

Crawford, Jo-Ann; McKeagg, Jo; Tolstova, Julia

Working Paper

Mapping of safeguard provisions in regional trade agreements

WTO Staff Working Paper, No. ERSD-2013-10

Provided in Cooperation with:

World Trade Organization (WTO), Economic Research and Statistics Division, Geneva

Suggested Citation: Crawford, Jo-Ann; McKeagg, Jo; Tolstova, Julia (2013) : Mapping of safeguard provisions in regional trade agreements, WTO Staff Working Paper, No. ERSD-2013-10, World Trade Organization (WTO), Geneva,
<https://doi.org/10.30875/5f75873e-en>

This Version is available at:

<https://hdl.handle.net/10419/90712>

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World Trade Organization
Economic Research and Statistics Division

Mapping of Safeguard Provisions
in Regional Trade Agreements

Jo-Ann Crawford, Jo McKeagg, and Julia Tolstova

Manuscript date: October 14, 2013

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MAPPING OF SAFEGUARD PROVISIONS IN REGIONAL TRADE AGREEMENTS

Jo-Ann Crawford, Jo McKeagg, and Julia Tolstova*

ABSTRACT

This study surveys safeguard provisions on trade in goods in 232 regional trade agreements (RTAs) notified to the GATT/WTO up to 31 December 2012. In particular, it identifies those RTAs that modify the conditions applicable to the RTA partner (either substantively or procedurally) in the event that a global safeguard is invoked. In the case of bilateral (or intra-RTA safeguards), the study analyses provisions governing injury assessment, causation, conditions for the invocation of a measure and the types of measures that may be employed. We use the yardstick of GATT Article XIX and the WTO *Safeguards Agreement* to determine whether the provisions applicable to bilateral safeguard measures are more or less stringent than the corresponding multilateral rules. The study also includes an inventory of infant industry, balance of payments, and special safeguards applicable to agricultural products found in RTAs.

We demonstrate through various examples that safeguard provisions have become more prescriptive in recent years, though little homogeneity in their design is found even for a given country. In the case of global safeguards, roughly a quarter of RTAs provide for the possible exclusion of the RTA partner, subject to certain criteria, thus discriminating against non-parties. In the case of bilateral safeguards, some RTAs use looser language to define the trigger mechanism to invoke a safeguard and to determine injury standards, thus potentially offering greater scope to use such measures. We found wide variety in the types of bilateral safeguard measures that are permitted in RTAs. A number of more recent RTAs tighten the conditions for application of a bilateral safeguard through limiting the duration of the safeguard measure, allowing the use of tariff-based measures only, and binding the use of the measure to the transition period. Other RTAs specify neither the length of the bilateral safeguard measure nor the conditions for its re-application, thus providing greater scope to impose such measures than in the multilateral context.

Keywords: Regional Trade Agreements, safeguards

JEL Classifications: F13, F15, F53

1 INTRODUCTION

Safeguard measures provide a temporary form of protection in the event that increased imports cause or threaten serious injury to domestic producers of like or directly competitive products. At the multilateral level, GATT Article XIX and the *Agreement on Safeguards* provide the legal framework governing the use of safeguard measures among WTO Members, subject to criteria which govern *inter alia* the conditions for the application of a safeguard measure, investigation procedures, determination of serious injury, duration and review of measures and flexibility to be offered to developing country Members. In principle, a multilateral safeguard measure should be applied on a non-discriminatory basis.¹ Safeguard provisions that provide for temporary protection from import surges that cause serious injury to domestic producers are also a common feature in Regional Trade Agreements (RTAs). The WTO legal framework for RTAs covering trade in goods is found in GATT Article XXIV and its Understanding; paragraph 2(c) of the Enabling Clause applies to RTAs among developing countries only.²

The study provides a taxonomy of safeguard provisions on trade in goods taking into account 232 RTAs notified to the WTO and in force as of December 2012. The objective of the

* Jo-Ann Crawford is Counsellor in the Regional Trade Agreements Section of the WTO; Jo McKeagg is Adjunct Professor, University of Illinois; Julia Tolstova is Trainee at Wenger Plattner Attorneys at Law, Basel. The authors thank Rohini Acharya, Richard Eglin, Mark Koulen, Ana Cristina Molina, Jean-Daniel Rey and Hiromi Yano for providing comments on an earlier draft.

¹ Article 9 of the *Safeguards Agreement* makes exceptions for developing country Members.

² Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, 1979.

paper is not to canvass all RTAs exhaustively, but rather to make observations and identify common themes or patterns by RTA member or family and across geographic regions. WTO jurisprudence of relevance to the invocation and application of safeguard measures is included where applicable.

Provisions applicable to global and bilateral (or intra-RTA) safeguards are analysed in detail according to a predefined set of criteria. In the case of global safeguards we focus particularly on RTAs that modify the conditions that apply to the RTA partner if a global safeguard is invoked. For bilateral safeguards, we focus our attention on the conditions for the invocation of a bilateral safeguard, the factors to determine injury, the establishment (or not) of a causal link between increased imports and serious injury, the type and duration of measures that may be taken, and the rules applicable to payment of compensation and retaliation. RTAs are grouped either according to the issue at hand, or by regional families, depending on the topic under analysis. Our goal is to highlight areas of divergence between RTA rules applicable to bilateral safeguards and the provisions of GATT Article XIX and the *Safeguards Agreement*, particularly to identify those areas where RTA rules are more or less stringent than multilateral rules. An inventory of infant industry, balance of payments and special safeguards applicable to agricultural products is also provided.

The analysis is based on the legal texts of RTAs and publicly available WTO documents.³ Despite the fact that many, if not most, RTAs contain bilateral safeguard provisions, not much is known about the functioning of these provisions. Information provided by RTA parties in the context of the WTO's RTA Transparency Mechanism suggests that such provisions are rarely used. We have not attempted in the study to assemble data on the use of global safeguards by WTO Members and the impact on RTA partners, nor to analyse the application of safeguard measures in the WTO versus their application in RTAs.⁴

2 CONSTRUCTING A TAXONOMY OF SAFEGUARD PROVISIONS IN RTAs

2.1 Previous efforts to classify safeguard provisions in RTAs

One of the first systematic classifications of safeguard provisions conducted by Teh, Prusa and Budetta and published in 2007, mapped safeguard provisions in 74 RTAs.⁵ We expand upon the classification used in Teh et al, first by updating the number of RTAs covered in the study (to 232 RTAs), and by developing a more detailed analysis of bilateral and global safeguards. We also provide an inventory of balance of payments, infant industry and special safeguards applicable to agricultural products.

As noted by Teh et al, despite the vast literature on regionalism, little is known about the actual content of many RTAs. The WTO's recent Transparency Mechanism, adopted in 2006, provides a valuable source of information on individual RTAs. The present study draws upon the information provided by the Transparency Mechanism to develop a horizontal analysis of safeguard provisions contained in RTAs.

In recent years the number of RTAs has grown as has the number of countries participating in such RTAs. RTAs have become more ubiquitous and wider in regulatory scope. While many RTAs that predate the WTO (pre-1995) lack detailed provisions on safeguards and other regulatory areas, the drafting of safeguard (and other) provisions in more recent RTAs tends to be more succinct and prescriptive.

3 THE APPROACH TO GLOBAL SAFEGUARDS

We distinguish in the study between RTAs' provisions on bilateral (or intra-RTA) safeguards and global safeguards taken pursuant to GATT Article XIX and the WTO *Agreement on Safeguards* (in as far as they are applied to the RTA partner). Our interest in analysing RTAs' provisions on global safeguards lies in identifying those RTAs that modify the conditions applicable to the RTA partner (either substantively or procedurally) in the event a global safeguard is invoked.

³ See the WTO's database on RTAs, <http://rtais.wto.org>

⁴ Although worthy of future research such analysis is beyond the scope of the present study.

⁵ R. Teh, T. Prusa and M. Budetta, (2007) 'Trade Remedy Provisions in Regional Trade Agreements' WTO Staff Working Paper ERSD-2007-03..

3.1 The Safeguards Agreement

Under GATT Article XIX, Members are permitted to apply a global safeguard if a product is being imported "in such increased quantities and under such conditions as to cause or threaten serious injury" to domestic producers of like or directly competitive products. Article 2.2 of the *Safeguards Agreement* further clarifies that "safeguard measures shall be applied to a product being imported irrespective of its source".

3.2 The RTAs: Analysis

A number of RTAs, particularly those that pre-date the WTO, contain a general safeguards clause that makes no clear distinction between the rules applicable to global safeguards and those that apply in measures applied solely between or among RTA parties. Unless there is a distinct reference to multilateral safeguard rules, we assume that the provisions contained in the legal text of the RTA apply to the bilateral application of safeguard measures between the parties. The legal texts of RTAs negotiated in the past few years are, for the most part, more succinctly drafted and tend to delineate clearly the rules applicable to the imposition of bilateral and multilateral safeguard measures.

3.2.1 No reference to global safeguards in the RTA legal text

About half the 232 RTAs in our analysis make no specific reference to global safeguards in their legal texts. For instance, the RTAs of Armenia, Georgia, the Kyrgyz Republic, the Russian Federation, and Ukraine (RTAs which, for the most part, entered into force before these countries became WTO Members and were notified following their accession) contain no reference to global safeguards. Other RTAs with no reference in their legal texts to either GATT Article XIX or the *Safeguards Agreement* include: roughly half of the EU's RTAs, particularly those that pre-date the WTO, but also more recent RTAs with the Faroe Islands, FYROM, Israel, Jordan, Morocco, the Palestinian Authority, San Marino, Tunisia, and Croatia; most of EFTA's pre-2010 RTAs (exceptions are those with Canada, Chile and SACU); Turkey's pre-2006 RTAs (with Bosnia and Herzegovina, Croatia, FYROM, Israel, the Palestinian Authority, and Tunisia); and intra-Africa RTAs - COMESA, EAC, CEMAC, ECOWAS, SADC and SACU.

Some of these RTAs predate the WTO; others are between WTO Members and non-WTO Members. It is beyond the scope of this paper to examine further what rights and obligations might exist where this is not explicit in the text. Where all parties are Members of the WTO, the RTA came into force after the WTO came into existence, and there is no explicit departure from the WTO obligations regarding global safeguards in the RTA provisions on safeguards, we assume for the sake of this paper that such rights and obligations remain unchanged.

3.2.2 Retention of rights under GATT Article XIX and the Safeguards Agreement

About a fifth of the 232 RTAs in our analysis contain an explicit provision (with little or no further elaboration or embellishment) in which the parties retain (or maintain) their rights under the WTO Agreement when a global safeguard is invoked. This is the case, for instance, in some of the RTAs of ASEAN, Australia, New Zealand, Chile, China, India, Malaysia, Pakistan, Turkey and the United States.

All of Japan's RTAs allow the parties to retain rights and obligations in a global safeguard action, though differing language is used. For instance, in its RTAs with Brunei Darussalam, Chile, India, Indonesia, Malaysia, Mexico and Switzerland, "nothing prevents a Party from applying safeguard measures to an originating good in accordance with Article XIX of the GATT 1994 and the WTO *Agreement on Safeguards*"; in Japan-Peru and Japan-Thailand, the parties "retain their rights and obligations" under Article XIX and the *Safeguards Agreement*; and in Japan-Philippines the parties may apply a safeguard measure to an originating good "in accordance with Article XIX of the GATT 1994 and the *Agreement on Safeguards*, provided that the originating good is the subject of the concession of that Party under the GATT 1994...". Japan-Viet Nam reiterates this language without making the linkage to GATT 1994.

We assume that RTAs that retain the rights and obligations of their parties under the *Safeguards Agreement* (with no further elaboration) result in no substantive modification in the

application of GATT Article XIX and the Safeguards Agreement and that a global safeguard action would, by default, include the RTA partner (unless the RTA partner is a developing country excluded by virtue of the *de minimis* clause contained in Article 9.1 of the *Safeguards Agreement*).

Some RTAs clarify that global safeguard actions taken under WTO rules may not be subject to the RTA's dispute settlement mechanism (DSM). This is the case, for instance, in ASEAN-Korea, Rep. of; ASEAN-Japan, Chile-China, Pakistan-China, and Pakistan-Malaysia. In some RTAs it is further specified that a bilateral and global safeguard measure may not be applied to the same good at the same time, e.g. in ASEAN-Australia and New Zealand, China-Peru, China-Costa Rica, EU-Korea, Rep. of; Korea, Rep. of-Peru and Singapore-Peru.

3.2.3 Exclusion of imports from an RTA partner in a global safeguard action

Two RTAs - Singapore-New Zealand and Singapore-Australia⁶ - definitively exclude the parties from applying a global safeguard measure within the meaning of GATT Article XIX and the *Agreement on Safeguards* against the goods of the other Party. Thus, imports from the RTA partner are excluded from a global safeguard action, without being subject to any condition.

3.2.3.1 Imports from an RTA partner "may be excluded" from a global safeguard action

Twenty-six RTAs in our analysis (beginning with US-Israel in 1985 and in a number of RTAs that entered into force in 2003 and after) provide that imports from the RTA partner may be excluded from a global safeguard action, subject to certain criteria. In most cases (20 RTAs), the condition for exclusion of the RTA partner(s) is "if such imports are not a substantial cause of serious injury or threat thereof". This is the case for Canada's RTAs with Colombia and Peru; Colombia-Northern Triangle (Honduras, El Salvador and Guatemala); Singapore's RTAs with India, Jordan, Panama and Peru; India-Korea, Rep. of; Peru with Panama and Korea, Rep. of; Thailand-Australia; and US RTAs with Australia, Colombia, Israel, Jordan, Korea, Rep. of; Panama, Peru, Singapore and CAFTA-DR. A numerical definition of "substantial cause of serious injury" is found only in Peru-Singapore.⁷

In Nicaragua-Chinese Taipei imports from the RTA partner may be excluded from a global safeguard if the party accounts for not more than 7% of total imports of the good concerned.⁸ In New Zealand-Malaysia and Thailand-New Zealand, the condition for exclusion is "if such imports are not a cause of serious injury or threat thereof", a presumably less stringent condition than "substantial cause". In China-New Zealand and China-Singapore, the condition for exclusion of the RTA partner is if such imports are "non-injurious" (not defined in the Agreement).⁹ In EU-Papua New Guinea, Fiji, the EU (only) "may, in the light of the overall development objectives of this Agreement and the small size of the economies of the Pacific States, exclude imports from any Pacific State" from a global safeguard measure; the provision is applicable for five years from entry into force and may be extended.

3.2.3.2 Imports from an RTA partner "shall be excluded" from a global safeguard action

Thirty-four RTAs in our analysis provide that imports from the RTA partner are to be excluded from a global safeguard action, if certain criteria are met. The most frequently encountered formulation is "unless such imports account for a 'substantial share' of total imports" and such imports "contribute importantly to the serious injury or threat thereof". This is the case in 22 RTAs, all of which involve North and Latin American countries, Israel and Chinese Taipei.¹⁰

⁶ In addition, EFTA-Hong Kong, China provides that Hong Kong and Norway shall not initiate or take safeguard measures under GATT Art XIX and the *Safeguards Agreement* in relation to goods originating in either country, while between Hong Kong, China; Switzerland; Liechtenstein and Iceland, imports of the other party are to be excluded if such imports do not "in and of themselves cause or threaten to cause serious injury".

⁷ If the party's imports account for less than 5% of the total volume of imports of that good.

⁸ There is no mention of such imports being a substantial cause of serious injury or threat thereof.

⁹ When questioned about whether a party had excluded the other's product(s) from global safeguard measures and if so, how the exemption was defined as "non injurious", the parties to China-New Zealand responded that no global safeguard measure had been applied by either Party since the Agreement entered into force. No definition of "non-injurious" was provided by the parties. See WTO document WT/REG266/3.

¹⁰ Canada's RTAs with Chile and Israel; Chile with Costa Rica, El Salvador, Guatemala, Honduras,

The definition of "substantial share" of total imports in these RTAs varies: the most common (found in 14 RTAs) is the "top five suppliers of the good in terms of import share in the most recent three year period"; in Mexico-Israel, the top five suppliers of the good should account "for at least 15% import share during most recent period"; in Guatemala-Chinese Taipei, and Honduras, El Salvador-Chinese Taipei more scope is provided for excluding the RTA partner by defining "substantial share" as "the top three suppliers in the most recent period"; while in Mexico's RTAs with Central American partners a global safeguard will only be applied to the other party if imports from that party, considered individually represent a substantial share of total imports (defined as "imports from principal suppliers of the good whose exports collectively account for 80% of total imports").

EFTA's RTAs with Albania; Colombia; Hong Kong, China;¹¹ Montenegro; Peru, and Serbia and the Hong Kong, China-New Zealand RTA provide that imports from the RTA partner shall be excluded from a global safeguard, if such imports "do not in and of themselves cause or threaten to cause serious injury". In EFTA-Ukraine, imports from the RTA partner are excluded "if such imports are not a substantial cause of serious injury or threat thereof". Finally, in the EU's RTAs with Cameroon, CARIFORUM, Côte d'Ivoire, and ESA, the EU (only) shall exclude imports from the African, Caribbean and Pacific (ACP) partner(s) from the application of a global safeguard for a period of five years, which may be extended.

The NAFTA makes provision that where an RTA partner has been initially excluded from a global safeguard, the party has the right subsequently to include the good if it determines that an increase in imports from the other party is contributing importantly to the serious injury and thereby undermining the effectiveness of the global safeguard action. This provision has been carried over into other RTAs such as Canada's RTAs with Chile and Israel, and Mexico's RTAs with Israel, Chile and the Northern Triangle.

