ARTICLE

EU Safeguard Law and Practice: 1995–2018

Edwin Vermulst* & Folkert Graafsma*

The EU, like other developed country WTO members, thus far has used safeguard measures only sporadically. Where they have been used, they have been applied in a relatively liberal manner. However, safeguard measures, including those of the EU, are by nature very blunt, particularly if they are applied on a global, first come-first served basis. Furthermore, the application of safeguard measures by the EU tends to have a snowball effect, as happened in 2002 and is now starting to happen again. It is therefore to be hoped that the EU will continue to apply safeguard measures only exceptionally and, when it does so, in a liberal manner. The two – at the moment of writing – ongoing safeguard investigations will provide an indication of the EU's future trade policy in this regard.

je me demandai: et après? Tout se répétait avec une monotonie désespérante, tout se ressemblait, tout revenait.

August Strindberg

1 Introduction

The European Union (hereinafter the EU or Union) has traditionally been reluctant to impose safeguard measures on third country exports of industrial products. At first sight, safeguard measures seem less attractive in terms of relief than anti-dumping duties and countervailing duties. The EU's preference for safeguard measures in the form of tariff rate quotas (TRQs) does not directly affect the prices charged for imported products[1] that may continue to hurt the Union's industry. Also, the time limits to impose safeguard measures are less strict. In addition, under WTO rules the EU must offer compensation to the main WTO suppliers affected by the protective measures.[2] Furthermore, the imposition of safeguard measures is normally directed against imports from all sources rather than one specific country and this therefore enlarges the pool of potential countries taking the matter to the WTO Dispute Settlement Body.[3] In fact, all safeguard measures that have been challenged before the WTO Dispute Settlement Body to date, have been found inconsistent with the WTO Agreement on Safeguards. Last, contrary to anti-dumping and anti-subsidy measures, safeguards target *fair* trade and therefore amount to an admission by a domestic industry that it cannot compete with fairly traded and perfectly legal imports. Thus, safeguards tend to be viewed as an instrument for inefficient producers.

For these reasons, safeguard actions were not popular with EU Member States and industries and few proceedings were initiated. And, indeed, from this moral high ground, the EU has since 1995 actively gone on the offensive in challenging, in the WTO, safeguard measures imposed by other WTO Members, including Korea, Argentina and, repeatedly, the United States.

Since 2002, however, the EU has also itself conducted a number of safeguard proceedings. Basically, the EU has concluded seven safeguard and five surveillance investigations (see Annex), out of which three ended with the imposition of measures:[4]

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* Founding partners VVGB Advocaten, Brussels, Belgium. Emails: eve@vvgb-law.com; fgr@vvgb-law.com. The authors gratefully acknowledge the help of Antoine Réco and Joris Cornelis in the preparation of this contribution.

1 While the EU has mostly used tariff quotas the measures can also take other forms. In *Salmon* there was a minimum import price (MIP) within the quota.

2 Either immediately or after three years if the measure is the result of an absolute increase in imports.

3 The notable exception being certain safeguard cases against China and, recently, against Cambodia and Myanmar.

4 *See* Annex 1 for an overview of these safeguard investigations.

(1) On 27 March 2002, in response to similar measures taken by the United States, the Commission initiated[5] a safeguard investigation on *Certain Steel Products* targeting twenty-one products and imposed provisional safeguard measures on fifteen products the very same day.[6] Definitive measures on seven products were imposed on 27 September 2002.[7] The measures lasted until 7 December 2003 when they were repealed following the retraction of the American measures;[8]

(2) On 11 July 2003, the Commission initiated simultaneous safeguard proceedings against *Citrus Fruits* from China[9] as well as safeguard proceedings against *Citrus Fruits erga omnes.*[10] These led to imposition of provisional safeguard measures on 7 November 2003[11] and definitive measures on 7 April 2004[12] on the basis of the *erga omnes* investigation since the China-specific safeguard investigation was terminated shortly after the imposition of the provisional safeguard measures; and

(3) On 6 March 2004, the Commission initiated a safeguard proceeding against *Farmed Salmon*,[13] with provisional measures on 14 August 2004[14] and definitive measures on 4 February 2005 (effectively against Norway, the Faroe Islands and Chile).[15]

In addition to these seven safeguard investigations, the Commission recently initiated two more investigations that are currently ongoing:

(1) On 16 March 2018, the Commission commenced a safeguard investigation into imports of *Indica rice* originating in Cambodia and Myanmar.[16] This is a special case as the initiation is based on the safeguard procedure foreseen in the EU's General System of Preferences (GSP); and

(2) On 26 March 2018, the Commission also initiated a safeguard investigation into twenty-six product categories of *Steel products.*[17] This investigation is *erga omnes* and is a reaction to, inter alia, the increased tariffs imposed on steel products in the United States (US) ex section 232. The Commission fears 'trade diversion'.[18] At the time of writing, the investigation is still in its infant stages although to some observers it significantly resembles the 2002 investigation.

