2011

Keywords: Safeguard Measures, Regional Trade Agreements, International Trade, Trade Barriers, Developing Countries

Introduction

This paper seeks to provide a brief presentation of safeguard measures in regional trade agreements (RTAs) and how these relate to developing countries. The purpose is also to examine whether regional safeguard measures are different from global safeguard measures and if the possible differences entail any conflict of norms. In order to answer that question, some RTAs have been investigated and compared, with a special emphasis on the Association of Southeast Asian Nations (ASEAN) and the Economic Partnership Agreements (EPAs). The methods for this study are the traditional legal method, i.e. examining the relevant law and making legal arguments and the comparative method where different aspects of the law are examined. The respective regulations of safeguard measures in various RTAs are examined in relation to each other as well as to global regulation, i.e. WTO law.

---

1 Some authors speak of preferential trade rather than regional since a large number of agreements are not limited to countries within a single region. This study use the term “regional”, though not making any limitations on the parties to the agreements beside the fact that it should involve two or more parties.
2 I.e. safeguard measures according to WTO law.
3 Parts of this paper are parts of a dissertation project called “Developing countries and emergency safeguard measures in world trade law” by Elenor Lissel, which is expected to be finalised during 2012. As part of the project, two field studies have been carried out in Vietnam and Botswana, which are parties to the ASEAN as well as the EPA.
Safeguard measures according to WTO law

According to Article XIX GATT and the Agreement on Safeguards, WTO Members can take safeguard actions in the form of temporarily restricting imports of a product in order to protect a domestic industry producing the same good from an increase which is causing or threatening to cause serious injury. The possibility of employing emergency safeguard measures in international trade should be seen as a safety valve to be used only temporarily. They are intended for situations where a sudden increase in imports of a certain product has unexpected effects in a WTO member, such as forcing domestic enterprises out of business or an increase in unemployment rates in a particular sector of trade or industry. Without this safety valve WTO Members would be prevented from taking action due to their general commitment not to raise tariffs and not to introduce quantitative restrictions.

Before the Agreement on Safeguards, two views existed on Article XIX. One class of observations viewed the “escape clause” as a way to restore competitiveness or to facilitate orderly contraction in declining industries i.e. an ex ante cause. The other observation viewed the “escape clause” as an ex post safety valve for protectionist pressures. Due to the linkage between ex post protection and ex ante liberalization there were moves for the improvement of Article XIX. However, without the clause, greater protection could arise in the form of direct legislation to protect injured industry. The purpose of the Agreement on Safeguards is to clarify and reinforce Article XIX GATT as well as other GATT disciplines; restore multilateral control over safeguards and eliminate all measures that are not included in the Agreement and lastly support structural alterations on the part of industries negatively affected by increased imports.

Emergency actions are clearly supposed to be used as a response to extraordinary events. This can be confirmed by the fact that no such actions have been found to be consistent with WTO law which aims to restrict the use of trade barriers. One of the reasons for this state of affairs is said to be the complex requirements linked to the

---

application of such measures. In the dispute *US-Line Pipe* the Appellate Body considered two questions on the application of safeguard measures namely: (i) Is there a right to apply a safeguard measure and (ii) if so, has that right been exercised, through the application of such a measure, within the limits set out in the treaty? The Appellate Body recognised that there is a tension between the appropriate scopes of the right to apply safeguard measures and ensuring whether safeguard measures are not applied against fair trade beyond what is necessary to provide extraordinary and temporary relief.\(^7\)

The availability of global safeguard measures is supposed to encourage countries to increase market access and perhaps in the long run enhance the overall development strategy. The regulatory framework for international trade should allow developing countries to adopt effective development policies, which are defined in the WTO. But how is this dealt with in regional trade? Do regional safeguard measures provide a better route for developing countries or do the difficulties in their application remain?

**Comparing global and regional safeguard measures**

The most recently concluded regional trade agreements have provisions on safeguard measures, which are practically identical to the global (WTO) safeguard measure, but they only deal with the effects of the regional agreement. This means that it is only the parties that can invoke these so called regional safeguard measures.\(^8\) However, as will be presented below, RTAs can consist of both regional safeguard measures and global and other measures. As an example of a difference between global and regional measures though,\(^9\) the regional safeguard clause in the RTAs is not as restrictive as the global measures. One of the reasons for this is that the application of global safeguard measures requires proof of a causal linkage between import surges and injury caused to the domestic industry, as will be elaborated below.\(^10\)


\(^9\) Global in this sense means safeguard measures according to WTO law, i.e. GATT Article XIX, Agreement on Safeguards, Agreement on Agriculture Article V and lastly the newly discussed SSM.