3.2.4 Patterns observed in RTAs providing for the exclusion of RTA partner(s) from a global safeguard

Some patterns are evident in the treatment of the RTA partner in the event of a global safeguard. For instance, Canada provides for the exclusion of its RTA partner(s) in a global safeguard in all its RTAs (except with Costa Rica) though the language differs.¹² Likewise, the United States provides for the exclusion of its RTA partner(s) from a global safeguard action in most of its RTAs,¹³ though only the NAFTA provides that RTA partners "shall be excluded" (subject to certain criteria). All of Chinese Taipei's RTAs provide for the exclusion of its RTA partner, though again the language differs.¹⁴ In contrast, none of Japan's RTAs provides for the exclusion of the RTA partner, but instead reiterate the parties' rights under the WTO. In the case of some countries, the drafting of provisions has changed over time. For instance, all seven of EFTA's RTAs that entered into force in 2010, or later, provide that imports from the RTA partner "shall be excluded" from a global safeguard action.¹⁵

For the EU, the only RTAs to provide for the exclusion of partners from a global safeguard are the recent Economic Partnership Agreements (EPAs) which have asymmetric provisions, allowing the EU (only) to exclude imports from the ACP partner from a global safeguard action for a period of five years (which may be extended). In EU-Papua New Guinea, Fiji, imports from the ACP partner "may be excluded" from a global safeguard imposed by the EU, while in the other EPAs imports from the ACP partner "shall be excluded".

For some Members, the approach to the treatment of an RTA partner in a global safeguard action appears somewhat piecemeal. For instance, in the Republic of Korea's RTAs with ASEAN, Chile, and Singapore the parties simply retain their rights and obligations under Article XIX and the

and Mexico; Chinese Taipei with Guatemala, Honduras, El Salvador, and Panama; Mexico with Colombia, Peru, Israel, Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua; and Panama with Costa Rica, El Salvador, and Honduras, and NAFTA.

¹¹ Only applies between Hong Kong, China; Switzerland; Liechtenstein and Iceland.

¹² In three RTAs the partner(s) "shall be excluded", while two other RTAs use softer language.

¹³ Exceptions are US-Bahrain, US-Chile, US-Morocco, and US-Oman.

¹⁴ Its RTAs with Honduras, El Salvador, Guatemala, and Panama provide that imports from the RTA partner "shall be excluded", while softer language is used in its RTA with Nicaragua.

¹⁵ None of EFTA's earlier RTAs provide for such exclusion.

Agreement on Safeguards (such actions are not subject to the RTA's DSM); in Korea, Rep. of-EFTA there are no global safeguard provisions; in EU-Korea, Rep. of, the parties retain their rights and obligations under GATT Article XIX and the *Agreement on Safeguards*, but additional procedural requirements apply in case the party has a "substantial interest"¹⁶; and in Korea, Rep. of-India, Korea, Rep. of-US, and Korea, Rep. of-Peru, the parties retain their rights and obligations under GATT Article XIX and the *Safeguards Agreement*, but may exclude imports of the other party "if such imports are not a substantial cause of serious injury or threat thereof".

Table 1 summarizes the different types of global safeguard measures found in RTAs.

Table 1: Global Safeguard Measures in RTAs

Treatment applied to the RTA partner in a global safeguard action	No. of RTAs
No Reference to Global Safeguards in the RTA legal text	117
Retention of rights under Art. XXIV and the Safeguards Agreement (with little embellishment)	53
Exclusion of imports from the RTA partner without conditions	2
Exclusion of imports from the RTA partner with conditions	34
Possible exclusion of imports from the RTA partner	26
Total	232

Source: WTO Secretariat

3.2.5 Welfare Effects and Jurisprudence relating to Global Safeguard Actions taken by RTA partners

The welfare effects of excluding imports from an RTA partner in a global safeguard action are ambiguous: while excluding imports from an RTA partner may have a positive impact on intra-RTA trade, discrimination vis-à-vis other WTO Members is likely to increase, resulting in trade distortion and diversion. Baldwin et al, 2009 suggest that this is "an example of exactly the opposite of multilateralizing regionalism, with RTAs undermining an established non-discriminatory multilateral norm".¹⁷ Likewise, RTAs that adopt special or additional rules on trade remedy actions on RTA partners' trade will effectively increase the level of discrimination against non-members.¹⁸ On the other hand, imposing a global safeguard on an RTA partner will potentially restrict intra-RTA trade (undermining the purpose of an RTA which according to GATT Article XXIV: 4 should be to "facilitate trade"), while reducing trade distortion and diversion away from RTA partners.¹⁹

The question of whether RTA partners *must* be excluded from the application of a safeguard measure given that Article XIX (emergency action) is not included in the list of bracketed exceptions contained in Article XXIV:8²⁰ has attracted the attention of a number of legal scholars, but has not been resolved in the WTO.²¹ In addition, limited jurisprudence exists with regard to the consistency of RTAs with GATT Article XXIV. In *Turkey-Textiles*, the only case concerning RTAs (and in this case a customs union) in the WTO era, the Appellate Body ruled that Article XXIV may justify a measure which is inconsistent with other GATT provisions. In the context of the formation of a customs union this defence is only applicable when two conditions are fulfilled: the party claiming such defence must demonstrate that the measure is introduced upon the formation of a customs union that fully meets the requirements of Articles XXIV:8(a) and 5(a), and; the formation of the customs union would be prevented if it were not allowed to introduce the measure.²² Although this suggests that Article XXIV might justify a departure from Article 2.2 of the *Safeguards Agreement*, which calls for the non-discriminatory application of safeguard measures, if such conditions are met, this has not been tested in the WTO.

¹⁶ This recalls the language of GATT Article XIX:2 that provides that before taking a safeguard action a WTO Member should afford other members having a "substantial interest" as exporters of the product an opportunity to consult regarding the proposed action.

¹⁷ R Baldwin, S. Evenett and P. Low, (2009) "Multilateralizing Non-Tariff RTA Commitments" in R. Baldwin and P. Low (eds.), *Multilateralizing Regionalism: Challenges for the Global Trading System*. Cambridge University Press, , 120.

¹⁸ Teh et al, 6 (see footnote 5).

¹⁹ T. Voon, (2010) *Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements*, *International & Comparative Law Quarterly*, Vol. 59, No. 3.

²⁰ In a customs union or free trade area "duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX)" are to be eliminated on substantially all the trade in products originating in such territories.

²¹ Voon, p28-34. (see footnote 19).

²² See Appellate Body Report, *Turkey-Textiles*, para 58.

In *Argentina-Footwear*, the Appellate Body upheld the Panel's reasoning that there is an implied "parallelism between the scope of a safeguard *investigation* and the scope of the *application* of safeguard measures."²³ Thus, if imports from all sources are included in the investigation, then safeguard measures must be applied to imports from all sources, including RTA partners. In *US-Wheat Gluten*, the Appellate Body determined that to include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase "product being imported" a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources.²⁴

The Appellate Body provided further guidance in *US-Wheat Gluten* by ruling that if there was any gap between imports covered under the investigation and imports falling within the scope of the measure (i.e. RTA partner imports included in the investigation, but excluded from the application of a global safeguard), this could be justified only if the competent authorities "establish explicitly" that imports from sources covered by the measure satisfy the conditions for the application of the safeguard measure.²⁵ In *US-Lamb*, the Appellate Body held "establish explicitly" to mean that a "reasoned and adequate explanation" had to be provided on how the facts supported such a determination.²⁶

In *US-Line Pipe* the Panel found that GATT XXIV could, in certain circumstances, prevail over Article XIX and that Article 2.2 of the *Safeguards Agreement* did not prejudice the interpretation of the relationship between GATT Articles XIX and XXIV:8. The Panel thus concluded that Article XXIV could provide a defence against claims of discrimination brought under Article 2.2 of the *Safeguards Agreement*,²⁷ i.e. that RTA partners could exclude each other from the application of a global safeguard measure. The Appellate Body did not consider it necessary to address that issue and declared the Panel's finding on the use of Article XXIV as a defence and its determination on the question of the relationship between Article 2.2 of the *Agreement on Safeguards* and GATT Article XXIV to be moot and of no legal effect.²⁸ Thus the central question of the relationship between Article XXIV and the *Safeguards Agreement* remains unresolved.

3.2.6 Retention of a margin of preference in a global safeguard action

A few RTAs provide explicitly for a margin of preference to be maintained in favour of the RTA partner in the event a global safeguard is invoked. The EU's RTAs with Albania, Algeria, Bosnia and Herzegovina, Chile, Montenegro, and Serbia contain a specific reference stating that the parties "shall preserve the level/margin of preference" granted under the Agreement in the event of safeguard measures applied in accordance with Article XIX of the GATT and the *Agreement on Safeguards*. In Israel-Mexico, the parties provide that if in a global safeguard action, "the rate of a customs duty is increased, the margin of preference shall be maintained". An example of how the retention of a margin of preference would operate is offered in the factual presentation prepared for the EU-Albania FTA. If the MFN duty is 10% and the preferential duty is 2%, a global safeguard measure raising the MFN duty to 20% would raise the bilateral duty to 12%, thus preserving the preference of 8 percentage points.²⁹ Thus the RTA partner is not excluded from the global safeguard per se, but continues to benefit from preferential treatment once a global safeguard is invoked.

The retention of a margin of preference, though not explicit in the legal text, may nonetheless be applied by parties. For instance, during the examination of EU-Mexico, the parties were asked whether a margin of preference vis-à-vis third countries would be maintained when safeguard provisions were invoked. Their response was that the "erga omnes" proceedings in accordance with the WTO Agreement would guarantee that the preference margin would always be respected.

²³ See Appellate Body Report, *Argentina-Footwear*, para. 111.

²⁴ See Appellate Body Report, *US-Wheat Gluten*, para. 96.

²⁵ See Appellate Body Report, *United States-Wheat Gluten*, para. 98.

²⁶ See Appellate Body Report, *US-Lamb*, para. 103.

²⁷ See Panel Report, *US-Line Pipe*, para. 7.158.

²⁸ See Appellate Body Report, *US-Line Pipe*, para. 198.

²⁹ WTO document WT/REG226/1/Rev.1, p 12.

3.2.7 Types of measures to be applied to an RTA partner in a global safeguard action

Article 5 of the *WTO Agreement on Safeguards* provides that a Member "shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". The types of measures that may be taken are not prescribed but could include tariff measures, quantitative restrictions or other measures.

We found ten RTAs that specify that tariff measures only may be applied to imports of the RTA partner in the event of a global safeguard action. These involve Latin American countries and Chinese Taipei.³⁰

One RTA – Israel-Mexico – limits the term of application of a global safeguard on the RTA partner: the parties agree to impose a global safeguard measure on a particular good of the other party no more than two times or for a cumulative period exceeding two years.

In a further nuance one RTA, Peru-Chile, provides that any exception in the application of a global safeguard granted by either of the parties to a non-party is extended automatically to the other party.

Limiting the choice of measures that may be imposed on imports of an RTA partner in a global safeguard to tariff-based measures will introduce an element of preference in favour of the RTA partner (particularly if third parties are subject to a quantitative restriction), but it may also signal a move towards greater use of tariff-based measures which would benefit all WTO Members.

3.2.8 Compensation and Retaliation in a global safeguard action

Article 8.1 of the *Agreement on Safeguards* states that a Member proposing to apply a safeguard measure "shall endeavour to maintain a substantially equivalent level of concessions"; to achieve this objective, the Members concerned "may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade" (emphasis added).

We found a total of 18 RTAs where the parties "shall provide" mutually agreed trade liberalizing compensation when invoking a global safeguard action against the RTA partner. These include the NAFTA and a number of RTAs involving Latin American countries and Chinese Taipei.³¹

Article 8.2 of the *Agreement on Safeguards* provides that in the absence of an agreement on trade compensation to be offered by the party imposing a global safeguard measure, the affected exporting Member shall be free to suspend application of substantially equivalent concessions to the trade of the Member applying the safeguard measure. Article 8.3 specifies that the right of such suspension shall not be exercised for the first three years that the safeguard measure is in effect, provided that the safeguard measure was taken as a result of an absolute increase in imports.

In 19 RTAs, if compensation cannot be agreed, the party against whose good the action is taken is free to suspend equivalent concessions with no waiting period specified, thus providing an immediate right to retaliation. In EU-Chile, the right of suspension may not be exercised during the first 18 months, provided that the measure is taken as a result of an absolute increase in imports.

Tightening the provisions on compensation and retaliation applicable when a global safeguard action is imposed on the RTA partner will incur an additional cost or penalty on the country imposing the safeguard. The obligation to provide immediate compensation and, failing that, to be faced with immediate retaliation may reduce countries' desire to invoke a global safeguard action (even if such conditions only apply to the RTA partner).

³⁰ Guatemala-Chinese Taipei, Panama-Chinese Taipei, Chile-Costa Rica, Chile-El Salvador, Chile-Guatemala, Chile-Honduras, Chile-Mexico, Panama-Costa Rica, Panama-El Salvador, and Panama-Honduras.

³¹ Canada-Chile, Guatemala-Chinese Taipei, Panama-Chinese Taipei, Honduras, El Salvador-Chinese Taipei, NAFTA, Chile-Costa Rica, Chile-El Salvador, Chile-Guatemala, Chile-Honduras, Chile-Mexico, Mexico-Northern Triangle, Mexico-Nicaragua, Panama-Costa Rica, Panama-El Salvador, Panama-Honduras, and Costa Rica-Mexico.

3.2.9 Specific procedural steps applicable to the RTA partner in a global safeguard action

A few RTAs specify distinct procedural steps that must be taken in the event of the application of a global safeguard measure to an RTA partner. For instance, in the NAFTA and in Canada's RTAs with Chile and Israel, and Chinese Taipei's RTAs with Panama, Guatemala, Honduras and El Salvador, the parties agree to deliver written notice of the institution of a proceeding that may result in emergency action; provide prior written notice to the RTA Commission responsible for administering the agreement; and provide adequate opportunity for consultation with the other party as far in advance of taking the global action as practicable.³² In New Zealand's RTAs with China and Hong Kong, China, and China's RTA with Singapore, the parties agree to advise the relevant contact point of the other party of the initiation of any global safeguard investigation and the reasons for it.

In EU-Korea, Rep. of, at the request of the other party, and provided it has a "substantial interest", the party intending to take a global safeguard measure shall provide immediately ad hoc written notification of all pertinent information on the initiation of a safeguard investigation, the provisional findings and the final findings of the investigation.³³ In EU-Chile, again when a party has a "substantial interest" (defined in the same manner as EU-Korea, Rep. of), the parties agree to a number of procedural steps including providing, immediate (no later than seven days) ad hoc written notification to the Association Committee of all pertinent information on the initiation of a safeguard investigation and on the final findings of the investigation; advance written notification (at least seven days before application of measures) of all pertinent information on the decision to apply provisional safeguard measures; and prior consultations before applying safeguard measures, if so requested.

4 BILATERAL SAFEGUARD PROVISIONS

The majority of RTAs studied (194 or over 80%) permit the use of a bilateral safeguard mechanism on their intra-trade. Two RTAs explicitly prohibit the use of bilateral safeguard measures.³⁴ A further 36 RTAs contain no specific bilateral safeguard provisions on goods in their legal texts,³⁵ though some of these RTAs provide for safeguards in case of balance of payment difficulties, infant industry protection and special safeguards for agricultural goods. In Korea, Rep. of-Chile, Iceland-Faroe Islands, EU-Andorra and EU-Chile, the use of the bilateral safeguard is restricted to agricultural goods only.

Our interest in analysing RTAs' bilateral safeguard provisions lies in identifying those areas where the conditions applicable to a bilateral safeguard measure are more or less restrictive or flexible than those applying to safeguards imposed on a multilateral basis under GATT Article XIX and the *Agreement on Safeguards*.

4.1 Conditions for the Invocation of the Bilateral Safeguard

4.1.1 The Safeguards Agreement

GATT Article XIX:1(a) provides that a WTO Member may impose a safeguard measure if, as a result of unforeseen developments and of the effect of obligations incurred including tariff concessions, a product is imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

³² In Chinese Taipei's RTAs with Guatemala, Honduras and El Salvador, 15 days written notice should be provided in advance of the initiation of a proceeding.

³³ It is considered that a party has a "substantial interest" when it is among the five largest suppliers of the good during the most recent three-year period, measured either in terms of absolute volume or value.

³⁴ New Zealand-Singapore and Singapore-Australia

³⁵ Armenia-Moldova; Armenia-Russian Federation; Armenia-Turkmenistan; Armenia-Ukraine; Australia-Chile; Gulf Co-operation Council; Hong Kong, China-New Zealand; India-Bhutan; Lao PDR-Thailand; SACU; Switzerland-Faroe Islands; Transpacific SEP; EU; Egypt-Turkey; Turkey-Albania; Turkey-Chile; Turkey-Georgia; Turkey-Jordan; Turkey-Montenegro; Turkey-Serbia; CEZ; CACM; Georgia-Albania; Georgia-Kazakhstan; Georgia-Ukraine; Kyrgyz Republic-Armenia; Kyrgyz Republic-Kazakhstan; Kyrgyz Republic-Moldova; Kyrgyz Republic-Russian Federation; Kyrgyz Republic-Uzbekistan; Russian Federation-Belarus-Kazakhstan; Russian Federation-Tajikistan; Ukraine-Kazakhstan; Ukraine-Uzbekistan; Ukraine-Turkmenistan; LAIA.