While the details and the modalities of the EU safeguard measures vary from case to case, the general structure has been the imposition of a system of tariff quotas. Under this system, a certain quantity of the product concerned is allowed to enter the EU without an additional duty. Once the quota is exhausted, the products in question can still enter the EU, but an additional duty applies. The reason for this approach is to ensure and not distort the availability of an adequate supply up to the amount of the typical (traditional) demand without application of safeguard measures.

Below, we will give a brief overview of the EU's general industrial goods[19] safeguard law and (emerging) practice, particularly, the form and basis of safeguard measures imposed by the EU. We will mainly focus on the basic Regulation (EU) 2015/478.

2 THE REGULATIONS IN FORCE ON SAFEGUARDS

The current basic Regulation covering safeguards is Regulation (EU) 2015/478 of the European Parliament and

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5 Notice of initiation of a safeguard investigation concerning imports of certain steel products, [2002] OJ C77/39.

6 Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/11.

7 Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

8 Commission Regulation (EC) No 2142/2003 of 5 Dec. 2003 terminating the definitive safeguard measures in relation to certain steel products imposed by Commission Regulation (EC) No 1694/2002, [2003] OJ L321/11.

9 Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 427/2003 and 2201/96 concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China, [2003] OJ C162/2.

10 Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 3285/94, 519/94 and 2201/96 concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ C162/2.

11 Commission Regulation (EC) No 1964/2003 of 7 Nov. 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ L 290/3.

12 Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, as amended [2004] OJ L105/52.

13 Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 3285/94 and 519/94 concerning imports of farmed salmon, [2004] OJ C58/7.

14 Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3.

15 Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8.

16 Notice of initiation of a safeguard investigation concerning imports of Indica rice originating in Cambodia and Myanmar, [2018] OJ C100/30.

17 Notice of initiation of a safeguard investigation concerning imports of steel products, [2018] OJ C111/29.

18 *Ibid.*

19 We will therefore not discuss the various EU safeguard regimes with respect to agricultural and textiles products, nor the safeguard clauses and implementing Regulations of various bilateral Agreements (e.g. with Switzerland, Iceland, Norway and, in the near future, Korea). With regard to Korea, *see* Proposal for a Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement (9 Feb. 2010, COM(2010) 49 final 2010/0032 (COD)).

of the Council of 11 March 2015 on common rules for imports (codification).[20] This Regulation applies to imports of products originating in third countries except for products originating in certain third countries[21] listed in Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (recast).[22] Regulation (EU) 2015/755 applies to imports of products originating in certain non-market economy countries (Azerbaijan, Belarus, Kazakhstan, North Korea, Turkmenistan, and Uzbekistan).[23]

The basic Regulation does not apply to imports of textile products either, which are subject to a specific Regulation (EU) 2015/936 of the European Parliament and of the Council of 9 June 2015 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules.[24]

While imports of products originating in China are nowadays subject to the basic Regulation, this has not always been the case. Following China's accession to the WTO in 2001, the Council adopted Regulation (EC) No. 427/2003 which envisaged a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China.[25] This Regulation was repealed by Regulation (EU) 2015/755.

There were several differences between Regulation (EC) No. 427/2003 and the basic Regulation. First, Regulation 427/2003 authorized *selective* safeguard measures against products originating in China only and did not contain a compensation requirement. Second, the extent of injury required to impose measures was less than under the basic Regulation, i.e., so-called 'market disruption' would exist *'whenever imports of a product, like or directly competitive with a product produced by the Community industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the Community industry'*,[26] (as opposed to the *'serious injury'* in the basic Regulation, defined as *'a significant overall impairment in the position of Union producers'*).[27] Third, there were no rules concerning the maximum duration of definitive measures[28] (as opposed to four plus four years under the basic Regulation[29]). Fourth, specific provisions existed to counter *trade diversion*[30] (in case of increased imports from China as a consequence of product-specific safeguards measures taken by other WTO Members). Last, the Commission had substantially more power to impose provisional measures as only a qualified majority of Member States could put an end to such measures.[31]