The main difference, though, between global and regional safeguard measures is that a global safeguard measure which takes the form of suspension of concessions or obligations can consist of quantitative import restrictions or of increases in duties to levels higher than the bound rates. According to the Most Favoured Nation (MFN) principle, any advantage (such as a lower customs duty rate for one product) granted by any contracting party means that it has to be the same for all other WTO members. Two of the exceptions to the MFN principle are regional (or bilateral) trade agreements and safeguard measures. This indicate that regional safeguard measures, however, can be applied up to the level of the MFN rate and consist of tariff increases, reductions, suspensions or withdrawals from the applied rate. As a conclusion, parties to an RTA can apply customs duties lower than the MFN rate and that global safeguard measures can be applied at levels above the MFN rate.\(^{11}\) Interestingly, due to the already low MFN rates, the increase of RTAs means that the difference between the MFN rate and the rate between the Members of the RTAs exaggerate the competitive advantage of the latter. Also, gradually more its competitors will also enjoy access to that market.\(^{12}\)

Regional safeguard measures are divided into three categories:

(i) disallowed,

(ii) allowed but with no specific provisions or

(iii) allowed and with specific provisions.\(^{13}\)

This means that some RTAs do not allow for safeguard measures, like the ones, for example, between the members of the EU as well as the members of SACU, which are both custom unions.\(^{14}\) Others allow for safeguard measures but have special provisions as well.

A template is introduced in Teh’s, Prusa’s and Budetta’s article where the three above categories are explained in more detail. Below we speak of a regional safeguard template instead of a bilateral one.\(^{15}\)

---

\(^{11}\) According to the Agreement on Safeguards, Article 5, safeguard measures shall be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The level of duties applied according to the new SSM is still debated.


\(^{14}\) The European Union and the Southern African Customs Union.
<table>
<thead>
<tr>
<th>Regional safeguards template[^16]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Elements</strong></td>
</tr>
<tr>
<td>1. Safeguard measures disallowed</td>
</tr>
<tr>
<td>2. Safeguard measures allowed but with no specific provisions</td>
</tr>
<tr>
<td>3. Safeguard measures allowed and with specific provisions</td>
</tr>
<tr>
<td>a Conditions for application of safeguards</td>
</tr>
<tr>
<td>- increasing imports causing serious injury to domestic industry</td>
</tr>
<tr>
<td>- during transition period, reduction in tariffs lead to increased imports and to serious injury</td>
</tr>
<tr>
<td>- other</td>
</tr>
<tr>
<td>b Mutually acceptable solution</td>
</tr>
<tr>
<td>c Investigation</td>
</tr>
<tr>
<td>d Application of safeguard measures</td>
</tr>
<tr>
<td>- only to the extent necessary to remedy serious injury and facilitate adjustment</td>
</tr>
<tr>
<td>- suspend concessions, tariff reduction or revert to MFN</td>
</tr>
<tr>
<td>- other</td>
</tr>
<tr>
<td>e Provisional measures</td>
</tr>
<tr>
<td>f Duration and review of safeguard measures</td>
</tr>
<tr>
<td>- duration less than four years</td>
</tr>
<tr>
<td>- not allowed beyond transition period</td>
</tr>
<tr>
<td>g Maintain equivalent level of concessions (Compensation)</td>
</tr>
<tr>
<td>h Suspension of equivalent concessions (Retaliation)</td>
</tr>
<tr>
<td>i Regional Body/Committee</td>
</tr>
<tr>
<td>- conducts investigations and decides on safeguard duties</td>
</tr>
<tr>
<td>- review/remand final determinations</td>
</tr>
<tr>
<td>- other</td>
</tr>
<tr>
<td>j Notification and consultation</td>
</tr>
<tr>
<td>k Special safeguards</td>
</tr>
</tbody>
</table>

[^15]: Robert Teh, Thomas J. Prusa and Michele Budetta speak of bilateral safeguard measures which here are translated as regional, see footnote 1.

The global safeguard measure within regional trade agreements consists of only one level where it refers to the Agreement on Safeguards and/or GATT Article XIX. The regional measure is triggered by a different mechanism, often involving price and/or quantity thresholds.\(^{17}\)

Furthermore, apart from regular regional safeguards, there are two other kinds of regional safeguards (i) transition safeguards or (ii) special safeguards. Transition safeguards are used while adjusting to preferential tariffs and are applied during a transition period. Special safeguards are aimed for politically sensitive products or sectors as indicated above. There is no equivalent WTO provision allowing such default behaviour as antidumping or subsidies to be covered by safeguard measures, so the RTAs often use broad language for the use of safeguard measures.\(^{18}\)

Some studies have divided the different clauses in RTAs on safeguard measures between WTO, NAFTA, GATT and European types.\(^{19}\) However, as mentioned above, it is the level of trade liberalization within each agreement that needs to be assessed for an overall understanding. If examining safeguard mechanisms from a negative impact point of view, the result would be that they only reflect the interests of politically powerful import competitive industries (or countries) which do not act in favour of free trade. When examining the positive functions which go beyond just restricting trade, they can be simply assessed after examining the results of a trade-off between negative and positive impacts.\(^{20}\)


The importance of regional safeguard measures

Before examining different agreements one important question needs to be asked, namely: Why do trade agreements need safeguard measures at all?