Article 2.1 of the *Agreement on Safeguards* provides greater precision by conditioning the application of a safeguard measure to products imported in such increased quantities, in absolute terms or relative to domestic production.

4.1.2 RTAs: The Analysis

The majority of RTAs that contain specific bilateral safeguard provisions in their legal text specify some sort of trigger (177 of 194 RTAs). While many RTAs use the terminology of the *Safeguards Agreement* when defining the trigger, only a few RTAs contain a reference to unforeseen developments: these include some of ASEAN's RTAs (discussed below) and Peru's RTAs with China, Singapore and Chile.

A number of RTAs establish a connection between increased imports that result from the elimination or reduction of a custom duty made under the RTA. Members have questioned the rationale for including this criterion in addition to conditions laid out in the *Agreement on Safeguards* and whether it means that investigating authorities would be required to demonstrate two causal links: first, between increased imports and the reduction or elimination of a customs duty, and second, between serious injury and the increase in imports. In response to such a question, the parties to India-Singapore stated that the main objective of the bilateral safeguard mechanism was to allow them to impose safeguard measures against a surge in preferential imports that alone constituted a substantial cause of serious injury or threat thereof. Thus the causal link analysis had to demonstrate increased imports in absolute terms as a result of the reduction or elimination of a customs duty.³⁶

Most of the EU's RTAs make reference to a product being imported "in such increased quantities" (exceptions include Andorra, OCTs, San Marino, Syrian Arab Republic and Turkey). Only EU-Korea, Rep. of makes the connection to imports resulting from the reduction or elimination of a customs duty though EU-Faroe Islands, Iceland, Norway, Switzerland and Liechtenstein refer to increased imports due to "the partial or total reduction ...of customs duties and charges having equivalent effect". Reference to an increase in imports "in absolute terms or relative to domestic production" is made only in EU-Korea, Rep. of. All other EU RTAs are silent on this point.

All of EFTA's RTAs make reference to increased imports and, starting with Singapore in 2003, all its subsequent RTAs (except with Tunisia) refer to imports resulting from the reduction or elimination of a customs duty. A reference to increased imports in absolute terms or relative to domestic production is found in all its RTAs beginning with the Republic of Korea in 2006 and thereafter (except with SACU).

In Turkey's RTAs, a reference to increased quantities of imports is made in its RTAs with Bosnia and Herzegovina, Croatia, FYROM, Georgia, Israel, Jordan, Palestinian Authority, Serbia and Tunisia. No connection is made in Turkey's RTAs to imports resulting from the elimination or reduction of a customs duty, nor to increased imports either in absolute terms or relative to domestic production.

None of the RTAs involving CIS countries establish a connection between imports resulting from the elimination or reduction of a customs duty under the Agreement, or increased imports in absolute terms or relative to domestic production. Some RTAs do however refer to increased imports.³⁷

All of Japan's RTAs make reference to increased imports, in absolute terms, resulting from the reduction or elimination of a customs duty. All except those with Brunei, Chile, Mexico, Peru and Singapore also make reference to increased imports relative to domestic production.

In the Republic of Korea's RTA with Chile (2004) the trigger refers to increased imports only. All subsequent RTAs of the Republic of Korea make reference to increased imports resulting from

³⁶ WTO document WT/REG228/2

³⁷ These include Armenia-Kazakhstan, Georgia's RTAs with Azerbaijan, Russian Federation and Turkmenistan, the Russian Federation's RTAs with Azerbaijan, Belarus, Kazakhstan, Moldova and Ukraine, and Ukraine's RTAs with Azerbaijan, Belarus, the Kyrgyz Republic and Tajikistan.

the reduction or elimination of a customs duty, in absolute terms or relative to domestic production.

All of the RTAs of Canada and the United States refer to increased imports resulting from the reduction or elimination of a customs duty, in absolute terms or relative to domestic production (except Canada-Israel (1997) which makes no mention of domestic production and US-Israel (1985), which predates the Agreement on Safeguards, and makes no reference to an increase in absolute terms or relative to domestic production).

The ASEAN FTA (which predates the WTO) refers to exceptional circumstances where a Member faces unforeseen difficulties in implementing its tariff commitments (but makes no reference to increased imports). In ASEAN's RTAs with China, Japan and the Republic of Korea, a party may take safeguard measures if as an effect of the obligations incurred under the agreement, including tariff concessions, or if as a result of unforeseen developments, goods are being imported in such increased quantities, in absolute terms or relative to domestic production. ASEAN-India is similar, but no reference is made to unforeseen developments. In ASEAN's RTA with Australia and New Zealand, the trigger refers to increased imports resulting from the reduction or elimination of a customs duty, in absolute terms or relative to domestic production.

Most of the RTAs involving Latin American countries refer to imports resulting from the reduction or elimination of a customs duty, although some such as Mexico-Colombia and Mexico-Nicaragua refer to increased imports resulting from the application of the tariff reduction programme while Chile-Peru refers to increased imports as a result of tariff preferences granted. Most of these RTAs make reference to increased imports in absolute terms or relative to domestic production (exceptions include Mexico's RTAs with the Northern Triangle and Nicaragua which refer to neither and Chile's RTAs with the Northern Triangle, Mexico and Costa Rica which refer only to increases relative to domestic production).

The Appellate Body has found, with respect to the requirement for increased imports, that the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Rather, there "must be 'such increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'." ³⁸ The Appellate Body also agreed with the Panel that it was necessary to consider intervening trends over the period of investigation, rather than only comparing end-points. ³⁹

Subsequently, the Panel in *US-Wheat Gluten*, echoing the findings of the Appellate Body in *Argentina-Footwear*, interpreted the phrase "in such increased quantities" as follows: "[A]rticle XIX:1(a) of the GATT 1994 and Article 2.1 [of the Agreement on Safeguards ("SA")] do not speak only of an 'increase' in imports. Rather, they contain specific requirements with respect to the quantitative and qualitative nature of the 'increase' in imports of the product concerned. Both Article XIX:1(a) of the GATT 1994 and Article 2.1 SA require that a product is being imported into the territory of the Member concerned in such increased quantities (absolute or relative to domestic production) as to cause or threaten serious injury. Thus, not just any increase in imports will suffice. Rather, we agree with the Appellate Body's finding in *Argentina-Footwear (EC)* Safeguard that the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury." ⁴⁰

It is clear that Panels and the Appellate Body envision a high standard, both quantitatively and qualitatively, when assessing whether increased import levels would justify the imposition of a safeguard measure. It is unclear whether RTAs which have a loosely defined trigger by, for example, referring to increases in imports as the sole criterion for determining whether sufficient

³⁸ Appellate Body Report, *Argentina – Footwear Safeguard (EC)*, para. 131.

³⁹ Ibid. para. 129.

⁴⁰ Panel Report, *United States-Wheat Gluten*, para. 8.31.

conditions prevail for the application of safeguard would meet such a high standard. If not, such RTAs would provide greater scope to invoke a bilateral safeguard action.

4.2 Injury

4.2.1 The Safeguards Agreement

Two types of injury are provided for in the *Agreement on Safeguards*, “serious injury” and “threat of serious injury”. These terms appeared in Article XIX of the GATT, but were not defined until the *Agreement on Safeguards* entered into force in 1995. Serious injury is defined as a “significant overall impairment in the position of a domestic industry”. Threat of serious injury is defined as “serious injury that is clearly imminent”. Such a determination must be based on facts and not “merely on allegation, conjecture or remote possibility”.⁴¹

4.2.2 The RTAs: Analysis

In the RTAs in force and notified to the WTO up to 31 December 2012, injury is referred to in a variety of ways. Sometimes the standards in the *Agreement on Safeguards* are incorporated fully or in part. Occasionally there are new formulations to evaluate injury, and in some RTAs a combination of options are provided to determine injury. In the following analysis, RTAs are grouped by families and then subdivided by issue, where appropriate.

4.2.2.1 The EU

Injury is rarely referred to in the same way in the EU’s RTAs. We have categorised the EU’s approach to injury in two ways. First, where no reference is made to the standards in the *Safeguards Agreement* and alternatives to determine injury are provided. Second, where options to determine injury include and go beyond those provided for in the *Agreement on Safeguards*.

4.2.2.1.1 No reference to serious injury or threat thereof, alternatives to determine injury

In the RTAs with Cameroon, the Faroe Islands, Iceland, Norway, the Overseas Countries and Territories (OCT), Switzerland and Liechtenstein, San Marino, Syrian Arab Republic and Turkey there is no direct reference to the injury standards in the *Agreement on Safeguards*.⁴² Many of these Agreements came into force prior to 1995. The RTA with Cameroon, which came into force in 2009, was negotiated to “prevent disruption to Cameroon’s exports to the EU after the trade provisions of the Cotonou Agreement expired on 31 December 2007...”.⁴³ The RTA with the Faroe Islands came into force in 1997 and the RTA with San Marino came into force in 2002, but neither is a Member of the WTO. So the absence of the *Safeguards Agreement* injury standards from these RTAs could be explained by a variety of factors.

In the RTA with Cameroon there are three options to determine injury to the domestic industry. First, where increased imports cause or threaten to cause serious *damage* to the domestic industry; second where such imports cause disruption in a sector of the economy, particularly where the disruption gives rise to major social problems or creates difficulties which could seriously jeopardise the economic situation of the importing Party; or, third where increased imports cause or threaten to cause disruption in the markets of like or directly competitive agricultural products, or in the mechanisms regulating those markets.⁴⁴

The RTA with the Overseas Countries and Territories (OCT) also has a broader safeguard provision. Where “serious disturbances occur in a sector of the economy of the Community or one or more of its Member States, or their external financial stability is jeopardized, or if difficulties arise which may result in deterioration in a sector of the Community’s activity or in a region of the

⁴¹ Articles 4.1(a) and (b) of the *Agreement on Safeguards*.

⁴² The interim agreement between the EU and Cameroon references the *Agreement on Safeguards* in the Article on multilateral safeguards, but does not mention those injury standards in the Article on bilateral safeguard measures.

⁴³ See fact sheet at: http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142190.pdf

⁴⁴ Agricultural safeguards are a feature of a number of RTAs, but their analysis is beyond the scope of this paper.

Community”⁴⁵ the Commission can authorise the Member States concerned to take safeguard measures. The concept of a serious disturbance is used again in the RTA with San Marino, which came into force in 2002, a year after the above mentioned provisions were published in the Official Journal of the European Communities. But in the San Marino RTA the reference is to *any* sector of the economy.

In the RTAs with the Faroe Islands, Norway, Switzerland and Liechtenstein and Iceland reference is made to where an increase in imports of a given product is or is likely to be seriously *detrimental* to *any* production activity.

In the RTA with the Syrian Arab Republic the reference is to serious disturbances that arise in any sector of the economy, or to difficulties that might bring about a serious deterioration in the economic situation of a region. This approach is identical or similar to the formulations used in a number of the EU’s RTAs that include the *Safeguards Agreement* injury standards.

So, an array of approaches to determine injury is used in these RTAs. Through an evaluation of damage, disruption, disturbances, detriment or deterioration to sectors, production, the economy or a particular region a determination was made regarding the injury suffered as a result of increased imports. These options to determine injury appear to be broader than those offered in the *Agreement on Safeguards*. The Appellate Body considers the standard for serious injury to be “exacting”⁴⁶ and “very high”⁴⁷. So, if indeed these options to determine injury are broader than those used in the *Agreement on Safeguards*, there would be greater scope to find injury thus increasing the opportunities to apply a safeguard measure (assuming all other criteria in the relevant RTAs are met). The potential meaning of serious disturbances is examined further below.

4.2.2.1.2 Reference to serious injury or threat thereof, and additional options to determine injury

The EU’s RTAs that incorporate the injury standards from the *Safeguards Agreement* are usually accompanied by other options to determine injury. The RTA with Chile refers only to the injury standards in the *Agreement on Safeguards*. In the RTAs with Albania, Bosnia and Herzegovina, Croatia, Israel, the former Yugoslav Republic of Macedonia (FYROM), Mexico, Montenegro, Morocco, the Palestinian Authority, Serbia, and Tunisia, additional options to find injury take the form of serious disturbances in any sector of the economy, or difficulties which could bring about serious deterioration in the economic situation of a region.

Other EU RTAs have variations of this approach, sometimes including a specific reference to the agricultural sector.⁴⁸ The RTA with CARIFORUM, which came into force in 2008, has a similar provision to that of Cameroon, which came into force in 2009. While the structure of the provisions in the two RTAs is the same, different terminology is used. The CARIFORUM RTA refers to serious injury or threat thereof (i.e. the *Safeguards Agreement* standard rather than serious damage); disturbances in a sector of the economy (rather than disruption), particularly where the disturbances produce major social problems or difficulties which could bring about serious deterioration (rather than seriously jeopardise) in the economic situation of the importing Party; and third disturbances (rather than disruption) in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets.⁴⁹

The RTA with Côte d’Ivoire, which came into force in 2009, has a near identical formulation to the RTA with CARIFORUM, but also incorporates some of the language from the Cameroon RTA. Again, three options are provided for applying a safeguard measure where increased imports cause or threaten to cause: serious injury; disruptions in a sector of the economy, particularly where such disruptions produce major social problems or difficulties which could bring about serious deterioration in the economic situation of the importing Party; or disruptions in the markets for similar or directly competitive agricultural products, or for the mechanisms regulating those markets. The RTA with the Eastern and Southern African states, negotiated after the RTAs with CARIFORUM and Côte d’Ivoire, refers to *disturbances* in a sector of the economy, or disturbances

⁴⁵ Official Journal of the European Communities, 30 November 2001, L 314/19, Article 42.1.

⁴⁶ Appellate Body Report, *United States-Wheat Gluten*, para. 149.

⁴⁷ Appellate Body Report, *US-Lamb Safeguard*, para. 124.

⁴⁸ Any analysis of agricultural safeguards is beyond the scope of this paper.

⁴⁹ As in the RTA with Cameroon, we note that any analysis of agricultural safeguards is beyond the scope of this paper.

in the markets of agricultural like or directly competitive products. No reference is made to social problems or to the deterioration in the economic situation.⁵⁰

In addition to serious injury or threat thereof, the RTA with South Africa also provides the option of serious deterioration in the economic situation of the EU's outermost regions or one or more SACU Members.

The RTA with Papua New Guinea and Fiji seems to encompass all of the above-mentioned elements. It refers to increased imports causing or threatening to cause disturbances in a sector or industry of the economy, whether of an economic or social nature, or difficulties which could bring about serious deterioration in the economic situation of the importing parties of Pacific States, or disturbances in the markets of agricultural like or directly competitive products or mechanisms regulating those markets.

The provision of multiple options to determine injury in addition to the standards in the *Agreement on Safeguards* inevitably broadens the scope to find injury and thus potentially simplifies a causation analysis. This would allow for the easier application of a safeguard measure (assuming all other components to apply a safeguard measure in the RTA are met).

What is unclear is how broad these formulations would be in comparison to the "high" injury standard in the *Agreement on Safeguards*. During the examination of the EU-Albania RTA in 2008 a question was posed by Switzerland⁵¹ regarding the definition of "serious disturbances". The joint response from both parties was that a "serious disturbance" was intended to be less stringent than "serious injury". This allowed the Parties the flexibility to make trade concessions whilst still protecting sensitive products, such as agriculture.

During the examination of the EU-South Africa RTA in 2012, a question was posed on the meaning of "serious deterioration in the economic situation." South Africa responded that the Parties had not defined the term further as the safeguard provisions had not been used. The EU response was more definitive, noting that the concept of "deterioration" related to the economic situation of a region and was therefore wider in scope than "serious injury".

Connected to these alternative and additional approaches to injury is the examination of injury factors, which is considered below.

4.2.2.2 EFTA and Turkey

EFTA and Turkey's RTAs also take a variety of approaches to injury. We again categorise injury in the RTAs in two ways. First, where reference is made to the standards in the *Safeguards Agreement*, but in relation to a "substantial" cause (this category does not apply to Turkey's RTAs). And, second, where a variety of options are provided to determine injury, including serious injury or threat thereof.

4.2.2.2.1 Substantial cause of serious injury or threat thereof

EFTA's RTAs referring to a single option to determine injury through a "substantial cause of serious injury or threat thereof" have come into force since 2003. The meaning of a "substantial cause" is explored further below. This approach to injury applies to EFTA's RTAs with Albania, Canada, Chile, Colombia, Hong Kong, China; the Republic of Korea, Montenegro, Peru, Singapore, Serbia, and the Ukraine. In the case of Tunisia, which came into force in 2005, three options are provided to determine injury. First, a substantial cause of serious injury. Second, serious disturbances in any sector of the economy, and third, difficulties that could bring about a serious deterioration in the economic situation of a region.

4.2.2.2.2 Serious injury or threat thereof and additional options to determine injury

Prior to 2003 EFTA's RTAs appear to have provided a variety of ways in which to determine injury. In the RTAs with Croatia, Israel, Mexico, FYROM, and Turkey the additional formulation (to

⁵⁰ We are cognisant of the fact that differences in terminology might arise from translation of legal texts.

⁵¹ See WT/REG226/2.

the *Safeguards Agreement* standards) was to serious disturbances in any sector of the economy, or difficulties which could bring about serious deterioration in the economic situation of a region. This same formulation was also used in the RTA negotiated between Turkey and Israel, which came into force in 1997.

A similar approach was used by Turkey in its RTAs with: Bosnia and Herzegovina, Croatia, the FYROM and the Palestinian Authority.⁵² But, these RTAs referred to a serious disturbance in any *related* sector, rather than *any* sector of the economy.