The EU never imposed any measures pursuant to this China-specific Regulation, but it did initiate a China-specific safeguard investigation with respect to *Citrus Fruits.*[32] However, as mentioned above, shortly after the imposition of provisional safeguard measures under a parallel *erga omnes* safeguard investigation, the China-specific safeguard investigation was terminated. Nonetheless, both provisional and definitive *erga omnes* measures in *Citrus Fruits* included China.[33] In *Textile Products*, a China-specific investigation was initiated,[34] although not pursuant to the China-specific Regulation but under the former Regulation specific to imports of certain textile products from third countries.[35] Regardless, the investigation was terminated without the imposition of any measures.[36]

Finally, as for the rarely used safeguards procedure under GSP, we very briefly describe this mechanism in the penultimate section of this contribution.

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[20] Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 Mar. 2015 on common rules for imports (codification), [2015] OJ L83/16.

[21] Art. 1(1)(b) of Regulation (EU) 2015/478.

[22] Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 Apr. 2015 on common rules for imports from certain third countries (recast), [2015] OJ L123/33.

[23] Annex I of Regulation (EU) 2015/755.

[24] Regulation (EU) 2015/936 of the European Parliament and of the Council of 9 June 2015 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules, [2015] OJ L160/1.

[25] [2003] OJ L 65/1.

[26] Art. 2(1) Regulation 427/2003.

[27] Art. 4(3)(a) basic Regulation.

[28] Arts 9–12 Regulation 427/2003.

[29] Art. 19 basic Regulation, *see also* s. 4.8 below.

[30] Art. 13 Regulation 427/2003.

[31] Art. 7(3) of Regulation 427/2003.

[32] Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 427/2003 and 2201/96 concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China, [2003] OJ C162/2.

[33] Commission Regulation (EC) No 1964/2003 of 7 Nov. 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ L290/3 and Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67.

[34] Notice of Initiation of a safeguard investigation concerning imports of certain textile products originating in the People's Republic of China, [2005] OJ C104/21.

[35] Council Regulation (EEC) No 3030/93 of 12 Oct. 1993 on common rules for imports of certain textile products from third countries, [1993] OJ L275/1, repealed in 2015.

[36] Notice of termination of the safeguard investigation concerning imports of certain textile products originating in the People's Republic of China, [2005] OJ C170/9.

3 Safeguard investigations

3.1 *Initiation of Safeguard Investigations*

A safeguard or surveillance investigation may be initiated by the Commission at its own initiative or at the request of one or more of the EU Member States. For example, the investigation concerning *Certain Steel Products* was initiated at the request of '[s]everal Member States'; *Citrus Fruits* – at the request of Spain; *Farmed Salmon* – at the request of the UK and Ireland; *WWAN Modems* – at the request of Belgium; and the investigation concerning *Indica Rice* at the request of Italy. Only the current *Steel Safeguard* investigation, was initiated by the Commission on its own initiative.

Prior to initiation, the Commission must consult the Member States. The 'Committee on Safeguards' (Safeguards Committee) used for this purpose is usually composed of the same government officials that also staff the TDI Advisory Committee.[37]

If, after consultations, the Commission considers that it has sufficient evidence, it will initiate an investigation. The opening of the investigation is published in the C-series of the Official Journal of the European Union. This notice of initiation provides a summary of the information on record and requires all further relevant information to be communicated to the Commission. It also states the period within which interested parties may make their views known in writing and submit information; and the period within which interested parties may apply to be heard orally by the Commission.[38]

Importantly, as a WTO Member, the EU must '*immediately*' notify the WTO Committee on Safeguards of the initiation of an investigation.[39] In *Korea – Dairy Products*, the WTO Panel found that transmission of the notification fourteen days after publication of the decision to initiate the investigation was not immediate and therefore constituted a violation of Article 12.1 (a) Safeguards Agreement.[40] The Appellate Body further specified that compliance with the immediacy requirement should be assessed on a case-by-case basis, with attention to the burden involved in preparing the notification. The complexity of the notification as well as any need for translation are also relevant elements. For example, because the US notification was a simple one-page document reflecting the information that had been published in the US Federal Register, the sixteen-day delay could not be justified.[41] In practice, the EU has always notified the initiation of safeguard investigations within one week to the WTO Safeguards Committee.[42]

3.2 *Procedural Requirements*

Contrary to the practice under the old basic Safeguard Regulation 288/82,[43] the Commission now sends out questionnaires that should be completed by all interested parties, including EU producers and exporters.[44] The Commission will sometimes also carry out verifications of selected questionnaire responses. Compared to anti-dumping and anti-subsidy questionnaires and verifications, the safeguard equivalents are relatively simple and straightforward.