An example is the effect on Indonesia after signing the ASEAN China Free Trade Agreement (ACFTA). Indonesia expressed some concerns about the risk of import surges from China after signing the ACFTA which could lead to injury to domestic producers of similar products. Indonesia therefore tried to renegotiate the deal with all parties, but with no luck to date. Import duties on more than 6,000 types of Chinese goods were removed as from 1 January 2010 in accordance with the agreement and it is feared that Indonesian industry will collapse in the near future.\textsuperscript{21} Exports such as coconut, rubber and coffee might increase due to the agreement but electronics, steel and food industry might decrease. The reason is that poorly competitive domestic producers that sell their products in the domestic market will have to compete with similar but cheaper goods from China.\textsuperscript{22} Even before the agreement came into force, imports from China of machinery and mechanical appliances as well as electrical machinery and equipment had increased by more than 50 per cent between 2004 and 2008.\textsuperscript{23} One of the tools for preventing injuries of this kind is the safeguard measure which is applicable through a safeguard clause in the above mentioned agreement. The ACFTA includes global safeguard measures, transitional and general regional measures.\textsuperscript{24} Global measures cannot be applied at the same time as regional measures and the latter must also offer compensation. Article 3.8 of the ACFTA also provides for safeguard measures in the framework agreement:

\begin{itemize}
\item \textsuperscript{21} \textit{The Jakarta Globe}, Get ready for Asean-China free trade pact: Indonesian Industry Minister, 26-November 2009, the Indonesian newspaper online, the Jakarta Globe daily newspaper at: http://thejakartaglobe.com/business/get-ready-for-asean-china-free-trade-pact-indonesian-industry-minister343855, visited on 28 November 2009.
\item \textsuperscript{22} Firman Mutakin dan Aziza Rahmaniar Salam, The impact of ASEAN-China Free Trade Agreement on Indonesian Trade, Economic Review, No. 218, December 2009, page 1. The authors are staff of Trading Department of Indonesia.
\item \textsuperscript{23} Firman Mutakin dan Aziza Rahmaniar Salam, The impact of ASEAN-China Free Trade Agreement on Indonesian Trade, Economic Review, No. 218, December 2009, page 6-7.
\item \textsuperscript{24} Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China.
\end{itemize}
“…safeguards based on the GATT principles, including, but not limited to the following elements: transparency, coverage, objective criteria for action, including the concept of serious injury or threat thereof, and temporary nature”.  

Article 9.3 in the Trade in Goods Agreement between ASEAN and China unifies the rules on initiating safeguard measures included in GATT Article XIX and Article 2 in the Agreement on Safeguards. However, the rules under ACFTA are less restrictive than those under GATT and the Agreement on Safeguards, while some other agreements tend to go the opposite way. For example, an ACFTA safeguard measure can only be initiated during the transition period of that product. Also, the use of quantitative restrictions is prohibited. The Trade in Goods Agreement does not allow for the requirements imposed on quantitative restrictions in Article 5 of the WTO Agreement on Safeguards. The Agreement also contains a limit on the maximum tariff level.

One reason for allowing safeguard measures is said to be the political economy of protectionism in that it is a tool to deal with the effects of trade liberalization. The latter may lead to modification costs. There is also, as mentioned, a theory where the actual use of measures might result in ex post losses but the intensity of the liberalization that can be accomplished by the agreement ex ante is dependent on whether there exist “escape clauses” in the first place. If there is too much flexibility in the agreements, the credibility in them could be undercut, leaving agreements with few or no benefits. If safeguard measures are included in the agreement, there is a risk of relative welfare

26 Simon Lester and Bryan Mercurio (ed), Bilateral and Regional Trade Agreements, Case studies, Cambridge University Press, (2009), page 205.
28 Simon Lester and Bryan Mercurio (ed), Bilateral and Regional Trade Agreements, Case studies, Cambridge University Press, (2009), page 205.
29 Ibid, page 206 and Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China, Article 9.3.
loss since the industry expects their government to use safeguard measures if needed. But, again, if included they can facilitate greater tariff concessions. One of the requirements for using global safeguard measures is “unforeseen developments” (which will be attended to again below) which mean that safeguard measures provide a form of insurance against adverse economic disclosure. Safeguard measures have also been described as a way for large countries to force other countries to maintain cooperation by temporarily raising tariff levels. Smaller countries rather use safeguard measures as a tool to insure themselves against international price fluctuations. The distinction between smaller and larger countries can also be made between importing and exporting countries as well.

Bilateral or regional safeguard measures facilitate the examination of their nature and effect on free trade, in contrast to other trade remedies (i.e. antidumping measures and countervailing duties). The different regional safeguard measures disclose characteristics in accordance with their political and economic backgrounds, as will be shown below where several agreements are investigated, some more thoroughly and others more superficially. The EPAs are covered more thoroughly as is the ASEAN. The following section cannot cover all regional or bilateral trade agreements but rather attempt to portray the complexity surrounding these constellations.