EFTA's RTAs with Morocco and the Palestinian Authority also used this less inclusive approach of serious disturbances to any *related* sector of the economy. But these RTAs also included an analysis of a serious deterioration in the economic situation of a region due to the difficulties encountered from increased imports. The RTA with Jordan referred to serious disturbances in any sector of the economy only.

Given multiple options to determine injury it would likely be easier to achieve a positive injury determination. However, other conditions would still need to be satisfied, including, unless otherwise specified, all relevant factors of an objective and quantifiable nature that could have an impact on the situation. The issue of injury factors is considered below.

4.2.2.3 Chile, China, India, Japan and Singapore

Chile, China, India, Japan and Singapore stay faithful to the injury standards in the *Agreement on Safeguards*, although Singapore's agreements with Australia and New Zealand prohibit the use of safeguard measures. In some RTAs there is a requirement for the causal link between increased imports and injury to be "substantial". We note below, first, the RTAs that repeat the injury standards from the *Safeguards Agreement*, and second, those that require a "substantial" causal link.

4.2.2.3.1 Serious injury or threat thereof

In Chile's RTAs with the Republic of Korea and the EU, reference is made to the injury standards in the *Agreement on Safeguards* only. The injury standards in China's RTAs with ASEAN; Hong Kong, China; China-Macao, China; and New Zealand are also the same as those in the *Agreement on Safeguards*. This is also the case for India's RTAs with Afghanistan, Malaysia, Nepal, Sri Lanka and Mercosur; Japan's RTAs with ASEAN, Thailand and Viet Nam, and the RTA between Singapore and Peru. All of these RTAs have been negotiated in the WTO era, i.e. since 1995.

4.2.2.3.2 Substantial cause of serious injury or threat thereof

In Chile's RTAs with Canada, China, India, Japan, the US and EFTA; China's RTAs with Chile, Costa Rica, Singapore, Pakistan and Peru; India's RTAs with ASEAN, Chile, Japan, Singapore, and the Republic of Korea; Japan's RTAs with Brunei Darussalam, Chile, India, Indonesia, Malaysia, Mexico, Peru, the Philippines, Singapore, and Switzerland; and Singapore's⁵³ RTAs with China, India, Japan, Korea, Rep. of, Panama, the US and EFTA, the reference is to a *substantial* cause of serious injury or threat thereof as a result of increased imports. The meaning of a "substantial cause" is examined further in the causation section, below.

4.2.2.4 Canada and the US

In all of the US and Canadian RTAs examined as a part of this exercise,⁵⁴ the reference is always to a *substantial* cause of serious injury or threat thereof, with the exception of the RTA

⁵² These RTAs were negotiated between 2000 and 2005.

⁵³ In Singapore's RTA with Jordan reference is made to a substantial cause of serious injury without any reference to threat.

⁵⁴ US RTAs considered are those with: Australia, Bahrain, CAFTA-DR, Chile, Colombia, Israel, Jordan, the Republic of Korea, Morocco, NAFTA, Oman, Panama and Peru. The RTA between the US and Singapore has a special bilateral safeguard for the textiles sector and such safeguards are excluded from the scope of this paper. All of these RTAs came into force after 1995 apart from the RTA with Israel, which came into effect in 1985, and NAFTA, which entered into force in 1994. The Canadian RTAs considered are those with Chile, Colombia, Costa Rica, EFTA, Israel and Peru. All of these agreements entered into force after the *Safeguards Agreement* came into force.

between Canada and Israel which excludes threat of serious injury. The meaning of the phrase “substantial cause” is considered further below.

4.2.2.5 Australia

Australia’s RTAs take a variety of approaches to injury.

4.2.2.5.1 Serious injury or threat thereof and substantial cause of serious injury or threat

The injury standards in the *Agreement on Safeguards* are retained in the RTAs with ASEAN and New Zealand, and with Papua New Guinea. In the RTA with the US the reference is to “substantial cause” of serious injury or threat thereof.

4.2.2.5.2 Other types of injury

The approach to injury in the RTA with Thailand is unique among Australia’s RTAs (as examined in this paper). The RTA states that a safeguard measure can be taken where increased imports result in serious *damage* or actual threat thereof. Unlike the reference to damage in the EU-Cameroon Agreement, it is defined here as a significant overall impairment in the position of a domestic industry. i.e. it is identical to the definition of serious injury in Article 4.1(a) of the *Agreement on Safeguards*. The Agreement with Thailand came into force in 2005.

A different approach to injury was also taken in the Australia-New Zealand Closer Economic Relations Agreement, which came into force in 1983, well in advance of the *Safeguards Agreement*. It stated that where increased imports cause or pose an imminent and demonstrable threat to cause severe material injury, consultations could be requested. But safeguard measures were available only during the transition period, which has since expired.

In the RTA with PNG the concept of material retardation to the establishment of an industry was introduced as another form of injury in addition to serious injury or threat thereof. No definition of material retardation is provided for in the Agreement. The Agreement came into force in 1977, again, well in advance of the establishment of the WTO and the *Agreement on Safeguards*.

4.2.2.6 Russian Federation and the Ukraine

4.2.2.6.1 Approach to injury

The RTA between the Russian Federation and the Ukraine came into effect in February 1994. The RTA did not make any direct reference to safeguards or emergency measures. Quantitative restrictions were allowed in specific circumstances, including where imports were in such “large” quantities so as to cause or threaten to cause *damage*. The same pattern was followed in the RTAs between the Russian Federation and Georgia and the Russian Federation and Belarus, both of which came into effect in 1993. The RTAs with Azerbaijan, Kazakhstan, and Moldova all of which came into force in 1993, follow the same pattern but refer to “injury” rather than “damage”.

The RTA between the Ukraine and Azerbaijan, which came into force in 1996, follows a similar formula to the Russian Federation RTAs, referring to increased imports causing or threatening to cause damage. The RTAs between the Ukraine and Belarus, which entered into force in 2006, and between the Ukraine and Tajikistan, ratified in 2002 are broader in their references to the types of measures that can be used, but otherwise similar to some of the Russian Federation RTAs which refer to damage rather than serious injury. The RTA between the Ukraine and Moldova, ratified in 2005, also uses the “damage” standard for injury. The RTA between the Russian Federation and Serbia, which entered into force in 2006, incorporates the use of the word “substantial” in referring to a causal link, but retains the word “damage” like the earlier Russian RTAs. Unlike the Australian-Thailand RTA, no definitions are provided for the meaning of this term.⁵⁵

⁵⁵ “Damage” was also one of the options used in the EU-Cameroon RTA.

The RTA between the Ukraine and the FYROM, ratified in 2001, provides two options to find injury: serious injury or threat thereof; and “serious disruptions to any related sector of the economy or difficulties which could bring about serious deterioration of the economic situation in the region....”, repeating the language from a number of EFTA and Turkey RTAs.

4.3 Factors to Determine Injury

4.3.1 The Safeguards Agreement

Article 4.2(a) in the *Agreement on Safeguards* require authorities to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.”

4.3.2 RTAs: The Analysis

The *Agreement on Safeguards* provides a non-exhaustive list of factors that must be considered at a “minimum” in an injury analysis.⁵⁶ RTAs take a variety of approaches to the consideration of these factors in assessing injury, either referring to the list of factors in Article 4.2(a) directly, avoiding any mention of such factors altogether, or altering the list of those factors. For example, the Canada-Chile, Canada-Costa Rica, NAFTA and the US-Dominican Republic-Central American RTAs add prices and inventories, and the generation of capital to the list of factors to be considered in the analysis. In the India-Chile and the India-Mercosur RTAs return on investment and cash flow are specifically noted in the respective agreements. In the RTA between Singapore and Peru the additional factors mentioned are exports, changes in prices and inventories, capital generating capacity and wages. Conversely, Japan does not include the rate and amount of the increase on imports in relative terms in its RTAs with Brunei Darussalam, Chile, Mexico and Peru.

On the face of it, regardless of the specific factors listed in the RTA it would be necessary to evaluate *all* relevant factors having an impact on the situation. The Appellate Body has found that in order to evaluate the relevance of a particular factor the authorities must assess the bearing, influence or effect of that factor on the overall situation of the domestic industry against the background of all other relevant factors.⁵⁷

The RTA between Singapore and Peru notes that none of the listed factors or several of them in conjunction would necessarily be sufficient to reach a decisive conclusion on injury. The RTA between Thailand and Australia talks about “relevant economic variables” emphasising that a single factor is not “necessarily decisive”.⁵⁸ These kinds of approaches appear to be in keeping with guidance provided by the Appellate Body where it has noted that the language in Article 4.2 (a) of the *Safeguards Agreement* “does not distinguish between, or attach special importance or preference to, any of the listed factors.” The contribution of each relevant factor to the final determination would depend on its bearing or effect on the domestic industry.⁵⁹

4.4 Causation, including Non-Attribution

4.4.1 The Safeguards Agreement

The causation requirement is elaborated in Article 4.2(b) of the *Agreement on Safeguards*. It requires that there be a “causal link” between increased imports and serious injury or threat thereof, and that injury caused by factors other than increased imports not be attributed to those increased imports.

⁵⁶ Appellate Body Report, *Argentina –Footwear (EC)*, para. 136.

⁵⁷ Appellate Body Report, *United States-Wheat Gluten*, para. 71.

⁵⁸ The same language is used in the RTA between Thailand and New Zealand.

⁵⁹ Appellate Body Report, *United States-Wheat Gluten*, para. 72.

4.4.2 RTAs: The Analysis

A number of RTAs use the phrase “substantial cause” of serious injury or threat thereof, rather than “cause” of serious injury or threat. The reference to a substantial cause is in all of the US and Canadian RTAs examined for this paper and appears frequently in the RTAs negotiated by Singapore, Japan, Chile, EFTA and China. “Substantial cause” is defined in almost all of the US RTAs⁶⁰ as “a cause which is important and not less than any other cause.” When India and Singapore were questioned during their examination process on the meaning of “substantial cause” in their agreement, they also responded that it could be understood to mean a cause which is important and not less than any other cause.⁶¹ This same definition is used in the RTA between China and Costa Rica.⁶²

On occasion parties have been questioned about the differences between the safeguards chapters in their RTAs and the *Agreement on Safeguards*. The response from the US and Singapore; and the US and Chile was that the use of the word “substantial” gave “greater clarity to the analysis of whether increased imports cause serious injury or threat of serious injury.”⁶³ A similar response was given by India and Singapore during their examination process where they also noted the objective of an RTA was to achieve greater liberalisation between the parties to the RTA.⁶⁴

The Appellate Body has found that a “causal link” must exist between increased imports and serious injury or threat thereof, and that this requires a relationship of cause and effect so that increased imports can be seen, on the basis of objective evidence, to contribute to bringing about, producing or inducing the serious injury.⁶⁵ This does not require that the increased imports be the *sole* cause of serious injury.⁶⁶ Rather, the effects of the increased imports must be examined to determine whether those imports establish a genuine and substantial relationship of cause and effect between the increased imports and serious injury.⁶⁷

In *Argentina-Footwear (EC)* the Appellate Body endorsed a three pronged approach outlined by the Panel to determine causation in a dispute on safeguards.⁶⁸ First, an upward trend in imports should coincide with a downward trend in injury factors. If not, a reasonable explanation would be needed as to why data could nevertheless support a finding of causation. Second, the conditions of competition would need to demonstrate a causal link between imports and the injury. And, finally, where the injury could have been caused by other factors, such injury could not be attributed to the increased imports. So, if a number of factors were causing injury at the same time, such effects had to be separated and distinguished from the injurious effects caused to the domestic industry by increased imports.⁶⁹ This third element, also in the *Agreement on Safeguards*, is referred to as the non-attribution requirement.

Many RTAs make no mention of a non-attribution requirement. This applies to RTAs negotiated by the EU, Turkey and Pakistan. EFTA's RTAs are either silent on a non-attribution requirement or include a general reference to the *Agreement on Safeguards*. Other RTAs include text that closely resembles the second sentence of Article 4.2(b).⁷⁰ For example, in Japan's RTAs with Brunei Darussalam, Chile, India, Mexico and Peru specific text regarding a non-attribution requirement is included in the RTA. In Japan's other RTAs there is a general reference to Article 4.2 in the *Safeguards Agreement*.

⁶⁰ The RTA with Israel is a notable exception, but this RTA came into force in 1985, before the *Agreement on Safeguards* came into force and much in advance of the other RTAs negotiated by the US.

⁶¹ See WT/REG228/2.

⁶² The RTA between China and Costa Rica came into force in 2011.

⁶³ See WT/REG161/5, para. 5; and WT/REG160/5, para. 11.

⁶⁴ See WT/REG228/2.

⁶⁵ Appellate Body Report, *United States – Wheat Gluten*, para. 67.

⁶⁶ Appellate Body Report, *United States-Wheat Gluten*, para.67.

⁶⁷ Appellate Body Report, *United States-Wheat Gluten*, para. 69; and Appellate Body in *US-Lamb*, para. 168.

⁶⁸ Appellate Body Report, *Argentina-Footwear (EC)*, para. 144.

⁶⁹ Appellate Body Report, *United States-Wheat Gluten*, paras. 68-69. The Appellate Body elaborated on this in *US-Lamb*, stating, among other things, that such an approach was necessary so that the injurious effects of other factors could be disentangled from the injurious effects of the increased imports. Appellate Body, *US-Lamb*, para. 179.

⁷⁰ Which says “when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”

Specific references regarding a non-attribution test are also included in the RTAs between Singapore and Peru, and Chile's RTAs with Canada, China, India and Japan. But Chile's RTAs with the Republic of Korea, the US, the EU and EFTA are silent on a non-attribution requirement.

India also has a mixed approach to whether it makes explicit mention of a non-attribution requirement. For example, with Chile, Japan and Mercosur there is text noting the requirement to ensure injury from other factors is not attributed to increased imports. With Malaysia, Singapore and the Republic of Korea there is a general reference to Article 4 of the *Safeguards Agreement*, and in the RTAs with Afghanistan, Nepal and Sri Lanka there is no mention of a non-attribution requirement.

Most of the USA's RTAs make no direct reference to a non-attribution test, although the US-Singapore RTA refers to Article 4.2(b) of the *Safeguards Agreement*, and NAFTA and CAFTA-DR have language reminiscent of Article 4.2(b). In the RTA with Australia any reference to Article 4.2(b) is noticeably absent as Articles 4.2(a) and (c) are incorporated into the RTA.

In all of Canada's RTAs there is either a specific reference to Article 4.2 of the *Agreement on Safeguards*, a generic reference to the *Agreement on Safeguards*, or a specific mention of a non-attribution requirement.

For the most part, China's RTAs either make a general reference to Article 4.2 of the *Agreement on Safeguards* or are silent on the issue of a non-attribution requirement. The RTA between Chile and China has a specific reference to a non-attribution requirement, as noted above. China's RTA with Hong Kong, China; Macao, China; and Pakistan are silent on a non-attribution requirement.

The approach in Australia's RTAs is also mixed. No mention is made of a non-attribution requirement in the RTAs with New Zealand and Papua New Guinea (PNG). The RTA with New Zealand came into force in 1983 and the RTA with PNG came into force in 1977. The specific non-attribution language was not in Article XIX of the GATT. The RTA with ASEAN and New Zealand has a reference to Article 4.2(b) of the *Agreement on Safeguards* and the RTA with Thailand includes a specific reference to a non-attribution requirement. There is no mention of a non-attribution requirement in the RTA with the US (see above).

It is difficult to see any discernible patterns from this mixed bag of approaches. There seems to be a general approach to refer to the non-attribution requirement either through specific text or referral to the *Safeguards Agreement*. Although the US, the EU, EFTA, Turkey, Pakistan, China and India often or always elect to leave out any specific mention of a non-attribution requirement.

Panels and the Appellate Body have found that even where there is no express requirement in the text of an Agreement to perform a non-attribution analysis, in order to determine injury some form of evaluation of the injurious effects of other factors is necessary. In *US-Upland Cotton*, notwithstanding the absence of non-attribution language in Articles 5 and 6.3 of the SCM Agreement, both the Panel and Appellate Body found that some form of non-attribution was inherent in establishing the causal link between the subsidy and price suppression.⁷¹ But the type or level of non-attribution analysis required to support a conclusion of causation will vary.⁷²

4.5 Investigation

4.5.1 The Safeguards Agreement

GATT Article XIX does not make specific reference to a safeguards investigation and the issues that should be considered therein. This is provided in Article 3.1 of the *Safeguards Agreement* which permits a Member to apply a safeguard measure "only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994." The investigation should include "reasonable public notice to all interested parties and public hearings or other appropriate means ...". Article 3.2 provides that confidential information may not be disclosed without the permission

⁷¹ Appellate Body Report, *US-Upland Cotton*, para. 438.

⁷² Appellate Body Report, *US-Tyres (China)*, para. 252.

of the party submitting it, though parties providing confidential information may be requested to furnish non-confidential summaries.

4.5.2 RTAs: The Analysis

Slightly more than half (105) of the 194 RTAs with specific bilateral safeguard provisions contain a specific reference to conducting an investigation prior to the imposition of safeguard measures. Other aspects of Article 3 of the *Safeguards Agreement* such as the right to adopt or maintain procedures for the treatment of confidential information and the obligation to furnish non-confidential summaries are either specifically incorporated in a number of RTAs or through general reference to (Article 3 of) the *Safeguards Agreement*.