The procedures for requesting a hearing by the Commission are contained in Article 5(5) of the basic Regulation. Thus, the Commission *may* hear interested parties, but such parties *must* be heard where they have applied in writing within the period laid down in the notice of initiation showing that they are actually likely to be affected by the outcome of the investigations and that there are special reasons for them to be heard orally.

Pursuant to Article 5(4), interested parties which have made themselves known on time and representatives of the exporting country may, upon written request, inspect all information made available to the Commission in connection with the investigation other than internal documents prepared by the authorities of the Union or its Member States, provided that that information is relevant to the presentation of their case and not confidential within the meaning of Article 8 and that it is used by the Commission in the investigation.

When information is not supplied within the time limits set by the basic Regulation or by the Commission, or the investigation is significantly

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37 Art. 3 basic Regulation.

38 Art. 5 basic Regulation.

39 Art. 12.1 (a) WTO Safeguards Agreement.

40 Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R (21 June 1999), para. 7.134.

41 Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (22 Dec. 2000), paras 103–112.

42 For *Steel Products*, e.g. notification to the WTO Safeguards Committee was given on 27 Mar. 2018, one day after the investigation was initiated on 26 Mar. 2018. *See* WTO document G/SG/N/6/EU/1 of 27 Mar. 2018.

43 Council Regulation (EEC) No. 288/82 of 5 Feb. 1982 on common rules for imports, [1982] OJ 35/1.

44 In *Farmed Salmon* the Commission noted:
'The Commission officially advised the exporting producers and importers as well as their representative associations known to be concerned, the representatives of exporting countries and the Community producers of the investigation. The Commission sent questionnaires to all these parties, to representative associations of salmon farmers in the Community, and to those parties who made themselves known within the time limits set in the Notice of Initiation.'
Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recital 7. These questionnaires request company-specific information, typically for the past four to five years, on sales (to the EU, on the domestic market and to third-country markets), production, capacity, capacity utilization, profitability, and employment. Companies will also be requested to provide projections for future (two years) developments.

impeded, findings may be made on the basis of the facts available.[45]

Article 8(1) provides that information received pursuant to this Regulation shall be used only for the purpose for which it was requested. Neither the Council, nor the Commission, nor the EU Member States, nor the officials of any of these shall reveal any information of a confidential nature received pursuant to this Regulation, or any information provided on a confidential basis without specific permission from the supplier of such information.[46] Each request for confidentiality shall state the reasons why the information is confidential. However, if it appears that a request for confidentiality is unjustified and if the supplier of the information neither wishes to make it public nor to authorize its disclosure in general terms or in the form of a summary, the information concerned may be disregarded.[47] Information shall in any case be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.[48] Last, the basic Regulation provides that the foregoing rules shall not preclude reference by the EU authorities to general information and in particular to reasons on which decisions taken pursuant to this Regulation are based. Those authorities shall, however, take into account the legitimate interest of legal and natural persons concerned that their business secrets should not be divulged.[49]

A completed preliminary investigation is not a mandatory requirement for imposing a safeguard measure. Article 7(1) of the basic Regulation provides that a surveillance measure may be taken at any time and, in the case of critical circumstances, a provisional safeguard measure may be imposed forthwith. Subsequently, an *ex post facto* investigation will be carried out by the Commission. This happened once in *Certain Steel Products*, where the Commission initiated the investigation and imposed provisional measures on the same day.[50] The United States originally challenged this practice of the EU in the WTO,[51] but later decided not to pursue this challenge.

Article 6(3) of the basic Regulation provides that the investigation should not exceed nine months. Exceptionally this time limit may be extended by two months. Where the Commission considers, within nine months of the initiation of the investigation, that no Union surveillance or safeguard measures are necessary, the investigation shall be terminated within a month, the Committee having first been consulted.[52]

4 Substantive conditions to impose safeguards

The basic Regulation enables the EU authorities to take safeguard measures against imports from third countries, except for:

(1) products originating in certain third countries listed in Regulation (EU) 2015/755[53] on common rules for imports from certain third countries (recast). This Regulation applies to certain non-market economy countries; and

(2) textile products covered by Regulation (EU) 2015/936[54] ('autonomous regime').