The object and purpose of regional safeguard measures

The purpose of the agreements considered should be to facilitate trade between the constituent territories and not to raise barriers which entail the removal of discriminatory treatment e.g. excluding trade defence measures or trade remedies such as safeguard measures. It is not clear though whether the provisions of GATT Article XXIV view the elimination of trade defence measures as a requirement. However, as

---

37 For more information on the relation between Article XXIV GATT and the existence of safeguard measures in regional trade agreements, see Elenor Lissel, The application of safeguard measures: a South-East Asian and Sothern African perspective, tralac, August 2010 or the upcoming Developing
mentioned, most RTAs are dependent on an “escape clause” in order to provide more liberalization in general. Import-competing sectors can be very vulnerable and need some kind of assurance that they have the means to defend themselves from the “unforeseen developments” of the regional liberalization arrangement. Global safeguard measures are to be applied on a special and limited basis as mentioned above; while regional measures have to derive from the additional trade liberalization provided by the RTA if they are to be applied at all. This means the purpose of a regional safeguard measure is different from a global measure as it addresses the specific results of additional liberalization. If the injury is not the result of such liberalization, then it is not the purpose of the regional measure to deal with it. The proposed Special Safeguard Mechanism (SSM, which is being negotiated in the Doha round) is said to be used either as an emergency measure for poor and vulnerable farmers and should thus be easier to use or it should be viewed as a means of helping liberalization and thus used more restrictively. This distinction can also be made between the safeguard measures in accordance with WTO law and RTAs.

Requirements for using regional safeguard measures

As with global safeguard measures, there are certain specific requirements that have to be met before applying regional safeguard measures. However, the requirements differ between the different measures. As examples, the RTAs signed between the EU and the African, Caribbean and Pacific (ACP) States (EPAs) as well as the ones signed between ASEAN as the one part and other parties on the other have been examined more closely so far as concerns the requirements for using safeguard measures. The relevant provisions have been compared to the requirements under WTO law. However, other regional trade agreements have been considered in order to provide a further comparison when needed.

Countries and Emergency Safeguard Measures in World Trade Law, by Elenor Lissel.


Unforeseen developments

Article XIX states that in order to impose a safeguard measure unforeseen developments must have occurred. This is not mentioned in the Agreement on safeguards, but as stated earlier it is still applicable law according to the WTO Dispute Settlement Body (DSB).

None of the EPAs mention unforeseen developments and the only ASEAN agreements that mention it are the AFTA and the ASEAN-Korea FTA. However, only Article XIX GATT provides for such a requirement. Nonetheless, the Appellate Body in *Korea – Dairy Products* determined that a clause in Article XIX not included in the Agreement on Safeguards is still a legal requirement for the application of the measure. Members who wish to apply a safeguard measure must demonstrate the existence of unforeseen developments in order to justify the use. Lee has questioned this since the clause is too ambiguous to form an objective legal requirement. There is also no clear standard to determine the existence of unforeseen developments and it does not seem to serve a useful purpose since the availability of safeguards should encourage Members to increase market access. In that sense, it is positive beneficial for all partners to regional trade agreements to exclude the requirement.

Increased quantities

When applying global safeguard measures there must also be an assessment whether the increase in imports is “recent enough, sudden enough, sharp enough, and significant enough both quantitatively and qualitatively,” to cause or threaten to cause serious injury to the domestic industry. This distinction is not mentioned in the regional trade agreements but all of them mention increased quantities as a requirement.

---

41 ASEAN Trade in Goods Agreement, Cha-am, Thailand, 26 February 2009, Article 20.2, and the Agreement on Trade in Goods under the Framework agreement on comprehensive economic cooperation among the governments of the member countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 9.3.
The imposition of global safeguard measures should be as a result to an “emergency” situation in the importing WTO Member. Nothing seems to be different in the RTAs since the reason for “escape clause” is to be capable of withdrawing from liberalization in exceptional circumstances. Examples of trends that could be taken into consideration when estimating the imported products share of the domestic market are e.g. those related to changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment. 45 In cases where global measures have been involved as in Argentina - Footwear (EC) - the question was whether the “increase” should be determined in relation to quantities or value.46 The panel emphasised that the rate as well as the amount of the increased imports need to be established both in absolute terms and as a percentage of domestic production.47

Serious injury

According to the Agreement on Safeguards (SA), when determining injury, an assessment is made as to whether increased imports have caused or threatened to cause serious injury to the domestic industry producing the like or directly competitive products. The difference between the SA and regional trade agreements is that the latter often have a wider application: this is especially the case with the European RTAs. The ASEAN agreement does not include any wider definition on injury, while the EPAs elaborate on the point as do other regional agreements where the EU is a party. The SA states that an injury has to be classified as a serious injury or giving rise to a threat of serious injury. In several regional trade agreements, such as the EPAs, Cotonou, GSP and EU-Chile the agreements talk only of injuries as disturbances and difficulties. This indicates that it is easier to prove the application of measures in regional trade than in fully multilateral trade when performing the injury test. In regional trade the member countries have further opened their markets to other WTO Members. The strategy is to relax the requirements for invocation while the regulations on applying the measure remain rather strict.48