The first RTA to make reference to referring a safeguards matter to an industry advisory body for investigation is Australia-New Zealand CER (1983). The NAFTA (1994) contains detailed provisions on the administration of safeguard proceedings including the contents of a petition or complaint, the requirement to hold a public hearing, the treatment of confidential information, factors to consider in weighing the evidence of injury and causation and the contents of the report of the investigating authority.⁷³ A number of RTAs concluded subsequently have followed the NAFTA model though some nuances are found. For instance in Chinese Taipei's RTAs with Honduras, El Salvador, Guatemala and Panama, safeguard measure proceedings initiated *ex officio* or as a result of a petition by domestic industry must have the support of at least 25% of domestic industry.

An innovation found in the NAFTA is a provision stating that a safeguard action must be initiated no later than one year after the date of the institution of the emergency action proceeding. Similar provisions are found in 35 RTAs subsequently concluded, usually with reference to the same timeframe, though some nuances are found. For instance, in Chinese Taipei's RTAs with Honduras, Guatemala, and El Salvador, an investigation should normally be concluded within six months (exceptionally within twelve months) of the initiation of the investigation. Japan's RTAs with Mexico and Thailand provide that an investigation should be completed within one year (except in special circumstances), and in no case more than 18 months, following its date of initiation.⁷⁴ In New Zealand-Malaysia the investigation should as far as possible be completed within 180 days after being initiated but in no case should it exceed one year. Peru-Singapore provides that the investigating authority has a maximum term of six months from the date of initiation of the procedure to conduct the investigation and prepare its report.

Another innovation found in the NAFTA is provision for the review of determinations of serious injury by judicial or administrative tribunals. We found 27 RTAs concluded since 1994 that incorporate such a provision: all of Canada's RTAs (except Canada-Israel); US RTAs with Panama, Singapore, and CAFTA-DR; all of Chinese Taipei's RTAs (with Honduras, Guatemala, El Salvador, Nicaragua and Panama), Israel-Mexico, Japan-Singapore, India-Singapore, India-Korea, Rep. of, Pakistan-Malaysia, Chile-Mexico, Chile-Central America, Mexico-Northern Triangle and Panama-Central America. Most of these RTAs also provide that negative injury determinations are not subject to modification, except by such review.

A number of RTAs do not specifically refer to conducting an investigation, but provide instead for an examination to take place within the institutional body responsible for administering the agreement. For instance, around half of Turkey's RTAs contain specific provisions governing bilateral safeguards.⁷⁵ None makes reference to an investigation per se, but all refer to conducting an examination. For instance, in Turkey-Bosnia and Herzegovina, a party which considers resorting to safeguard measures shall supply all relevant information. Consultations then take place between the parties within the Joint Committee with a view to finding a solution acceptable to the parties. The Joint Committee then examines the case and takes any decision needed to put an end to the difficulties.⁷⁶ In the absence of a decision within 30 days the Party may adopt the measures necessary to remedy the situation.

⁷³ Annex 803.3 of NAFTA

⁷⁴ Japan's other RTAs specify that the investigation shall in all cases be completed within one year following its date of institution.

⁷⁵ In the rest, the parties simply retain their rights and obligations under GATT Article XIX and the WTO *Agreement on Safeguards*.

⁷⁶ No guidance is provided on how the examination would be conducted and what elements would be considered.

Around half of EFTA's RTAs (including all those dating from 2009) make a specific reference to conducting an investigation in accordance with the procedures laid down in the *Agreement on Safeguards*. For those predating 2009, the procedure to be followed is similar to that in Turkey's RTAs, i.e. the Joint Committee is to be supplied with all relevant information, consultations take place between the parties, the Joint Committee examines the case, and in the absence of a decision by the Joint Committee putting an end to the difficulties, the party may adopt measures.

The majority of the EU's RTAs contain no reference to conducting an investigation.⁷⁷ Instead, most of its RTAs make reference to conducting an examination along the same lines as found in Turkey's and EFTA's RTAs. The emphasis in these RTAs seems to be on settlement of the issue within the relevant institutional body with safeguard measures adopted only as a last resort, rather than charging the domestic authorities of the complaining party with conducting an investigation.

Baldwin et al, 2009 argue that notification to a joint committee and consultations with the RTA partner may facilitate an amicable solution thereby de facto reducing the application of trade remedies. What was previously a purely unilateral act undertaken by domestic authorities instead becomes a matter that automatically invokes the possibility of trade diplomacy in the first instance.⁷⁸ Voon disagrees, arguing that although these additional procedural hurdles may encourage RTA partners to reach a mutually agreed solution rather than imposing trade remedies, these are fairly soft obligations that do not assure that result.⁷⁹

The Appellate Body in *US-Wheat Gluten* has stated that the ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. This suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study must actively seek out pertinent information. The nature of the "investigation" required by the *Agreement on Safeguards*, elaborated further in the remainder of Article 3.1, sets forth certain investigative steps that the competent authorities shall include in order to seek out pertinent information. The focus of the investigative steps mentioned in Article 3.1 is on "interested parties", who must be notified of the investigation, and who must be given an opportunity to submit "evidence", as well as their "views", to the competent authorities. The interested parties are also to be given an opportunity to "respond to the presentations of other parties".⁸⁰

In a number of RTAs, the lack of precision in the text with regard to an examination or investigation makes it unclear if the investigative steps that would be required prior to the invocation of a multilateral safeguard would be followed in the bilateral context.

4.6 Type and Duration of Measure and Conditions for Reapplication

4.6.1 The Agreement on Safeguards

Article 5.1 of the *Safeguards Agreement* provides that a Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.⁸¹ Neither GATT Article XIX nor the *Safeguards Agreement* prescribe the measures that may be taken, thus leaving Members flexibility to use tariff-based measures, quantitative restrictions or other measures.⁸²

Article 7 of the *Safeguards Agreement* provides that safeguard measures shall be applied only for a period of time necessary to prevent or remedy serious injury and facilitate adjustment. The period should not exceed four years, unless extended. The total period of application including the extension should not exceed eight years. If the safeguard is imposed for a period over one year, it should be progressively liberalized during the period of application. No safeguard measure

⁷⁷ Exceptions are EU-Algeria, EU-Chile and EU-Korea, Rep. of.

⁷⁸ Baldwin et al., 121.

⁷⁹ Voon, 15

⁸⁰ See Appellate Body Report, *US-Wheat Gluten*, paras. 53-54.

⁸¹ No reference is made in GATT Article XIX to remedying serious injury and facilitating adjustment.

⁸² Article 5.1 of the *Safeguards Agreement* states, however, that if a quantitative restriction is used, it shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given.

shall be applied again to the same good which has already been subject to a measure until a period of time equal to that during which the measure was previously applied has elapsed, provided the period of non-application is at least two years.⁸³

GATT Article XIX does not prescribe the length of the safeguard measure and its extension, nor the conditions for its reapplication

4.6.2 RTAs: The Analysis

4.6.2.1 The EU's RTAs

In the EU's RTAs, only EU-Korea, Rep. of incorporates the language of the *Safeguards Agreement*, by providing that safeguard measures shall be applied only for such time as may be necessary to prevent or remedy serious injury and facilitate adjustment. A number of the EU's RTAs, particularly those with Euro-Mediterranean partners provide that measures should not exceed what is necessary to remedy the difficulties which have arisen. In the EPAs, differing language is found: should not exceed what is necessary to remedy or prevent the serious damage or disruption (Cameroon); necessary to prevent or remedy serious injury or disturbances (CARIFORUM, ESA and Papua New Guinea, Fiji); and should not exceed that which is strictly necessary to prevent or remedy serious injury or disruptions (Côte d'Ivoire).

The EU's pre-WTO RTAs, but also certain post-WTO RTAs (with Andorra, Faroe Islands, Israel, Jordan, Morocco, OCTs, Palestinian Authority, San Marino, Tunisia, and Turkey), allow the parties to take (appropriate) measures, but provide no guidance about the type of measure, its duration, whether or not it may be reapplied and under what conditions, and whether its use is limited to the transition period of the agreement.

In the EU's RTAs with Algeria, Egypt and the Lebanese Republic, the provisions of Article XIX and the *Safeguards Agreement* apply between the parties, suggesting that use of the bilateral safeguard mechanism is not time-bound and may continue to be used beyond the transition period of the agreement.

More recent EU RTAs with Albania, Bosnia and Herzegovina, Chile, Croatia, FYROM, Korea, Rep. of; Mexico, Montenegro, South Africa and Serbia are more prescriptive with regard to permitted measures though provisions vary by partner. For the most part, these RTAs provide that bilateral safeguard measures should normally consist of the suspension of further tariff reductions or, in some cases, a duty increase (up to the MFN level or rate of basic duty). Although QRs or TRQs are not stated as options, the use of permissive language, "should normally consist of" might leave the door open for the use of measures other than tariff increases. The permitted length of the measure in these RTAs varies: one year plus two year extension (Albania, Croatia, FYROM); two plus two years (Bosnia and Herzegovina, Korea, Rep. of and Montenegro) and; three years (South Africa). In EU-Chile the length of the measure is not specified. No reapplication of the measure to the same product is permitted for a period of at least two years (Serbia), three years (Albania, Croatia, FYROM, Mexico) or four years (Bosnia and Herzegovina, Montenegro and Serbia) since the expiry of a measure. EU-Korea, Rep. of and EU-Chile do not specify whether or not a measure can be reapplied and under what conditions.

In the EPAs, safeguard measures "may only consist of one or more of the following": suspension of further duty reductions; increase in duties to the MFN level; or introduction of TRQs on the product concerned. Measures may be taken by the EU for a period not exceeding two years which may be extended for two years; for the ACP partner and the EU's outermost regions the measures may be taken for four plus four years. No safeguard measure may be reapplied to the same product for a period of at least one year since the expiry of the measure.

4.6.2.2 EFTA

⁸³ Safeguard measures with a duration of 180 days or less may be reapplied if at least one year has elapsed since the date of introduction of a safeguard measure on that good and the measure has not been applied on the same product more than twice in the five-year period immediately preceding the introduction of the measure.

In EFTA's RTAs safeguard measures are restricted to what is strictly necessary to remedy (or rectify) the situation (FYROM, Israel, Jordan, Morocco, Palestinian Authority and Turkey); should not exceed what is necessary to remedy the difficulties which have arisen (Croatia, Mexico, and SACU); or may be taken to the minimum extent necessary to remedy or prevent the injury (Albania; Canada; Colombia; Chile; Hong Kong, China; Korea, Rep. of; Montenegro; Peru; Serbia; Singapore and Ukraine).

In EFTA's RTAs with Turkey and Israel (which pre-date the WTO) and with FYROM, Jordan, Morocco and the Palestinian Authority there is no definition of the type of measure that may be taken, its duration, whether or not it may be reapplied and under what conditions, and whether its use is limited to the transition period of the agreement. In RTAs with Egypt, the Lebanese Republic and Tunisia, the parties may apply the provisions of GATT Article XIX and the *Safeguards Agreement*, with no link to the transition period to signal a limit to its applicability. In other EFTA RTAs, the parties *may* take measures consisting of an increase in duties: in some cases it is specified that the increase is to the lesser of the MFN rate or the MFN rate on the day preceding the agreement's entry into force; in others a suspension of further duty reductions is specified.⁸⁴ The use of permissive language in these RTAs suggests that other measures may be permitted. In EFTA-Croatia and EFTA-Singapore safeguard measures are restricted to tariff increases.

In most of EFTA's RTAs, beginning with Mexico (2001) and later, the length of the safeguard measure is defined: not exceeding one year or in exceptional circumstances up to a maximum of three years (Albania; Croatia; Chile; Hong Kong, China; Korea, Rep. of; Mexico; Montenegro; SACU; Singapore and Ukraine), three years (Canada); or two years with a possible extension of one year (Colombia, Peru and Serbia).

Use of a safeguard measure is limited to the transition period in EFTA's RTAs with Canada, Colombia and Peru. The transition period is defined as either ten years (five in EFTA-Canada) from entry into force or the period of a good's staged tariff elimination, if longer.

Reapplication of a safeguard measure to the same good is prohibited in EFTA's RTAs with Albania; Canada; Colombia; Hong Kong, China; Montenegro; Peru; Serbia and Ukraine (all of which entered into force after 2008). In EFTA-Korea, Rep. of and EFTA-Mexico a safeguard may not be reapplied to a good unless a period of at least three years has expired. In EFTA-Chile and EFTA-Singapore reapplication can take place after a period of five years. In all of EFTA's other RTAs it is not specified whether or not a safeguard measure can be reapplied to the same good.

About a third of EFTA's RTAs, for the most part concluded in recent years, provide for a review of the safeguard mechanism. In EFTA-Canada the parties shall consider whether there is a need to extend the transition period for certain products; for EFTA-Singapore a review is to take place two years after entry into force of the agreement to determine if there is a need to maintain a safeguard mechanism with biennial reviews programmed thereafter if the mechanism is retained; for Albania; Montenegro; Serbia; Korea, Rep. of; Ukraine and Hong Kong, China the review is to take place five years after entry into force with a biennial review thereafter (except for Hong Kong, China where no such review is foreseen).

4.6.2.3 Turkey and CIS

Most of Turkey's RTAs that have specific provisions on bilateral safeguards provide that measures should be limited to what is strictly necessary in order to rectify the situation giving rise to their application and should not be in excess of the injury caused by the practice or difficulty in question.

None of Turkey's RTAs that provide for bilateral safeguards define the type and duration of the measure, conditions for reapplication, and whether its use is limited to the transition period of the agreement. None provides for the review of the safeguard mechanism.

RTAs involving CIS countries, most of which were concluded either pre-WTO or before these countries acceded to the WTO, do not, unsurprisingly, echo the language of Article XIX or the

⁸⁴ EFTA's RTAs with Albania; Canada; Colombia; Chile; Hong, Kong China; Korea; Mexico; Montenegro; Peru; SACU; Serbia and Ukraine.

Safeguards Agreement. A number of these RTAs specifically permit the use of quantitative restrictions when safeguard measures are invoked.⁸⁵ Other RTAs involving CIS countries do not define the type of measure that may be used. None of the CIS RTAs defines the duration of the safeguard measure, conditions for reapplication, and whether its use is limited to the transition period of the agreement. None provides for the review of the safeguard mechanism.

4.6.2.4 Canada

Canada's RTAs with Colombia and Peru recall the language of the *Safeguards Agreement*, such that safeguard measures may be imposed to the extent necessary to prevent or remedy serious injury, or thereof, and facilitate adjustment. In the NAFTA and with Chile and Costa Rica, measures are permitted to the minimum extent necessary to remedy or prevent the injury, while with Israel measures may be taken to the extent necessary to remedy the injury.

Canada's RTAs provide for a mix of measures depending on the partner: with EFTA the parties may increase a rate of duty not to exceed the lesser of the MFN rate or the MFN rate applicable on the day preceding the agreement's entry into force; with Colombia, Peru, Israel, Chile, Costa Rica and the NAFTA, suspending the further reduction of customs duties is offered as an additional option. In the latter three RTAs, reference is also made to seasonal goods. The use of permissive language ("the party may") for the choice of safeguard measures might mean that the list of measures is not exhaustive and other measures could be taken.

In all of Canada's RTAs, measures may not be taken for a period exceeding three years, not subject to extension (except for the NAFTA which provides for an extension of one year provided that the duty applied during the initial period of relief is substantially reduced at the beginning of the extension period).

The use of the bilateral safeguard mechanism is time-bound in all of Canada's RTAs and is applicable for 2.5 years (in the case of Israel), five years (EFTA), six years (Chile), seven years (Costa Rica and Peru), and ten years (NAFTA); in most cases the transition period is extended for those products whose staged tariff elimination exceeds the period stated. In Canada's RTAs with Costa Rica, Chile and the NAFTA the measure may be maintained beyond the transition period with the consent of the other party.

In the RTAs with Costa Rica and Peru, no party may apply a safeguard measure against the same good more than twice. With EFTA, Chile, Colombia and the NAFTA partners, no measure may be reapplied to the same good, while the RTA with Israel is silent on this point.

4.6.2.5 The United States

With the exception of US-Israel and the NAFTA (which pre-date the WTO and the *Safeguards Agreement*), US RTAs recall the language of the *Safeguards Agreements* such that measures may be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

In terms of measures that may be taken, all US RTAs provide for the suspension of further duty reductions, or an increase in duties not to exceed the lesser of the MFN rate in effect when the action is taken and the MFN rate on the day immediately preceding the date of entry into force of the RTA.⁸⁶ In its RTAs with Chile, Colombia, Panama, Peru, and CAFTA-DR, the parties specify that neither tariff rate quotas nor quantitative restrictions are a permissible form of safeguard measure. When questioned about the type of safeguard measures that could be employed, the parties to US-Singapore stated that the RTA provided only for increases in tariff rates, not other types of measures such as quotas.⁸⁷ This suggests that the language used in these countries' RTAs specifying measures that "may" be taken is not permissive.

⁸⁵ These include Armenia-Kazakhstan, EAEC, Georgia-Azerbaijan, Georgia-Russian Federation, Georgia-Turkmenistan, CIS, Kyrgyz Republic-Ukraine, Russian Federation-Azerbaijan, Russian Federation-Belarus, Russian Federation-Kazakhstan, Russian Federation-Moldova, Russian Federation-Ukraine, Ukraine-Azerbaijan and Ukraine-Belarus.

⁸⁶ In its RTAs with Australia, Jordan, Morocco, Singapore and the NAFTA, provision is made for seasonal goods.

⁸⁷ The text of US-Singapore states that a party "may" suspend the further reduction of a customs duty or increase a customs duty.