Chapters IV and V of the basic Regulation discuss respectively *surveillance* and *safeguard measures*, which may be imposed on imports from third countries. Safeguard measures may be preceded by surveillance measures.[55]

In a safeguard investigation, the first step is to identify the domestic '*like product*' or the domestic '*directly competitive product*'. Then, the domestic industry (i.e. the producers of the like or directly competitive product) needs to be defined and it is necessary to conduct a determination of '*serious*' injury. The next step is to identify '*unforeseen developments*' *ex* Article XIX(1)(a) GATT 1994 and to examine whether imports are taking place in '*such increased quantities*' and '*under such conditions*' as to cause serious injury or threat thereof to the relevant domestic industry. Once '*all relevant factors*' having a bearing upon the condition of the domestic industry have been examined, the causal relationship between increased imports and serious injury has to be demonstrated. In addition, any known '*sources*' of injury other than increased imports have to be examined in

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[45] Art. 5(6) basic Regulation.

[46] Art. 8(2) basic Regulation.

[47] Art. 8(3) basic Regulation.

[48] Art. 8(4) basic Regulation.

[49] Art. 8(5) basic Regulation.

[50] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/11.

[51] *European Communities – Provisional Safeguard Measures on imports of Certain Steel Products*, Request for Consultations by the United States, WT/DS260/1, G/L/554 G/SG/D28/1 (5 June 2002).

[52] Art. 6(2) basic Regulation.

[53] Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 Apr. 2015 on common rules for imports from certain third countries (recast), [2015] OJ L123/33.

[54] Regulation (EU) 2015/936 of the European Parliament and of the Council of 9 June 2015 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules (recast), [2015] OJ L160/1.

[55] With respect to surveillance, Art. 10(1) of the basic Regulation provides that where the trends in imports on the market in respect of a product originating in a third country threaten to cause injury to Union producers of like or directly competing products and where the interests of the Union so require, importation of that product may be subject to retrospective Union surveillance or prior Union surveillance.

order not to attribute the injury resulting from these sources to the increased imports (non-attribution requirement). Finally, the Commission examines whether the imposition of safeguard measures is in the Union interest. In order to perform this analysis, however, an investigation period will need to be selected. It is important to note that such selection is done by the Commission and that exporters[56] are not consulted on the selection of the period.

4.1 *The Investigation Period*

The selection of the investigation period is a crucial element in a safeguard investigation since it is normally the data for this period that will determine whether there is an increase in import quantities and whether the domestic industry has suffered serious injury, or whether there is a threat of serious injury to the domestic industry.

Both the basic Regulation as well as the WTO Agreement on Safeguards are silent on the selection of the investigation period but given the finding of the Appellate Body in *Argentina – Footwear*[57] that the increase in imports must be recent, sudden, sharp and significant, the EU will typically determine a period of investigation that ends close to the date of initiation and will, on occasion, even take into account data after the initiation of the safeguard investigation.[58]

In *Certain Steel Products* the investigation period covered five years and the investigation was initiated three months after the end of the investigation period. The Commission took into account recent trends in its definitive Regulation.[59]

In *Citrus Fruits*, the investigation period that was selected also covered five years and ended six months before initiation. Again, when imposing definitive measures, the Commission took into account the most recently available data, i.e. data corresponding to the period for which provisional measures were already in force.[60]

In *Farmed Salmon*, the investigation period that was selected covered four years and ended two months before initiation. The Commission also took into account that the investigation was initiated two months before the EU enlargement and indicated that it would include available data relating to the new Member States. In this case, forecasts for 2004 and in some cases 2005 were requested in order to check whether they confirmed the trends shown during the investigation period.

In *WWAN*, the investigation period covered four and a half years and the investigation was initiated at the exact ending point of this period.

In *Indica Rice*, the investigation period covers five years and the investigation started about six months after the end of the period.

In *Steel Products*, the investigation period spans five years and the investigation was initiated about four months after the end of that period.

4.2 *Like or Directly Competitive Products*

In *Certain Steel Products*, the Commission provisionally stated that although technical differences in product characteristics and qualities were alleged, the imported product and the Union product were like or directly competitive.[61] At the definitive stage, the like or directly competitive analysis was carried out for each product type individually.

In *Citrus Fruits*, the Commission took into account that both products were classified under the same HS code level (at the six-digit level) and that they shared the same or similar physical characteristics (the differences in quality were considered negligible from the perspective of the consumers and, in fact, some imported products did not specify their origin, making it difficult for the consumers to make a distinction between the EU and the Chinese product). Regarding end-uses, the EU considered that both products had *'the same or similar end-uses, they were, therefore, alternative or substitute products and were easily interchangeable'*.[62] As a result, the EU concluded that the imported and the EU products were like products.