Article 21 in the GSP calls for serious difficulties but the EU and Chile Agreement, EPAs and Cotonou regulations describe the injury needed as serious injury. However the other agreements talk of various disturbances in the market or in the mechanism that regulates the market as other kinds of injuries.\(^4\) The Cotonou Agreement covers disturbances in any sector of the economy or difficulties that can make the economic situation worse.\(^5\) In the EU and Chile Agreement, serious injury or disturbance in the market are criteria for introducing agriculture safeguards but this is not mentioned in the general clause on safeguards.\(^6\)

The Cotonou Agreement and the EPAs have similar wording that leaves much space for interpretation. It is not clear what is meant by or where the limit falls with disturbances, major social problems, difficulties and serious deterioration. Also “mechanism regulating those markets” is questionable since it is not clear which countries even have these regulations. The key difference between the agreements is that in the EPAs, any party has the right to invoke the measures, but in the Cotonou it is only the European Community that has that ability. The term “difficulties” can nevertheless be easy for a country to use as an excuse to invoke measures, but it can be difficult for the targeted countries to show that they do not contribute to these difficulties. These requirements can still be seen as improving flexibility and together with infant industry protection providing for pro-development aspects.\(^7\)

The agreement “Global System of Trade Preferences among Developing Countries” (GSTP) also includes a clause on safeguard measures.\(^8\) Many developing countries in Africa, South America, West Asia, Caribbean, Europe, East Asia, Middle East and Central America are part of the agreement. According to Article 13(1), the possibility of invoking safeguards measures stems from the injurious consequences of unforeseen

---


\(^6\) Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, (30 December 2002), L 352/45, Article 73.


\(^8\) Date of entry into force; 19 April 1989 and notified to the WTO in September 1989. The WTO legal cover for the agreement is the Enabling Clause.
substantial rise of imports enjoying preferences under the GSTP. The injury must be clearly demonstrated to the parties concerned and before any action is taken, consultation is generally required. Dispute settlement is called for when it comes to the interpretation and application of the provisions and in the event of failure the Committee will review the matter.

Article XIX and the SA provides that an injury test must be performed in order to impose safeguard measures, while the Special Safeguard in the Agreement on Agriculture (SSG) and SSM do not. None of the ASEAN or AFTAs suggests that an injury test has to be performed nor do the EPAs. The EU-CARIFORUM Article 25.1 states that alternative solutions have to be examined before applying safeguard measures. Also, the EU-CARIFORUM Article 25.7 states that the CARIFORUM-EC Trade and Development Committee may make any recommendation needed to remedy the circumstances which have arisen.

As indicated above it is most likely easier to prove injury in the RTAs than according to WTO law since the element of discretion is so much wider. However, some developing countries do not have the capacity to perform the investigation and thereby have difficulties with the injury test. Nevertheless, member countries have opened their markets more widely in regional trade agreements than towards other WTO Members generally. The requirements for invoking a regional measure are as indicated more relaxed than those called for by the WTO.

Causation requirement

In the SA there is a requirement for a causal linkage in Article 4.2 (b) but none of the ASEAN agreements or the EPAs mentions this. However global safeguard measures are applied in the same manner in the RTAs as under the WTO law.
Other provisions

Transparency

Some agreements mention transparency in terms of what documents should be given to the Committee, while a smaller number (for example the Cotonou agreement) mention the information that has to be presented to the parties.

According to the EPAs all relevant information is to be given to the Joint Committees while the Cotonou states that the Community shall give all information asked for to the ACP countries (article 9.1).

The ASEAN-Australia New Zealand FTA mentions that the parties shall provide public versions of the report and that the targeted party shall be given evidence supporting the findings. Other agreements such as the ACFTA state that the WTO Agreement on Safeguards shall, \( mutatis mutandis \), be incorporated into and form an integral part of the Agreement which could indicate that there should be some kind of transparency.\(^{54}\) Within ASEAN disputes can be solved in various ways but the whole proceedings in the dispute are confidential and the reports are not enforceable in national courts. The practice of transparency does not seem to have the same importance in the ASEAN as compared to the EPAs.

Time limit for safeguard measures

According to the SA, the time limit for applying a measure is “necessary to prevent or remedy serious injury” but not exceed four years while some agreements have a more precise limitation in years. Developing countries also have extended time limit in the SA.

Neither the GSP nor the Cotonou state any limit in the use of safeguard measures. The EPAs have different time limits. According to the EU-CARIFORUM Article 25.6 the normal time limit is two years which can be extended by two years. If a CARIFORUM state uses a safeguard measure it can be for four years extendible by another four years.

\(^{54}\) Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China, Vientiane, (29 November 2004), Article 9(6).
If the Community uses a safeguard measure limited to the outermost regions in the Community, it has the same limits. There is also a limit of ten years from the establishment of the agreement if a CARIFORUM state introduces a safeguard measure towards the Community when the latter causes injury or threatens to cause injury to an infant industry that produces a like product. Some of the EPAs also allow for extensions of the period due to the world economic situation or troubles affecting the particular developing country.\(^{55}\)

**Compensation or retaliation**

One thing that could prevent developing countries from using safeguard measures is the compensation or retaliation which is required under the Agreement on Safeguards.