The length of time a measure may remain in place varies depending on the partner: three years plus one year extension (NAFTA); two plus one (Korea, Rep. of); two plus two (Australia, Colombia, Peru, Singapore); total of three (Bahrain, Chile and Oman); total of four (Jordan, Panama and CAFTA-DR); and three plus two (Morocco). In US-Israel the length of the measure is not specified.

With the exception of US-Israel and US-Morocco, the safeguard mechanism may not be used beyond the transition period, though the US RTAs with Bahrain, Jordan, Oman, Korea, Rep. of, Singapore and the NAFTA provide for a safeguard measure to be imposed beyond the transition period with the consent of the other party. In all US RTAs (except US-Israel) a party may not apply a safeguard measure more than once on the same good.

4.6.2.6 China

Most of China's RTAs recall the language of the *Safeguards Agreements* such that measures may be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment (exceptions are those with Singapore and ASEAN which refer to the application of measures in accordance with the *Safeguards Agreement* and the RTAs with Hong Kong, China; Macao, China and the Asia Pacific Trade Agreement (APTA) which are silent on the issue).

For the most part, China's RTAs provide for the suspension of tariff reductions, or an increase in duties up to the lesser of the MFN rate in force or in force on the date of entry into force of the agreement.⁸⁸ Its RTAs with Chile, Costa Rica, and Peru specify that neither TRQs nor QRs are permissible forms of safeguard measures, while those with ASEAN and Singapore prohibit QRs. In those with New Zealand and Pakistan, the use of permissive language may leave open the possibility to apply measures other than those provided for in the agreement.

The permissible length of the safeguard measure varies by partner: three years plus one year extension (ASEAN and Singapore); one year plus one year extension (Chile); one plus two (Costa Rica); two plus one (New Zealand); three plus one (Singapore).⁸⁹ The use of the safeguard measure is tied to the transition period in its RTAs with ASEAN, Chile, Costa Rica, New Zealand, Singapore, Pakistan and Peru. In most RTAs the measure may be reapplied to the same good (during the transition period) provided that certain conditions are upheld. For instance, in China-Costa Rica, a measure may not be reapplied to a product which has been subject to such a measure for a period of time equal to half the duration of the previous safeguard.

In all of China's RTAs (except with Macao, China; Hong Kong, China and APTA) the safeguard mechanism may not be used beyond the transition period which varies depending on the agreement. For instance, in the RTAs with ASEAN and Singapore, the transition period ends five years from the date of completion of the tariff elimination or reduction for a given product. With New Zealand the transition period is three years, or two years beyond the date of tariff liberalization for products for which the liberalization period lasts five years or more.

4.6.2.7 Republic of Korea

Most of the Republic of Korea's RTAs recall the language of the *Safeguards Agreements* such that measures may be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment (in Korea, Rep. of-Chile to remedy the difficulties that have arisen). For the most part, the Republic of Korea's RTAs provide for the suspension of tariff reductions, or an increase in duties up to the lesser of the MFN rate in force or in force on the date of entry into force of the agreement. In Korea, Rep. of-ASEAN, QRs may not be used and in Korea, Rep. of-Peru the parties agree that neither QRs nor TRQs are a permissible type of safeguards measure. The use of permissive language in the Republic of Korea's other RTAs suggests that such measures might be taken.

⁸⁸ Exceptions are the RTAs with Hong Kong, China; Macao, China and the APTA which do not specify the type or length of measure, whether it can be reapplied, or whether its use is limited to the transition period only.

⁸⁹ In China-Pakistan the length of the safeguard measure is not specified.

The length of the safeguard measure varies by partner: two years with a possible two year extension (India, Singapore, Peru and the EU); one plus two years (EFTA); two plus one (US); and three plus one (ASEAN). In Korea, Rep. of-Chile, the length of the safeguard measure is not specified.

In the Republic of Korea's earlier RTAs (with Chile, Singapore and EFTA), the use of the safeguard mechanism is not tied to the transition period. All its later RTAs tie the safeguard mechanism to the transition period which varies by partner. For instance in its RTA with Peru, the transition period is defined as ten years from the agreement's entry into force, except for goods with a tariff phasedown of over ten years, for which the transition period is the tariff elimination period plus five years. For India and the EU, the transition period is ten years from the date of completion of tariff elimination or reduction for the good in question. With the US, the transition period is ten years from the entry into force of the agreement (or the end of the tariff elimination period for goods whose tariff elimination period is longer), but a measure may be imposed beyond the transition period with the consent of the other party.

4.6.2.8 Mexico

All of Mexico's RTAs (with the exception of the NAFTA and LAIA) entered into force in 1995 or later and provide for a mix of measures depending on the partner: a combination of duty suspension or an increase to the lesser of the MFN rate or the MFN rate applicable on the day preceding the agreement's entry force in RTAs with Israel, Japan, the EU, EFTA, Chile, Peru and the NAFTA. The permissive language used suggests that other measures might be taken. With Colombia, Costa Rica, the Northern Triangle and Nicaragua it is specified that only tariff measures may be used.

The permitted length of the measure varies by partner: one year (Chile); one year plus one year extension (Colombia, Costa Rica); one year plus two one year extensions (Nicaragua); one plus two (EU and EFTA); two years (Israel); two plus one (Peru); three plus one (NAFTA, Japan) and; four plus one (Northern Triangle).

The use of the bilateral safeguard mechanism is time-bound in most of Mexico's RTAs (exceptions are with Japan, the EU and EFTA) and is usually tied to the tariff elimination period (sometimes with an addition). In some cases, e.g. with Israel, the Northern Triangle and Peru the measure may be maintained beyond the transition period only with the consent of the other party.

Conditions for reapplication of the measure also vary by partner: with Chile, Costa Rica and the NAFTA a safeguard measure may not be applied to the same good twice; in most other RTAs the measure may be reapplied to the same good, subject to varying criteria.

4.6.2.9 El Salvador, Guatemala and Honduras

Most of the RTAs involving El Salvador, Guatemala and Honduras refer to applying measures only to the extent necessary to prevent or remedy injury (usually without mention of facilitating adjustment). The RTAs with Chinese Taipei make reference to applying measures in accordance with the *Safeguards Agreement*.

Most RTAs provide for measures to take the form of a suspension of further tariff reduction or an increase to the lesser of the MFN duty in effect or the MFN duty (or base rate) applicable on the agreement's entry into force. In RTAs with Chinese Taipei, Colombia and CAFTA-DR, neither QRs nor TRQs are permissible forms of safeguard measures. In Central America-Mexico, Central America-Dominican Republic, and Central America-Panama safeguard measures are to be tariff-based. In the RTA with Chile there is no mention of QRs being unacceptable, thus permissive language might mean that measures other than tariff-based could be applied.

The length of the safeguard measure varies by partner: (four years plus four year extension in RTAs with Chinese Taipei⁹⁰; three years plus one (Chile and Colombia); one plus one (Dominican Republic); two plus one (Panama); three plus one (Mexico); and a total of four years (CAFTA-DR). In all of these RTAs use of the safeguard mechanism is tied to the transition period, though in the

⁹⁰ El Salvador, Guatemala and Honduras have the right to extend the safeguard measure for a further two years.

RTAs with Chile, Chinese Taipei and Panama a safeguard measure may be used beyond the transition period with the other party's consent. The length of the transition period varies: the length of the tariff elimination period plus two years (Chile, Panama, Dominican Republic); length of the tariff elimination period plus three years (Mexico) and; ten years from the agreement's entry into force or longer for products subject to a longer phase-down period (Chinese Taipei, Colombia, CAFTA-DR).

The RTAs with CAFTA-DR and the Dominican Republic do not provide for the reapplication of a safeguard measure. Others do. For instance, with Chinese Taipei a safeguard measure may be reapplied as many times as necessary provided that at least a period equivalent to half the time during which the safeguard measure was applied for the first time has elapsed. With Chile and Panama, a measure may be reapplied a maximum of twice.

4.6.2.10 Intra-Africa RTAs

SACU provides for the protection of infant industries of Botswana, Lesotho, Namibia and Swaziland but has no bilateral safeguard provisions. SADC provides for measures to be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The measure may be imposed for four years with a possible extension of four years. In COMESA, appropriate measures of one year duration (that may be extended) may be taken. In WAEMU, measures may be taken for sixth months which may be renewed. In ECOWAS, measures may be taken for one year which may be extended with the approval of the Council. In CEMAC and the EAC the duration of the measure is not specified. Neither the type of measure nor conditions for reapplication are specified in these RTAs. The use of the safeguard measure is not tied to the transition period of the agreement.

4.7 *De minimis*

4.7.1 The Agreement on Safeguards

Article 9.1 of the *Safeguards Agreement* provides flexibility for developing countries. Safeguard measures shall not be applied against a product originating in a developing country as long as its share of imports of the product concerned does not exceed 3%, provided that developing country Members with less than 3% import share collectively account for not more than 9% of total imports of the product concerned. In addition, developing country Members have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for developed Members,⁹¹ i.e. for ten years in total.

4.7.2 RTAs: The Analysis

We found a few RTAs, 15 in total, which provide for a *de minimis* exception in the event a bilateral safeguard is invoked.

In ASEAN-Australia and New Zealand and ASEAN-Japan, safeguard measures may not be applied against the ASEAN country that fulfils the criteria found in the *de minimis* exception of Article 9.1 of the *Safeguards Agreement*. ASEAN's RTAs with China, India and Korea and China-Singapore have a *de minimis* provision applicable to all parties such that a safeguard measure shall not be applied against a good as long as its share of imports of the good in the importing party does not exceed 3% of total imports. Similarly, *de minimis* exceptions apply among all parties if imports represent: less than 3% of total imports (India-Malaysia); less than 2% of market share in terms of domestic sales or less than 3% of total imports (India-Singapore); less than 5% of apparent domestic consumption or less than 10% of total imports (Jordan-Singapore); or less than 8% of total imports (Pakistan-Malaysia).

Three RTAs involving the United States contain *de minimis* provisions echoing the criteria of Article 9.1 of the *Safeguards Agreement*, but applicable to *all* parties (CAFTA-DR, US-Colombia, US-Peru).

The CARICOM Agreement provides that a safeguard measure may not be applied against products of a Community disadvantaged country where such products do not exceed 20% of the

⁹¹ Article 9.2 of the *Safeguards Agreement*.

market of the importing country. The SAFTA provides that a safeguard measure shall not be applied against a product originating in an LDC as long as its share of imports of the good in the importing country does not exceed 5%, provided that LDC states with less than 5% import share collectively account for not more than 15% of total imports of the product concerned.

4.8 Patterns observed in types of safeguard measure and conditions for application

It is evident from the foregoing analysis that there is considerable variety in the type of safeguard measures found in RTAs. Pre-WTO RTAs and those involving Turkey, the CIS and African countries tend to prescribe neither the type of measure that can be taken nor its duration. More recent RTAs tend to be more prescriptive with regard to the type of measure that can be taken (though permissive language might still provide some flexibility in the choice of measure). Some RTAs particularly involving Latin American and Asian countries provide that only tariff-based measures may be used. The permitted duration of measures tend, where defined, to be less than that prescribed in the *Safeguards Agreement* but again we find considerable variation; in other RTAs that entered into force after 1995 the permitted length of the measure is *not* defined.

The conditions for reapplication of a safeguard measure also vary: some RTAs prohibit a bilateral safeguard measure being used more than once; some attach varying conditions along the lines of Article 7.5 of the *Safeguards Agreement*; others are silent on the issue, suggesting that a safeguard measure could be reapplied to the same good over and over. Increasingly, RTAs contain some kind of linkage between use of the safeguard mechanism and the agreement's transition period: once the liberalization period is complete, the bilateral safeguard mechanism may no longer be used (in some cases only with consent of the other partner(s)). Again, numerous formulations are found: in some RTAs, the transition period is defined as a distinct number of years; in others it is tied to the tariff liberalization period of the good in question; and sometimes a considerable margin *beyond* the tariff liberalization period is granted during which a safeguard can still be applied. A few RTAs provide for the review of the bilateral safeguard mechanism to determine if it is still required.

Clearly, some provisions in RTAs regarding the type, duration, and conditions for reapplication of a safeguard measure are more stringent than those found in the *Safeguards Agreement*, thus providing less scope for the application of bilateral measures. On the other hand, some RTAs – through lack of a defined duration of the safeguard measure, no clear conditions for its reapplication, no apparent linkage of use of the mechanism to a transition period, nor for a possible review to determine if its usage is still required – provide a broader basis for the continued application of bilateral measures and greater flexibility than multilateral rules. Given the variety of provisions encountered, it is difficult to identify clear patterns. More recent RTAs tend to be more prescriptive with regard to measures, but few countries seem to take a consistent approach to defining measures across all their RTAs. This suggests that considerable effort is made to negotiate and custom make provisions depending on the partner. Given that bilateral safeguard provisions are, to our knowledge, rarely used this begs the question of countries' motivation for negotiating such a dizzying array of provisions.

4.9 Provisional Safeguard Measures

4.9.1 The Agreement on Safeguards

Article 6 of the *Safeguards Agreement* provides that in critical circumstances where delay would cause damage which would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or threaten to cause serious injury. Provisional measures should not exceed 200 days and should take the form of tariff increases to be promptly refunded if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The prescribed duration and type of the measure and provision for refund are not found in GATT Article XIX.

4.9.2 RTAs: The Analysis

Almost all of the EU's RTAs make provision for the application of provisional safeguard measures (exceptions are OCTs and Turkey).⁹² In most EU RTAs, the duration of the provisional measure is not stated. In the EPAs (with Cameroon, CARIFORUM, Côte d'Ivoire, ESA and Papua New Guinea and Fiji), the measure should not exceed 180 days for the EU and 200 days for the ACP partner and the EU's outermost regions. In EU-Korea, Rep. of, the provisional measure may not exceed 200 days. In EU-Chile a provisional safeguard measure may be applied to agricultural goods (only) for a maximum of 120 days. Explicit provision for the payment of a refund if the investigation does not determine that increased imports have caused or threaten to cause serious injury is found only in EU-Korea, Rep. of.

All of EFTA's RTAs (except EFTA-Canada) provide for the application of provisional safeguard measures.⁹³ In EFTA's earlier RTAs the permitted length of the provisional measure is not specified. The first to do is EFTA-Chile in 2004 which allows a maximum of 120 days. The permitted length of provisional measures in subsequent RTAs varies: 180 days for Colombia and Peru; 200 days for the Republic of Korea; Albania; Serbia; Hong Kong, China; Montenegro and Ukraine; and six months for SACU. The earliest RTA that provides for payment of a refund if injury is not found is EFTA-Korea, Rep. of (2006); subsequently, such provisions are found in some of EFTA's RTAs - with Albania; Serbia; Colombia; Peru; Hong Kong, China; Montenegro and Ukraine.

In Turkey's RTAs, provisional safeguard measures are only found in its RTAs with Bosnia and Herzegovina, Croatia, FYROM, Israel, Palestinian Authority, Syrian Arab Republic and Tunisia. The length of the measure is not specified, nor is there explicit provision for the payment of a refund if the investigation does not determine serious injury.

In RTAs involving CIS countries, provisional safeguard measures are found only in the Economic Cooperation Organization (ECO), Eurasian Economic Community (EAEC), the Russian Federation's RTAs with Belarus and Serbia, and Ukraine-FYROM. Neither the length of the measure nor provision for the payment of a refund is provided for in these RTAs.

ASEAN's RTAs with Australia and New Zealand and Japan allow for provisional safeguard measures of maximum 200 days duration with a refund to be provided if the investigation does not determine serious injury. Its RTAs with China, the Republic of Korea and India incorporate the provisions of the *Safeguards Agreement* with regard to provisional measures.

None of Canada's RTAs contain provisions allowing for provisional measures. For the United States, only its RTAs with Australia, Jordan, Morocco and Singapore allow for provisional safeguard measures of maximum 200 days duration with a refund to be provided if the investigation does not determine serious injury.

India's RTAs with Afghanistan, Bhutan, Chile, Nepal, Singapore and Sri Lanka do not provide for provisional measures, while those with Japan, Malaysia, Korea, Rep. of and MERCOSUR (all concluded in or after 2009) allow for provisional safeguard measures of maximum 200 days duration with a refund to be provided if the investigation does not determine serious injury.

China's RTAs with Hong Kong, China; Macao, China and Pakistan do not provide for provisional measures, while those with Chile, Costa Rica and New Zealand allow for provisional safeguard measures of maximum 200 days duration with a refund to be provided if the investigation does not determine serious injury. In China-Peru the duration of the provisional safeguard measure is limited to 180 days.

Some of Chile's RTAs contain provisions allowing for provisional measures.⁹⁴ In its RTA with Central American countries, provisional measures are allowed, but neither the length of the measure, nor provision for an eventual refund is specified. In its RTAs with EFTA, the EU and Korea, provisional measures of up to 120 days are permitted, but no provision for a refund is

⁹² Those with Algeria, Egypt and the Lebanese Republic do so by reference to the Agreement on Safeguards.

⁹³ EFTA-Lebanese Republic and EFTA-Egypt do so by reference to the Agreement on Safeguards.

⁹⁴ Those with Mexico, Panama, the United States, India, Canada, and Turkey do not provide for provisional measures, while those with Australia and the Transpacific Partnership do not provide for bilateral safeguard measures at all.

made.⁹⁵ With Peru, China and Japan, provision is made for a refund if the investigation does not find serious injury and the length of the measure may not exceed 200 days (180 days in Chile-Peru).