In *Farmed Salmon*, the EU concluded in the provisional determination that the imported product and the Union product were 'like or directly competitive'. It rejected the argument that frozen salmon is a different product to fresh salmon although it admitted that the fresh product is marketed as a premium quality product and enjoys a price premium at the retail level.[63]

4.3 *Definition of the Domestic Industry*

Once the like or directly competitive product is determined, the next step is to define the Union industry, i.e. the EU producers of the like or directly competitive product.

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[56] It is not known whether EU producers are consulted.

[57] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (14 Dec. 1999), para. 131.

[58] This happened e.g. in *Citrus Fruits*. *See* Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recital 117.

[59] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

[60] *See* Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67.

[61] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recital 9.

[62] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recital 20.

[63] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recitals 16 and 17.

In *Certain Steel Products*, the Commission provisionally established that the Union industry were all members of the European Confederation of the Iron and Steel Industry (Eurofer), the European Steel Tube Association (ESTA), the Fachvereinigung Stahlflanschen e.V. (FS) and the Defence Committee of the EU steel butt-welding fittings industry (DCEU) and that these industry associations represented between 50% and 95% of the total Union production of the products concerned.[64] At the final stage, the determination of the Union industry was conducted for each product type individually.[65]

In *Citrus Fruits*, the EU highlighted that virtually all production of the product concerned in the EU was carried out in Spain and that in 2002–2003 the Spanish producers accounted for over 85% of the total Union production.[66]

In *Farmed Salmon*, the Commission noted that the EU producers represented 47% of the total Union production for 2003 and, therefore, a major proportion. Claims by non-complaining EU producers that they opposed the initiation were rejected on the ground that the requirement of 'standing' did not apply to safeguard proceedings.[67]

4.4 *Unforeseen Developments*

Although the EU's basic Regulation does not contain a reference to the requirement that the increase in imports must have been the result of unforeseen developments, it is standing WTO case law that the '*unforeseen developments*' requirement of Article XIX GATT 1994, paragraph 1(a) also applies under the WTO Agreement on Safeguards. Moreover, an increase in imports does not only have to have happened suddenly and in substantial quantities, but since the increase in imports should be a consequence of the unforeseen developments, the imports themselves must also have been unforeseen and unexpected.[68] It is important to note, however, that the mere increase in imports does of itself not qualify as 'unforeseen developments'. WTO Members, including the EU, that wish to impose safeguard measures are thus obliged to demonstrate how the circumstances they are facing qualify as '*unforeseen developments*'. Indeed, the Appellate Body has repeatedly held that national authorities must demonstrate unforeseen developments as a matter of fact before applying a safeguard measure.[69]

It is not sufficient for national authorities to merely describe certain new developments.[70] National authorities also have to demonstrate that a logical connection exists between the '*unforeseen developments*' and the other requirements to impose safeguard measures (i.e. absolute or relative increase in imports, serious injury to the domestic industry that produces like or directly competitive products).[71] Moreover, it was held in *US – Steel Safeguards* that the '*unforeseen developments*' requirement should be established with regard to each specific product when imports of a broader category of products are under investigation.[72]

In *Certain Steel Products*, the EU concluded that the unforeseen developments consisted of the increased use of trade defence instruments by the United States and the resulting decrease in steel exports to the US.[73] Interestingly, at the provisional stage, the determination of the unforeseen developments was carried out for all product types together and thus in violation of the findings of the Panel, as later confirmed by the Appellate Body in *US – Steel Safeguards.* At the definitive stage, however, the EU carried out the unforeseen developments determination for each product type individually.[74]

In *Citrus Fruits*, the EU concluded that the unforeseen developments consisted of the unprecedented increase in Chinese production capacity leading to high pressure to export; the possibility that United States retaliatory measures in the hormones dispute would exclude the EU product from the United States, encouraging an increase in the People's Republic of China capacity and consequently production; a change in consumer preferences from 2001 onwards; and the exchange rate policy of the Chinese government coupled with the unexpected fall of the United States dollar since October 2000.[75]

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[64] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recitals 10 and 11.

[65] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

[66] Commission Regulation (EC) No 1964/2003 of 7 Nov. 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ L 290/3, at recitals 26 and 27.

[67] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8, at recitals 33 and 34.

[68] *See* Appellate Body Report, *supra* n. 57, para. 131; and Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 1999), paras 68–67.

[69] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177-178/AB/R (1 May 2001), para. 72 and Appellate Body Report, *supra* n. 68, para. 75.

[70] Appellate Body Report, *supra* n. 69, para. 73.

[71] *Ibid.*, para. 72.