Many RTAs specify that the safeguard investigation must be notified to a joint committee and that consultations may follow between the parties where other solutions may be proposed. This procedure might not reduce the application of remedies de jure, but it is more likely to do so de facto. Being a member of a RTA makes a unilateral act more like a tactful trade negotiation which might restrain certain members from taking action.\(^{56}\) These clauses on joint committees flourished after the year 2000 and according to Teh, Prusa and Budetta are common in RTAs with the EU.\(^{57}\)

The ASEAN-Australia New Zealand FTA and the ACFTA include provisions for compensation by calling for substantially equivalent level of concessions or other obligations between the Party applying the measure and the exporting country. The EPAs only mentions compensation in relation to intellectual property rights provisions.

---

\(^{55}\) The EU-Ghana allows for an extension, Central Africa is given 15 years extra protection, Botswana, Namibia and Swaziland are also given 15 years as well as a possible extension. 15 years for LDCs in Eastern and Southern Africa and up to 20 years in order to promote development of productive and sustainable industries with a view to raising the general standard of living of the people for some countries in the Pacific. In the Pacific there is also a *de minimis* rule on imports from the EU of 3 per cent.


Special provisions for developing country members in ASEAN and EPAs

The Agreement on Safeguards has special and differential treatment towards developing countries both when applying safeguard measures and when subjected to them. This is however not the general principle in regional trade agreements. The Cotonou Agreement states that special treatment will be given towards least developed countries, landlocked countries and ACP islands. In GATT Article XIX there is a special limit when calculating shares of imports. Agreements signed under the Enabling Clause do provide for special treatment (such as the GSP) since it is supposed to provide differential and more favourable treatment to developing countries. Article XXIV however, is supposed to provide the framework under which free trade areas and customs unions are endorsed as being in accordance with the WTO. Interestingly, however, the most common experience for developing countries is that little trade creation occurs, imports coming from other RTA Members rather than from world markets.58

In the various ASEAN free trade agreements, there are rules indicating a pro-development perspective. In the AFTA, the members of the Australia-New Zealand Closer Economic Relations Trade Agreement (AFTA-CER), the ASEAN-India economic cooperation, ASEAN-Japan, ASEAN and the Government of the Russian Federation and ASEAN – Republic of Korea Free Trade Area it is stated in the various preambles that the different stages of economic development among ASEAN Members States are recognized and considered. New members are especially in need of attention, these being Cambodia, Lao PDR, Myanmar and Vietnam. The ASEAN – Australia New Zealand FTA also includes special and differential to facilitate their more effective economic integration.59 ACFTA as well as the ASEAN-Australian New Zealand FTA also allows special treatment for developing countries by not applying measures if the share of imports of the product concerned in the importing member does not exceed 3 per cent - which is similar to provisions in the Agreement on Safeguards. The ASEAN-Korea FTA also includes a provision regarding de minimis exceptions of 3 per cent of total imports.60

59 Agreement establishing the ASEAN-Australia New Zealand Free Trade Area, Article 1.
60 Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian
In the EU-CARIFORUM article 24 on global (multilateral) safeguards, the text announces that safeguard measures may be applied in accordance with GATT article XIX and the Agreement on Safeguards as well as the WTO Agriculture Agreement.\textsuperscript{61} According to Article 24.2, the measure on imports will however be excluded due to the level of development of the CARIFORUM countries and the size of the economies in the region. This will be limited to a time period of five years but the transitional exclusion will be reviewed before the end of the five year period. Article 24.4 states that the Article shall not be subject to dispute settlement according to the last agreement which means that it will not be subject to the WTO dispute settlement system. All EPAs have a similar approach to global safeguards.\textsuperscript{62} In the Council Regulation applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of EPAs from December 2007, certain development aspects are also mentioned.

According to the WTO Dispute Settlement Body, safeguard clauses should be applied in extraordinary circumstances which is a narrower approach than the one the EU-CARIFORUM or most other regional trade agreements provides. In exceptional circumstances moreover, instant measures can be applied without being handled in the joint committees. These can be applied for 180 days if the Union applies them or 200 days if the other party applies the measure.

\textsuperscript{61} Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, L 289/1/4 Official Journal of the European Union 30.10.2008.

\textsuperscript{62} Stepping stone Economic Partnership Agreement between Côte d’Ivoire, of the one part, and the European Community and its Member States, of the other part, L 59/10 Official Journal of the European Union 3.3.2009.