Panama's RTAs with Chile, Singapore and the United States do not provide for provisional measures, while those with Central American countries and Chinese Taipei allow for measures not to exceed 120 days with no provision for an eventual refund. In Panama-Chile, provisional measures may not exceed 200 days and a refund is to be made if a subsequent investigation does not find evidence of serious injury.

Again, we see considerable variety in the design of provisional safeguard measures. For a number of RTAs the permitted maximum length of the provisional measure is less than the 200 days specified in the *Agreement on Safeguards*, thus tightening the provisions that may be applied, while for others the permitted maximum length is not specified thus potentially providing more flexibility. Only the more recent RTAs tend to provide for a refund to be made if an investigation does not find serious injury.

4.10 Compensation and Retaliation

4.10.1 The Agreement on Safeguards

The *Safeguards Agreement* provides that a Member proposing to apply a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to exporting Members which would be affected by such a measure. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade. If no agreement is reached within defined time periods, the affected exporting Members are free to suspend the application of substantially equivalent concessions or other obligations to the trade of the Member applying the safeguard measure. The right of suspension by the exporting Member shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports.⁹⁶ This effectively grants a considerable grace period to the Member imposing the measure.

4.10.2 RTAs: The Analysis

Only a few of the EU's RTAs specifically address the issue of compensation and retaliation.⁹⁷ In the EU's RTAs with Algeria and Mexico, if the parties are unable to agree on compensation the party whose product is the subject of safeguard measures may adopt compensatory tariff measures having trade effects essentially (or substantially) equivalent to the safeguard measure adopted. No mention is made of a waiting period to be observed before retaliation takes place. Likewise, EU-Chile provides for the suspension of the application of substantially equivalent concessions by the affected exporting party in the event of failure to agree mutual compensation. Again, no mention is made of a waiting period to be observed before retaliation takes place. EU-Korea, Rep. of, on the other hand, provides for a waiting period of 24 months before the right of suspension can be exercised.

Slightly less than half of EFTA's RTAs contain specific provisions on compensation and retaliation.⁹⁸ The earliest RTA to include such provisions is EFTA-Mexico (2001). RTAs subsequently signed with Croatia; Singapore; Chile; Korea, Rep. of Korea; Canada; Albania; Colombia; Peru; Hong Kong, China, and Ukraine contain similar provisions, but others that entered into force recently such as with Serbia (2010) and Montenegro (2012) do not. Compensation should normally consist of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If compensation is not mutually agreed within a period of 30 days, the exporting party is free to suspend concessions having substantially equivalent trade effects or substantially equivalent to the value of the additional duties expected to

⁹⁵ Bilateral safeguard measures may be taken on agricultural goods only in EU-Chile and Chile-Korea Rep. of.

⁹⁶ Article 8 of the *Safeguards Agreement*.

⁹⁷ EU-Lebanese Republic and EU-Egypt make a general reference to applying measures in accordance with the *Safeguards Agreement*.

⁹⁸ Those with the Lebanese Republic, Egypt and Tunisia do so through reference to the Agreement on Safeguards.

result from the emergency action. There is no requirement of a waiting period to be observed before retaliation takes place.

None of Turkey's or the CIS RTAs contain specific provisions on compensation or retaliation.

All of the Republic of Korea's RTAs contain specific provisions on compensation and retaliation. In general the parties have 30 days to agree on compensation⁹⁹ having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action (substantially equivalent level of concessions in Korea, Rep. of-ASEAN; compensation for the adverse effects of the measure in Korea, Rep. of-Chile, and replacement by a concession of equivalent value in APTA). In the absence of mutually agreed compensation retaliation may take place, generally not subject to a waiting period. In Korea, Rep. of-India, the right to retaliation shall not be exercised for the first two years the measure is in effect (three years if it has been extended) provided that the measure has been taken as a result of an absolute increase in imports. In EU-Korea, Rep. of, the right of suspension cannot be exercised for the first 24 months.

Australia's RTAs with New Zealand and PNG (which predate the WTO) have no provisions on compensation and retaliation. RTAs with Thailand, the US, and ASEAN and New Zealand have provisions on compensation and retaliation; the latter provides that the right of suspension shall not be exercised for the first two years provided the safeguard measure is applied as a result of an absolute increase in imports.

New Zealand's RTAs with China, Malaysia and Thailand contain provisions on compensation and retaliation. The right of suspension may not be exercised for one year if the safeguard measure was taken as a result of an absolute increase in imports.¹⁰⁰

Provisions on compensation and retaliation are a feature of all of Japan's RTAs. Those with Indonesia, Mexico, Peru, Singapore, Switzerland, Brunei Darussalam and Chile do not specify a waiting period prior to retaliation. All others do with the time specified varying from 12 months (Philippines), 18 months (Malaysia), to two years (Thailand, Viet Nam, ASEAN and India),¹⁰¹ provided that the safeguard measure is taken as a result of an absolute increase in imports.

India's RTAs with Chile, Bhutan, MERCOSUR, Nepal and SAFTA contain no specific provisions on compensation and retaliation. India's RTAs with Japan, Malaysia, Singapore and the Republic of Korea recall some of the language of the *Safeguards Agreement* in providing for compensation and retaliation. In India-Malaysia, retaliation may not be exercised for the first two years, providing the safeguard measure was taken as a result of an absolute increase in imports. With Japan and the Republic of Korea, the right to claim trade compensation and/or suspension shall not be exercised for the first two years (which may be extended by a year), provided that the measure has been taken as a result of an absolute increase in imports. In India-Singapore compensation need not be provided if the measure is applied for up to two years (extendable by a further year).

Mexico's RTAs with Israel, Japan, the EU, EFTA, Chile, Colombia, Costa Rica, Central American countries, and NAFTA all provide for compensation and retaliation and do not specify a waiting period prior to retaliation if there is no agreement on compensation. Mexico-Peru has no provisions on compensation and retaliation.

Chile's RTA with Australia and the Transpacific SEP have no bilateral safeguard provisions and those with Peru and India, while having bilateral safeguard provisions, have nothing specific on compensation and retaliation. In Chile-Turkey, safeguard measures are to be applied in accordance with the *Agreement on Safeguards*. Chile's RTAs with the Republic of Korea, US, EU, EFTA, Colombia, Central American countries, Mexico, Panama, Canada and Japan contain provisions on compensation and retaliation with no waiting period specified if there is no agreement on compensation. In Chile-China, the right of suspension cannot be exercised during the first year if the safeguard measure was taken as a result of an absolute increase in imports.

⁹⁹ Ninety days in APTA and Korea, Rep. of-ASEAN

¹⁰⁰ New Zealand's RTAs with Hong Kong, China; Singapore and the Transpacific SEP have no bilateral safeguard provisions.

¹⁰¹ For India the waiting period may be extended for one year if the party provides evidence that the measure continues to be necessary.

All US RTAs (except US-Israel) make provision for compensation and retaliation. The majority do not require a waiting period before concessions can be suspended if no mutually agreed compensation is in place. The exception is US-Jordan which stipulates that the right of suspension may not be exercised during the first 24 months, if the safeguard measure was taken as a result of an absolute increase in imports.

4.11 Notification Requirements

4.11.1 The Agreement on Safeguards

Article 12 of the *Safeguards Agreement* provides for notification and consultation. A WTO Member shall immediately notify the Committee on Safeguards upon initiating an investigation, making a finding of serious injury or threat thereof and taking a decision to apply or extend a safeguard measure. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned.

4.11.2 RTAs: The Analysis

Over 90% of RTAs which have bilateral safeguard provisions include provisions relating to notification. Some do so through reference to the *Safeguards Agreement*, others have specific provisions. Newer RTAs tend to be more prescriptive with regard to the form and timing of the notification. For instance, in India-MERCOSUR, the parties agree to notify the exporting party of a decision to initiate an investigation and apply definitive or provisional safeguard measures. The decision is to be notified by the party within a period of seven days from the publication and is to be accompanied by the appropriate public notice. Chinese Taipei's RTAs with Guatemala, Honduras and El Salvador stipulate that in general notifications in safeguard proceedings are to be made in writing within 15 days of the date resolutions are issued. Most other RTAs do not define a specific timeline, but refer to prompt or immediate notifications. Japan's RTAs typically require immediate written notice upon initiating an investigation and taking a decision to apply or extend a bilateral safeguard measure. In some RTAs the requirement to provide written notification is not explicit. This is the case in most of the EU's, EFTA's and Turkey's RTAs.

RTAs which do not contain specific provisions on notification for the most part involve CIS countries.

5 INFANT INDUSTRY SAFEGUARDS

5.1 GATT Article XVIII:C

GATT Article XVIII:C permits developing country Members that find that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people to introduce specific measures on imports. There is no explicit mention in GATT Article XVIII:C of measures taken for structural adjustment purposes.

5.2 RTAs with Infant Industry and Structural Adjustment Safeguards

Provisions allowing the imposition of safeguard measures to protect new or infant industries are predominantly a feature of the EU's, EFTA's and Turkey's RTAs though there are a few examples from other regions. Sometimes the scope of these safeguards is wider and may be invoked in the case of structural adjustment.

Annex Table 1.1 lists the 42 RTAs which permit infant industry and/or structural adjustment safeguards and summarizes the conditions applicable to their use. In RTAs involving developed and developing countries, the right to use such safeguards is usually asymmetrical, i.e. limited to the developing partner. In most cases the use of the measure is time bound, usually tied to the expiry of the transition period.

Thirteen of the EU's 33 RTAs contain provisions permitting the partner country to use of infant industry and, in some cases, structural adjustment safeguards. These fall into two distinct

groupings: RTAs with (some of) the countries in the Euro-Mediterranean partnership¹⁰² and South Africa which allow for both infant industry and structural adjustment safeguards; and the EPAs¹⁰³ with some of the ACP group of states which permit infant industry safeguards only.

Eight of EFTA's 24 RTAs contain provisions permitting the use of infant industry and structural adjustment safeguards; six are with countries involved in the Euro-Mediterranean partnership. Such measures apply to new and infant industries or "to sectors undergoing restructuring or experiencing serious difficulties, particularly where those difficulties entail severe social problems".

Twelve of Turkey's 17 RTAs contain provisions permitting the use of infant industry and structural adjustment safeguards. Of the twelve, six allow both Turkey and its partner to use the safeguard,¹⁰⁴ while in the other six¹⁰⁵ use of the infant industry safeguard is limited to Turkey's RTA partner only.

Other RTAs that permit the use of infant industry safeguards are Australia-PNG, COMESA, the Melanesian Spearhead Group, PICTA, SACU, SADC, Ukraine-FYROM, US-Israel, and US-Jordan. The basis for the application of the infant industry safeguard in these RTAs varies. In Australia-PNG, Papua New Guinea may suspend tariff reductions "in order to protect an existing primary industry or to foster the development of a new primary industry". In the Melanesian Spearhead Group, a party may introduce measures for "the purpose of encouraging new productive activities which contribute to economic development, whether by the establishment of a new industry or an extension of the range of commodities produced or manufactured by an existing industry". In PICTA, a party may raise tariffs in response to increased imports that "materially retard the establishment of a domestic industry in like or directly competitive products".

In COMESA, a member state may impose quantitative or like restrictions or prohibitions on similar goods "for the purposes of protecting an infant industry". In SACU, Botswana, Lesotho, Namibia or Swaziland may levy additional duties on goods imported into its area "to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area". Under SADC, the Committee of Ministers responsible for trade may authorise a Member State to suspend certain obligations in respect of like goods imported from the other Member States in order to promote an infant industry.

The infant industry and structural adjustment safeguard provision in Ukraine-FYROM (the only one of Ukraine's 15 RTAs to include such safeguards) follows the EU's RTAs. In US-Israel, Israel may increase customs duties "insofar as its industrialization and development make protective measures necessary". Finally, in US-Jordan, the parties recognize that an infant industry "may face challenges that more mature industries do not encounter" and thus the procedures for the imposition of a safeguard measure should "not create obstacles to infant industries that seek imposition of such measures".

6 RESTRICTIONS TO PROTECT THE BALANCE OF PAYMENTS

6.1 GATT Articles XII and XIII:B

GATT Article XII provides that in order to safeguard its external financial position and its balance of payments a Member may restrict the quantity and value of merchandise permitted to be imported.¹⁰⁶ Under GATT Article XVIII:B, a developing country Member may, in order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, control the general level of imports by restricting the quantity or value of merchandise permitted to be imported.

6.2 RTAs with balance of payments safeguards

¹⁰² Algeria, Egypt, Jordan, Lebanese Republic, Morocco, Palestinian Authority, and Tunisia.

¹⁰³ Cameroon, CARIFORUM, Côte d'Ivoire, ESA, and Papua New Guinea/Fiji.

¹⁰⁴ Turkey's RTAs with Albania, Bosnia and Herzegovina, Croatia, FYROM, Morocco, and Serbia.

¹⁰⁵ Egypt, Jordan, Montenegro, Palestinian Authority, Syria and Tunisia.

¹⁰⁶ In accordance with the Understanding on Balance-of-Payments Provisions Members agree to give preference to price-based measures.

We found 176 RTAs (or 75% of our total of 232 RTAs) which contain balance of payments safeguards. Some countries systematically include balance of payments safeguards, e.g. all of ASEAN's and Turkey's RTAs have balance of payments safeguards. Almost all of Canada's and China's RTAs have balance of payments safeguards.¹⁰⁷ The EU's RTAs for the most part contain balance of payments safeguards: exceptions include RTAs with Andorra, San Marino and Turkey; those with Cameroon, Côte d'Ivoire and ESA make provision for such a provision to be negotiated at a later date. About half the US RTAs contain balance of payment safeguards.¹⁰⁸ On the other hand, most (but not all) partial scope agreements do not include balance of payments safeguards, e.g. Chile-India, India-Bhutan, India-Nepal, Lao PDR-Thailand, Melanesian Spearhead Group, and MERCOSUR-India. Likewise, most of the intra-African RTAs do not include balance of payment safeguards.¹⁰⁹

7 SPECIAL SAFEGUARD PROVISIONS ON AGRICULTURAL PRODUCTS

7.1 Article 5 of the Agreement on Agriculture

Article V of the *Agreement on Agriculture* provides that a Member may impose an additional duty on the importation of an agricultural product (for goods whose measures have been converted into an ordinary customs duty and designated in its Schedule with the symbol "SSG") if the volume of imports during any year exceeds a trigger level or the price falls below an agreed reference price for the product concerned.

7.2 RTAs with special safeguard provisions on agricultural products

Special safeguards provisions found in RTAs differ from bilateral safeguards in that they are triggered by a different mechanism, generally price or volume, and are not dependent upon a finding of serious injury. The objective in this study was to identify RTAs which provide for special safeguards.¹¹⁰

55 RTAs containing provisions on special safeguards were identified. More than half of the EU's 33 RTAs contain special safeguard provisions. These fall into distinct groupings: those signed with Switzerland, Norway, Iceland and the Faroe Islands which provide for "appropriate measures" in the event that serious disturbances arise in any sector or the economy or if difficulties arise which could bring about serious deterioration in the economic situation of a region (which provides a wider scope than agricultural products). In the EU's RTAs with Balkan countries¹¹¹ and South Africa, the special safeguard is directed towards sensitivities in agricultural and fisheries markets, where the parties may take measures if imports of products under the Agreement "cause serious disturbance to the markets or to their domestic regulatory mechanisms". The EPAs contain special safeguard provisions¹¹² which apply to imports of sugar and certain products containing sugar. Finally, the EU-Korea, Rep. of FTA contains a list of agricultural products on which Korea may maintain special safeguards (in some cases up to 25 years from the RTA's entry into force). With the exception of EU-Korea, Rep. of, none of these special safeguard mechanisms is time-bound.

Only one of EFTA's RTAs provides for special safeguards (on agricultural products).¹¹³ Ten of Turkey's RTAs, AFTA and CEFTA contain special safeguard provisions that allow the parties to take measures in the event that imports cause serious disturbance. None of the mechanisms is time-bound. In other RTAs involving for example Canada, China, New Zealand, Chinese Taipei, Colombia, Peru, Central American countries and the United States, a special safeguard may be invoked in the case of specific agricultural products listed by each party in the RTA. Measures are generally limited to a calendar year and may be applied only during a transition period. The trigger is generally related to the volume of imports, though in US-Chile and US-Morocco a price mechanism is included. In most of these RTAs the use of the special safeguard mechanism expires at the end of the tariff liberalization period.

¹⁰⁷ Exceptions are Canada-Peru, and China's RTAs with Hong Kong, China and Macao, China.

¹⁰⁸ Exceptions are with the Republic Korea, Australia, Bahrain, Colombia, Oman, Peru and Singapore.

¹⁰⁹ CEMAC is an exception.

¹¹⁰ A future targeted study could draw upon this information.

¹¹¹ Albania, Bosnia and Herzegovina, Croatia, FYROM, Montenegro, and Serbia.

¹¹² Those in force as of mid-2013 are with Cameroon, CARIFORUM, Côte d'Ivoire, ESA, and Papua New Guinea and Fiji.

¹¹³ EFTA-SACU

8 CONCLUSIONS

This survey of safeguard provisions in 232 RTAs demonstrates the considerable diversity of such provisions which vary depending *inter alia* on the region, the configuration of RTA parties and the time period when the RTA came into force. Many RTAs evoke the conditions of GATT Article XIX and the *Safeguards Agreement*, sometimes with innovations. In other RTAs the language of safeguard provisions is more loosely drafted, potentially providing for more flexible application of RTAs' safeguard provisions compared to multilateral rules.