[72] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-249/AB/R, WT/DS251-254/AB/R, WT/DS258-259/AB/R (10 Nov. 2003), paras 314–319.

[73] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recitals 15–16.

[74] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

[75] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, as amended [2004] OJ L105/52, at recital 37.

In *Farmed Salmon*, the EU provisionally concluded that the unforeseen development that caused the increase in imports was significant over-production in Norway, aggravated by the unexpected effects of the termination of trade defence measures against Norway and the fact that its industry did not achieve its forecast of increasing its exports to non-EU countries, in addition to the rise in the value of the Euro and the Danish Krone.[76]

In its Notice of Initiation in *Steel Products*, the Commission alleges that the unforeseen developments are '*the global overcapacity in steel making and trade measures adopted by a series of third countries during the last years in the context of that global overcapacity*'.[77]

4.5 *Increase in Imports*

Safeguard measures can only be imposed when a product is imported '*in such greatly increased quantities and/or on such terms or conditions*' as to cause, or threaten to cause, serious injury to Union producers.[78] This requirement mirrors Article 2.1 of the WTO Agreement on Safeguards and stipulates that safeguard measures can only be imposed when there are imports in increased quantities, either absolute or relative to domestic production or consumption.

For the imposition of safeguard measures, it does not make any difference whether the increase in imports is absolute or relative, but it does have an impact on the possibility of retaliation by other WTO members. Article 8.3 of the WTO Agreement on Safeguards explicitly states that retaliation (i.e. the right of suspension of equivalent concessions or other obligations under GATT 1994) cannot be exercised by exporting countries during the first three years during which a safeguard measure is in effect when the safeguard measure has been taken on the basis of an absolute increase in imports.

In *Argentina – Footwear*, the Appellate Body held that the increase in imports needs to be recent, sudden, sharp and significant.[79] A steady and slow increase over several years would thus be insufficient for the justification of the application of safeguard measures.[80] Furthermore, an investigating authority cannot simply compare the quantity or value of imports at an early point in time of the investigation period and at the end of the period (end point to end point analysis) to justify safeguard measures. Instead, an investigating authority should make an evaluation of the trends of imports during the entire period of investigation. Thereby, imports must show a trend that resembles a recent, sudden, sharp and significant increase. Otherwise, the safeguard measures will not be justified.

As mentioned, the case law of panels and the Appellate Body shows that a WTO member cannot simply select a baseline that results in an end point-to-end point comparison reflecting an increase in imports. Moreover, if a change in the baseline year can easily reverse that finding, the WTO member may have a difficult time establishing '*increased quantities*'. Any evidence that the baseline period reflected an abnormally low period for imports also precludes investigating authorities from finding '*increased quantities*'. Similarly, investigating authorities cannot rely on the low point of the downtrend as the baseline for the finding of a recent increase.

In practice, the EU has found little difficulty establishing an increase in imports, both at the absolute level as well as in relation to domestic consumption. It was only in *Certain Steel Products* that, for ten product types, no increase in imports could be observed and no safeguard measures were therefore imposed for these product types.[81]

4.6 *Serious Injury*

The injury standard in safeguard proceedings differs from the injury standard in anti-dumping and anti-subsidy proceedings. Whereas safeguard proceedings require 'serious injury', anti-dumping and anti-subsidy proceedings only require 'material injury'. Although it is not clear where the dividing line is between material injury and serious injury, the difference in terminology makes it clear that the injury standard under safeguard proceedings is a higher standard than the injury standard in anti-dumping and anti-subsidy proceedings. In fact, the Appellate Body has on various occasions held that '*serious injury*' is a tough standard to meet and WTO Panels and the Appellate Body have for the most part closely scrutinized findings of serious injury by investigating authorities.

Article 9(1) of the basic Regulation requires an analysis of the following injury factors:

(1) The volume of imports, in particular where there has been a significant increase, either in absolute terms or relative to production or consumption in the Union;

(2) The price of the imports, in particular where there has been a significant price undercutting as compared with the price of a like product in the Union;

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[76] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recital 37.

[77] Notice of initiation of a safeguard investigation concerning imports of steel products, [2018] OJ C111/29.

[78] Art. 15(1) basic Regulation.

[79] Appellate Body Report, *supra* n. 57, para. 131.

[80] *Ibid.*, para. 130.

[81] *See* Commission Regulation (EC) No 1695/2002 of 27 Sept. 2002 terminating certain safeguard proceedings and establishing a system of monitoring, in relation to certain steel products and providing for the refund of certain duties, [2002] OJ L261/124 and Commission Regulation (EC) No 142/2003 terminating the safeguard proceedings relating to certain steel products and providing for the refund of certain duties, [2003] OJ L23/9.