Council Decision on the signature and provisional application of the Interim Partnership Agreement between the European Community, of the one part, and the Pacific States, of the other part, Brussels, 26 June 2009.
Other EPAs do not provide for special and differential treatment for its lesser developed countries as the EU-CARIFORUM does. The EU-CARIFORUM also has one of the longest transition periods.\textsuperscript{63}

**Agricultural safeguard measures**

In developing countries, agriculture’s contribution to total exports is often quite considerable. However, their proportion of world trade tends to be very small which might be explained by the use of trade barriers such as sanitary and phytosanitary measures, i.e. standards of production. Tariffs are being reduced on all products and lower tariffs have on some occasions led to an overflow of food imports, as when subsidized tomato paste from Italy which destroyed Ghana and Senegal’s tomato producers and subsidized Dutch poultry demolished small chicken farmers in the same countries. Some RTAs go even further when reducing tariffs. One would thus assume that safeguards should play a considerable role in developing countries, especially in the agricultural sector. Such measures, in the form of raised tariffs, are often the only border measure, developing countries can use to safeguard their farmers’ interests when price falls or import surges occur, as explained above in the case of Indonesia and Chinese imports. Developing countries that are attempting to develop their agricultural potential and expand production are very vulnerable to external shocks and they often lack instruments to deal with risk situations. When reducing trade barriers or tariffs, these countries become exposed to the general instabilities of the external agricultural market and to import surges.\textsuperscript{64} However, many RTAs do not include special safeguards on agriculture.

Some regional trade agreements such as the North America Free Trade Agreement (NAFTA) and the agreement between the EU and Chile have provisions on agricultural safeguards. These agreements include product scope, remedies, transparency, requirements and the mechanism for activation.\textsuperscript{65} Other agreements that include a kind of special safeguard mechanism are EFTA-SACU, US-Morocco, the TDCA and the

\textsuperscript{63} The CARIFORUM-EU Economic Partnership Agreement (EPA): The Development Component, Directorate-General for external policies, (2009), page 46.

\textsuperscript{64} Tim Ruffer and Paolo Vergano, An agricultural safeguard mechanism for developing countries, Oxford Policy Management and O’Connor and Company, (August 2002), page 8.

AFTA. According to Vergano, clauses on agricultural safeguard measures are becoming more common in RTAs. But more products are also being excluded from trade liberalisation in the agricultural sector. It also seems that quantity based safeguard measures are more common than price based ones.

In the NAFTA there are special provisions for agriculture under market access. In terms of AFTA, the Agreement on the CEPT Scheme for the AFTA contains provisions regarding agricultural safeguards. The Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products in the latter agreement indicates that safeguard measures have to be taken in accordance with the emergency measures contained in the CEPT Scheme Agreement and its interpretive notes. The permitted action is suspension of the preferences given to agricultural products with further flexibility allowed for the highly sensitive products listed in an annex to the agreement. Indonesia, Malaysia and the Philippines are allowed further special safeguards on vegetable products which are considered as highly sensitive products in Annex 1.

During the negotiations of the EPAs, there was criticism due to the lack of clauses on agricultural safeguards. It was said such clauses would give the vulnerable and weak sector help with the increasing dependency of ACP countries on imports. In the region there have been import surges involving poultry in West Africa; sugar, rice and maize in Kenya and Malawi; tomato paste in Ghana; dairy products in Tanzania and vegetable oils in Mozambique. Developing countries that are subject to such surges and the consequent price depressions experience economic consequences such as displacement of domestic producers and lower incomes. The UN’s Food and Agriculture Organisation (FAO) has stated that long term food insecurity in the region can be caused by declining domestic production and increased dependency on imports. Developing country imports increase faster than exports and 34 out of 47 African states are now classified as net food importing countries. The elimination of tariffs under the EPAs may increase vulnerability to import surges. However, the sensitivity of

---

agricultural products was mentioned in Council Regulation (EC) No 1528/2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of the EPAs which were later also included in the EPAs.

The key features of Rodriguez’ proposal to improve regional safeguard measures in the EPAs included (i) the possibility of having recourse to such a mechanism for all agricultural tariff lines, (ii) the ability to respond to price slumps and import surges by incorporating price and volume triggers and (iii) the opportunity to impose additional duties as trade remedies proportional to the problem at hand (i.e. the bigger the import surge and lower the import price, the higher the additional duty).\(^\text{71}\) By comparison with the SSGs, higher duties can be used \textit{automatically} when import volumes rise above a certain level and serious injury does \textit{not} have to be demonstrated. It should be the same for special safeguards in RTAs as well since the risk is that otherwise they will not be used. Another important matter is that compensation should not be an option as developing countries might then be afraid of retaliation and decline to apply the measure. Demonstrating injury in agricultural products is also rather difficult since the volatility of the products is already high due to weather and other external shocks. This shows again the importance of the new SSM which would be applicable to all developing countries and can be used automatically in contrast to SSGs where only a few countries are allowed to use them. There are three justifications for a Special Safeguard Mechanism (SSM)\(^\text{72}\) - the same reasons can be used to justify a special safeguard clause on agriculture in RTAs as well. First the imbalances in current rules and the fact that many developing countries are not able to use the measures offered due to their lack of legal and institutional capacities. Secondly, small farmers in developing countries are very vulnerable; temporary fluctuations can thus have a serious impact on their livelihood. The third reason is said to be the turbulence of world agricultural markets. Due to the weather, subsidisation of agricultural production and the cyclical nature of agricultural markets, countries are vulnerable to external market instability and to import surges. However, some reports indicate that the SSM could negatively affect trade in developing countries. One report state that a price based SSM would