The analysis of the rules applying to the RTA partner in the event that a global safeguard action is invoked shows considerable variation in the conditions imposed, even by the same Member. While only a couple of RTAs definitively exclude imports from the RTA partner in a global safeguard action, roughly a quarter of RTAs surveyed provide for the possible exclusion of the RTA partner, subject to certain criteria, thus resulting in discrimination vis-à-vis non-parties. Similarly, the retention of a margin of preference in favour of the RTA partner in the event that a global safeguard is invoked will have a discriminatory impact on trade with third parties. Nonetheless, such provisions allow trade to continue to flow between RTA parties and are illustrative of the delicate balance to be struck between facilitating trade between RTA parties while not raising barriers to the trade of third parties. A few RTAs tighten the conditions applicable to the RTA partner in the event a global safeguard is invoked by, for instance, specifying the use of tariff-based measures only, and by providing for immediate retaliation by the exporting party if mutually agreed compensation is not provided by the importing party. Such provisions, though only applicable to the preferential partner, may diminish the appeal of global safeguard measures, thus benefiting the wider WTO Membership.

With regard to bilateral safeguard provisions, the trigger mechanism for the invocation of a bilateral safeguard is more loosely worded in some RTAs than the language found in GATT Article XIX and the *Safeguards Agreement*, thus suggesting that it may be easier to invoke a safeguard measure in a bilateral context. With regard to injury standards, many RTAs make no mention of a non-attribution requirement, again potentially offering broader scope to RTAs to find a positive injury determination with their preferential partners. Slightly more than half the 194 RTAs with specific bilateral safeguard provisions refer to a safeguards investigation: some remain faithful to the injury standards found in the *Safeguards Agreement*; others that use varying formulations to define injury and causation appear to broaden the scope for an injury determination. Certain innovations are found: for instance, in the NAFTA and a number of RTAs concluded subsequently, initiation of a safeguard action must commence no later than a year after the date of the institution of an emergency action proceeding;¹¹⁴ also found in the NAFTA (and other RTAs) is provision for the review of determinations of serious injury by judicial or administrative tribunals.

We found wide variety in the types of bilateral safeguard measures that are permitted in RTAs, their duration and the conditions for their reapplication. Some RTAs provide lesser scope for the application of a bilateral measure by reducing its duration (often less than the four plus four years permitted under the *Safeguards Agreement*); limiting its use to once only for a given product; prohibiting the use of tariff rate quotas or quantitative restrictions; binding the use of the bilateral safeguard mechanism to the transition period (or the transition period plus a prescribed number of years); or permitting use of the mechanism beyond the transition period with the consent of the other Party only. Other RTAs, including some that post-date the WTO and the *Safeguards Agreement*, prescribe neither the length of the measure nor the conditions for its re-application, and provide neither a time-frame for phasing out the use of the bilateral safeguard mechanism nor a review to determine if the mechanism should be retained. This would appear to give greater scope to apply a safeguard measure in the bilateral context. Many RTAs provide for the use of provisional measures (often limited to less than the 200 days permitted under the *Safeguards Agreement*), though not all of these provide for the payment of a refund if serious injury is not found.

For those RTAs that contain provisions relating to compensation and retaliation, the majority do not specify a waiting period before the exporting party may exercise the right to suspend concessions if no agreement is reached on compensation. This closes a loophole that is available to Members under the *Safeguards Agreement* where the right of suspension shall not be exercised

¹¹⁴ The timeframe varies depending on the RTA.

for the first three years a safeguard measure is in effect, provided it was taken as a result of an absolute increase in imports.

As shown through various examples, safeguard provisions have evolved over time - in general becoming more prescriptive in recent years, but still with evidence of considerable variation in their drafting. Little homogeneity in the design of safeguard provisions was found even for a given country. This suggests that safeguard provisions are carefully negotiated and crafted depending on the RTA partner. The degree of effort required to tailor make and administer such provisions seems to be at odds with the frequency of their use, given that the limited information at our disposal (garnered from parties whose RTAs have been subject to scrutiny in the WTO) suggests that such provisions are rarely, if ever, used.

ANNEX

Table 1.1 RTAs containing infant industry and/or structural adjustment safeguards

RTA	Can be used by	Type of measure	Limit on imports subject to measure	MOP	Length of measure (years)	Is measure time-bound	Details
EU-Algeria	Algeria	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EU-Cameroon	Cameroon	Suspension of further duty reduction, increase of duties to MFN level, TRQ	no	no	4 + 4 year extension	yes	15 years from EIF
EU-CARIFORUM	CARIFORUM	Suspension of further duty reduction, increase of duties to MFN level, TRQ	no	no	4 + 4 year extension	yes	10 years from EIF
EU-Côte d'Ivoire	Côte d'Ivoire	Suspension of further duty reduction, increase duties to MFN level, TRQ	no	no	4 + 4 year extension	yes	10 years from EIF, but may be extended upon agreement between the parties
EU-Egypt	Egypt	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 4 years beyond, if authorized)
EU-ESA	ESA	Suspension of further duty reduction, increase duties to MFN level, TRQ	no	no	4 + 4 year extension	yes	10 years from EIF for non-LDCs, 15 years from EIF for LDCs
EU-Jordan	Jordan	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EU-Lebanese Republic	Lebanese Republic	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EU-Morocco	Morocco	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EU- Palestinian Authority	Pal. Authority	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	no	
EU-Papua New Guinea, Fiji	PNG, Fiji	Suspension of further duty reduction, increase duties to MFN level, TRQ	3% of tariff lines or 15% of total value of imports	no	7 + 3 (for non-LDCs), 12 + 3 (SIS and LDCs)	yes	20 years from EIF
EU-South Africa	South Africa	Customs duties not > basic duty, MFN rates, or 20%, whichever is lower	10% of total imports of industrial products	yes	4, unless extended		Expires at end of transition period unless extended
EU-Tunisia	Tunisia	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EFTA-Egypt	Egypt	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 4 years beyond, if authorized)
EFTA-FYROM	FYROM	Customs duties not > 25%	15% of total imports of industrial products	yes	3, unless longer is decided	yes	9 years from EIF, unless decided otherwise
EFTA-Jordan	Jordan	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EFTA-Lebanon	Lebanese Republic	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period (or 3 years beyond, if authorized)
EFTA-Morocco	Morocco	Customs duties not > 25%	15% of total imports of industrial products	yes	3, unless longer is authorized	yes	8 years from EIF
EFTA-Palestinian Authority	Pal. Authority	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	no	
EFTA-SACU	SACU	Customs duties not > MFN rate	15% of total imports	yes	4, unless longer is authorized	yes	Expires at end of transition period unless extended
EFTA-Tunisia	Tunisia	Customs duties not > 25%	15% of total imports	yes	5, unless longer	yes	Three years after the end of the transition

RTA	Can be used by	Type of measure	Limit on imports subject to measure	MOP	Length of measure (years)	Is measure time-bound	Details
Turkey-Albania	Both parties	Customs duties not > 25%	of industrial products 15% of total imports of industrial products	yes	is decided 5, unless longer is authorized	yes	period, unless decided otherwise Expires at end of transition period
Turkey-Bosnia and Herzegovina	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	3.5	yes	Expires at end of transition period
Turkey-Croatia	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-Egypt	Egypt	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-FYROM	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-Jordan	Jordan	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-Montenegro	Montenegro	Customs duties not > basic duty	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	No measures allowed three years after tariff elimination of the good
Turkey-Morocco	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Three years after expiry of the transition period
Turkey-Palestinian Authority	Pal. Authority	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	no	
Turkey-Serbia	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-Syrian Arab Republic	Syrian Arab Republic	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Turkey-Tunisia	Tunisia	Customs duties not > 25%	20% of total imports of industrial products	yes	5, unless longer is authorized	yes	Expires at end of transition period
Australia-Papua New Guinea	Papua New Guinea	Suspend tariff concessions	no	no	ns	no	
COMESA	All parties	quantitative or like restrictions or prohibitions on similar goods	no	no	ns	no	
Melanesian Spearhead Group	All parties	Suspend tariff concessions and levy customs duties not > MFN rate	no	no	3	no	
PICTA	All parties	Raise tariffs	no	no	10, 15 (for SIS and LDCs)	yes	10 years, or 15 years (for Small Island States (SIS) and LDCs)
SACU	All parties except South Africa	Additional duties	no	no	8	no	
SADC	All parties	Suspend certain obligations of the trade protocol	no	no	ns	no	
Ukraine-FYROM	Both parties	Customs duties not > 25%	15% of total imports of industrial products	yes	5, unless longer is authorized	yes	No measures allowed three years after tariff elimination of the good
US-Israel	Israel	Ad valorem duties not > 20 percentage points above the level otherwise in effect	10% of total value of Israel's imports from US in 1984	no	ns	yes	1 January 1995
US-Jordan	Both parties	Suspend concessions, or increase duties to lesser of MFN rate in effect or that preceding RTA's EIF	no	no	4	yes	No measures allowed after the expiry of the transition period, except with the consent of the other party

Source: WTO Secretariat.

ns - not specified

Table 1.2 RTAs containing special safeguards on agricultural products

RTA	SSG can be used by	Trigger	Type of measure	Products concerned	Maximum length of measure	Is measure time-bound	Details
EU-Albania	Both parties	If imports cause serious disturbance	"Appropriate measures"	All agricultural goods	ns	no	
EU-Bosnia & Herzegovina	Both parties	If imports cause serious disturbance	"Appropriate measures"	All agricultural goods	ns	no	
EU-Cameroon	EU	Until October 2015 volume trigger. Thereafter price trigger	Increase in duties to MFN level	sugar	Marketing year	no	
EU-CARIFORUM	EU	Until October 2015 volume trigger. Thereafter price trigger	Increase in duties to MFN level	sugar	Marketing year	no	
EU-Côte d'Ivoire	EU	Until October 2015 volume trigger. Thereafter price trigger	Increase in duties to MFN level	sugar	Marketing year	no	
EU-Croatia	Both parties	If imports cause serious disturbance	"Appropriate measures"	All agricultural goods	ns	no	
EU-ESA	EU	Until October 2015 volume trigger. Thereafter price trigger	Increase in duties to MFN level	sugar	Marketing year	no	
EU-Faroe Islands	Both parties	If serious disturbances arise or serious deterioration in the economic situation of a region	"Appropriate measures"	Any sector of the economy	ns	no	
EU-FYROM	Both parties	If imports cause serious disturbance	"Appropriate measures"	All agricultural goods	ns	no	
EU-Iceland	Both parties	If serious disturbances arise or serious deterioration in the economic situation of a region	"Appropriate measures"	Any sector of the economy	ns	no	
EU-Korea, Rep. of	Both parties (Korea, Rep. of lists measures)	Volume	Duty not to exceed lesser of MFN applied rate, MFN rate in force as of EIF, or tariff rate in party's schedule	Beef, pork, apples, barley, potato starch, ginseng, sugar, alcohol, dextrins	One year	yes	Expires at end of phase-out period for each good
EU-Montenegro	Both parties	If imports cause serious disturbance	"Appropriate measures"	All agricultural goods	ns	no	
EU-Norway	Both parties	If serious disturbances arise or serious deterioration in the economic situation of a region	"Appropriate measures"	Any sector of the economy	ns	no	
EU-Papua New Guinea, Fiji	EU	Until October 2015 volume trigger. Thereafter price trigger	Increase in duties to MFN level	sugar	Marketing year	no	
EU-Serbia	Both parties	If imports cause serious disturbance. Imports of fish from Serbia are subject to a volume trigger	"Appropriate measures". For EU imports of fish from Serbia, EU may suspend preferential treatment.	All agricultural goods	ns	no	Subject to review three years after EIF
EU-South Africa	Both parties	If imports cause or threaten to cause serious disturbance	Provisional measures necessary to limit or redress the disturbance	All agricultural good	ns	no	
EU-	Both parties	If serious disturbances arise or	"Appropriate measures"	Any sector of the economy	ns	no	

RTA	SSG can be used by	Trigger	Type of measure	Products concerned	Maximum length of measure	Is measure time-bound	Details
Switzerland		serious deterioration in the economic situation of a region					
EFTA-SACU	All parties	Increase in quantities that cause serious injury or threat thereof	Increase in duties to MFN level, TRQ	All agricultural goods	One year	no	
Turkey-Albania	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Bosnia & Herzegovina	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Croatia	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Jordan	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Montenegro	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Morocco	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Pal. Auth.	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Serbia	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Syrian Arab Republic	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Turkey-Tunisia	Both parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
AFTA	All parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
Canada-Colombia	Colombia	Volume	Lesser of MFN rate and base rate	Beef, meats, beans	one calendar year	yes	Expires at end of transition period
Canada-Costa Rica	Both parties (Costa Rica lists measures)	Volume	TRQ	Flour, soya products, oil	one calendar year	yes	Expires at end of phase-out period for each good
CARICOM	All parties	a "sensitive industry" disadvantaged by operation of the tariff liberalization scheme	Suspend Community treatment	Sensitive industries	ns	no	
CEFTA	All parties	If imports cause serious disturbance	"measures it deems necessary"	All agricultural goods	ns	no	
China-New Zealand	China	Volume	Additional duty not > than lesser of MFN and base rate	Milk, butter, cheese	one calendar year	yes	Expires in 2023
CAFTA-DR	All parties	Volume	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF	Specific lists of agricultural products by country	one calendar year	yes	Expires at end of phase-out period for each good
Guatemala-Chinese Taipei	Both parties	Volume	Additional duty not > prevailing MFN rate or MFN rate as of 31 July 2005	Certain agricultural goods, adhesives, toys, pocket lighters, yarn, garments	18 months, renewable	no	
Honduras -	Both parties	volume	Additional duty not > prevailing	Fruit, juices	one	no	

RTA	SSG can be used by	Trigger	Type of measure	Products concerned	Maximum length of measure	Is measure time-bound	Details
Chinese Taipei			MFN or base rate		calendar year		
NAFTA	All parties	Ns	TRQ	Specific lists of agricultural products by country	ns	no	
Peru-Korea, Rep. of	Both parties (Korea, Rep. of lists measures)	Volume	Higher import duty	Includes poultry, dairy products (evaporated milk, cheddar cheese), honey, beans and mandarins	Calendar year	yes	Expires 17 years after EIF, i.e. 2028
Thailand-Australia	Both parties	Volume	Increase customs duty to MFN rate or base rate, whichever is lower	Includes tuna, pineapples, meat, dairy, mandarins, honey, grapes, potatoes	Calendar year	yes	Expires in 2008 for Australia; 2020 for Thailand
Thailand-New Zealand	Both parties (Thailand lists measures)	Volume	Increase customs duty to MFN rate or base rate, whichever is lower	Includes meat, dairy, mandarins, honey, grapes, potatoes	Calendar year	yes	Expires in 2020
Transpacific SEP	Chile	Volume	Increase customs duty to MFN rate or base rate, whichever is lower	Dairy products	Until end of the semester	yes	May be applied only during the tariff liberalization period
Ukraine-FYROM	Both parties	Where imports seriously disrupt operation of the market of the other Party	measures it deems necessary	All agricultural goods	ns	no	
US-Australia	United States	Price/volume	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF	Horticultural products, beef	one calendar year	yes	Expires at end of phase-out period for each good (except beef)
US-Chile	Both parties	Price	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF	Specific lists of agricultural products by country	one calendar year	yes	Expires at end of phase-out period for each good
US-Colombia	Both parties	Volume	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF or base rate	Beef, chicken, dried beans, rice	one calendar year	yes	Expires at end of phase-out period for each good
US-Korea, Rep. of	Both parties (Korea, Rep. of lists measures)	Volume	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF or base rate	Includes beef, pork, horticultural products, sugar, alcohol, cereals, dextrins	one calendar year	yes	Expires at end of phase-out period for each good
US-Morocco	Both parties	Price (for imports into the US); volume (for imports into Morocco)	Additional duty not > prevailing MFN rate or MFN rate immediately prior to EIF	Includes onion, garlic, tomatoes, asparagus,			
US-Panama	Both parties	Volume	Additional duty not > base rate, prevailing MFN rate or MFN rate immediately prior to EIF	Includes beef, chicken, dairy, rice, tomatoes	one calendar year	yes	Expires 19 years after EIF, i.e. 2031
US-Peru	Both parties	Volumen	Additional duty not > base rate, prevailing MFN rate or MFN immediately prior to EIF, or level of duty in Peru's schedule	Beef, chicken, rice, milk powder, butter, milk, cheese	one calendar year	yes	Expires 16 years after EIF, i.e. 2025
US-Singapore	Both parties	If increased imports constitute a substantial cause of serious damage or actual threat thereof	suspend further duty reduction or increase duty not > prevailing MFN rate or MFN rate on EIF	textile or apparel goods benefiting from preferential tariff treatment	Two years, extendable for two years	yes	Ten years from EIF

RTA	SSG can be used by	Trigger	Type of measure	Products concerned	Maximum length of measure	Is measure time-bound	Details
Mexico-El Salvador	El Salvador	Volumen	TRQ - in-quota tariff rate is that resulting from tariff liberalization programme; out of quota rate is e lower of base rate and MFN rate	Includes pork, onions, avocados, prepared meats, sugar, pasta	One calendar year	yes	May be applied only during the tariff liberalization period
Mexico-Guatemala Mexico-Honduras	Both parties (from second year of RTA's EIF)	Volume, import growth	Increase to lesser of MFN rate and base rate	Includes meat, vegetables, flour, prepared meats, cereals, and vegetables, beverages	12 months, extendable by 12 months	no	To be reviewed case by case

Source: WTO Secretariat