\(^{71}\) Ibid, page 7.
\(^{72}\) Tim Ruffer and Paolo Vergano, \textit{An agricultural safeguard mechanism for developing countries}, Oxford Policy Management and O’Connor and Company (August 2002), pages 8-10.
actually increase the volatility of producer prices in certain developing countries.\textsuperscript{73} Another report indicates that the SSM is more likely to be triggered against exports from developing countries.\textsuperscript{74}

Increasing farm production and productivity is vital for the region since the exported products currently tend to generate insignificant export revenue. An agricultural safeguard in the EPAs could prevent these import surges and take into account the different productive capacities of the ACP and the EU. Studies made by FAO and the Swedish Board of Agriculture also show a link between export subsidies by developed countries and (a) major disruptions in African import markets of low-priced poultry and (b) depression of global dairy prices.\textsuperscript{75} Despite the fact that the EU’s Common Agricultural Policy (CAP) has reduced agricultural support prices, the effects have been questioned by the WTO. Some believe that, instead of raising tariffs, developing countries ought to act against subsidised exports from developed countries. The results are perhaps the same but countervailing duties could send a signal that export subsidies are unfair. One of the greatest potentials for increase in agricultural trade lies in increasing demand in developing countries which cannot succeed if they increase their tariffs.\textsuperscript{76}

In the EPAs it is stated that regional safeguard measures may be applied when a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause disturbances in the markets of like or directly competitive agricultural products. These agricultural products are those covered by Annex 1 of the Agreement on Agriculture (referred to in this paragraph as “AA Products”). In the EU-CARIFORUM, the Interim Agreement between the EU and Central Africa and the Interim Partnership Agreement between the EU and the Pacific States there are also clauses on agricultural export subsidies. It is stated in Article 24 of the Interim Partnership Agreement between the EU and the Pacific States that the latter eliminates

\textsuperscript{74} Harry de Gorter, Erika Kliauga and Andre Nassar, How current proposals on the SSM in the Doha Impasse Matter for Developing Exporters, Institute for International Trade Negotiations, (January 2009), page 4.
\textsuperscript{76} ICTSD, Bridges Weekly Trade News Digest, Volume 6, Number 5, (12 February 2002), page 3.
duties on AA Products while the EU undertakes to phase out existing subsidies on exports to the Pacific. In Article 24 of the Interim Agreement between the EU and Central Africa, it is stated that new export subsidies may not be introduced nor any existing subsidies increased. However, existing subsidies may be increased due to world prices. With respect to AA Products, the Central Africa Party has undertaken to eliminate its tariffs while the EU undertakes to dismantle existing subsidies on its exports to the Central Africa Party. In EU-CARIFORUM article 28 it is stated that no party may introduce new subsidy programmes or increase existing subsidies on AA Products. Where the CARIFORUM party commits to eliminating customs duties, the EU will phase out all existing subsidies on exports to the CARIFORUM States. However, the regional safeguard measures basically apply equally to both parties, which could raise the risk of developing countries’ exports to the EU being blocked due to “market disturbance”. It has also been argued that the regional safeguard clause is weaker than the SSM. The Caribbean Regional Negotiating Machinery (CRNM) has though asserted that the EPA contains some of the most pro-development provisions on safeguard measures ever negotiated in a trade agreement.77

Concluding remarks

The intention of this study was to examine safeguard measures in regional trade agreements (RTAs) and how these relate to developing countries. The Agreement on Safeguards and Article XIX provide some rules for developing countries only. These can also be found in some of the RTAs. However, these rules do not make it easier for developing countries to apply the measures as such; they only allow their use for a longer time-period. The lack of injury test and the lack of compensation makes application easier since developing countries often lack the capacity and means allowing them to compensate. However, this could have a negative effect on developing countries if they are targeted by safeguard measures and do not receive compensation. Also, due to the lack of an injury test, developing countries can potentially be targeted more often. When a domestic producer seeks protection and files a complaint against injurious imports, it must be reviewed in light of succeeding the request. Developing countries are indeed quite often the target of safeguard measures and, according to Lee,

limitations on safeguard measures as well as countervailing duties and antidumping measures targeting developing countries should be imposed in order to facilitate the development of poor countries. This would benefit both sides since the flourishing economic development of developing countries can give the industries of developed countries promising new markets and new sources of wealth. Since developing countries risk being target of safeguard measures, it is important that there is a de minimis exception for developing countries as states in the WTO law. It is vital that development aspects are included in the RTAs in order to protect the interest of developing countries.

Regional safeguard measures are easier to invoke than global measures under the Agreement on Safeguards and GATT Article XIX since the circumstances allowing for their use occur more frequently than those in WTO law. This indicates that the object and purpose behind regional measures is actively to provide an “escape clause” rather than to restrict their use. A comparison with global safeguard measures is very interesting since this shows two different purposes at play. Global safeguard measures seem to want to restrict the possibility of using an “escape clause” while regional safeguard measures allow temporary withdrawals by the use of an “escape clause”.

78 See the coming Developing Countries and Emergency Safeguard Measures in World Trade Law, by Elenor Lissel for information on what developing countries can do when targeted by safeguard measures.