(3) The consequent impact on the Union producers of similar or directly competitive products as indicated by trends in certain economic factors such as:

– production;

– utilization of capacity;

– stocks;

– sales;

– market share;

– prices (i.e. depression of prices or prevention of price increases which would normally have occurred);

– profits;

– return on capital employed;

– cash flow; and

– employment.

Furthermore, where a threat of serious injury is alleged, the Commission must also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, account may be taken of factors such as (1) the rate of increase of the exports to the EU and (2) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the EU.[82]

In *Certain Steel Products*, the EU provisionally concluded that the Union industry had suffered serious injury as a result of the increased imports in the form of lost market share and decreases in capacity utilization, productivity and employment. The EU also took into account that the EU producers were already suffering serious injury and that due to the US steel safeguard measure that was taken on 5 May 2002, the Union producers' situation was likely to worsen because of expected further increases in imports.[83] At the definitive stage, the serious injury determination was carried out for each product type individually.[84]

In *Citrus Fruits*, the EU noted that in 2001/2002, imports more than doubled, the Union producers' sales volume in the Union was low and their profitability decreased. Moreover, in 2002/2003, consumption fell, the level of Union producers' sales decreased by 22% and their prices dropped by 6%. Nevertheless, the level of imports did not decrease. The effect of this was a reduction in the Union producers' sales revenue and in the profitability of the Union producers. Therefore, the Commission concluded that the producers had suffered serious injury. The EU also took into account the negative development for capacity utilization, production, employment, productivity, cash flow, return on capital employed (ROCE), sales, market share, prices and profitability when reaching the conclusion that the Union producers suffered serious injury.[85]

In *Farmed Salmon*, the Commission concluded that there had been a recent, sudden, sharp and significant increase in imports (absolute and relative). The Commission also examined the conditions under which those imports were made and stated that prices of imports were slightly below their average in 2003 and that the latest information available showed that prices were following a downward trend (although reliable data was not available at that time). The Commission noted that during the last year of the investigation period, the position of the Union industry worsened considerably, as witnessed by a fall in profitability and a negative development in ROCE and cash flow. The Commission added that stocks of fish in the water and sales fell and that Union producers had lost market share. Furthermore, the EU took into account the forecast for 2004 that indicated that capacity, production, capacity utilization, employment, sales volume, market share and live fish stocks would decline. All these factors, added to the fact that five Union producers went into bankruptcy or receivership, two were taken over by feed companies and seven more closed down or were preparing the closing down their operations, led the Commission to conclude that provisional measures were necessary. The Commission also stated that the serious injury took the form principally of reduced unit prices and substantially worsening profitability leading to large financial losses.[86]

4.7 *Causation and Non-Attribution*

The final condition for the imposition of safeguard measures is the existence of a causal link between the increased imports and the serious injury suffered by the domestic industry. In *Argentina – Footwear*, the Panel established the following three-prong test for the determination of causation:[87]

– Whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why the data nevertheless show causation. In *United*

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[82] Art. 9(2) basic Regulation.

[83] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recital 35.

[84] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

[85] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/1, as amended [2004] OJ L105/52, at recitals 59–63.

[86] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recitals 60–65.

[87] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R (25 June 1999), para. 8.229. This test was later confirmed by the Appellate Body, *see* Appellate Body Report, *supra* n. 57, paras 140–146.

States – Wheat Gluten, the Panel held that the general and overall coincidence of an upward trend in increased imports and negative trend in injury factors over the investigation period would be sufficient to meet this requirement and that precise coincidence in every injury factor is not required;[88]

- Whether the conditions of competition on the domestic market between imported and domestic products demonstrate a causal link between the imports and the injury; and
- Whether other relevant factors have been analysed and whether it is established that the injury caused by factors other than increased imports has not been attributed to them.

As regards the non-attribution requirement, the Appellate Body held in *US – Lamb Safeguards* that investigating authorities have an obligation to ensure that the injurious effects of factors other than increased imports are not included in the assessment of the injury ascribed to increased imports.[89] The investigating authorities are therefore required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as sufficiently explain the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.[90]

In *Certain Steel Products*, other factors examined by the Commission were on-going rationalizations and restructuring, excess capacity, and a decline in consumption, captive use and exports and efforts but the Commission concluded that the impact of these other factors was not significant and therefore did not break the existence of a '*genuine and substantial link between increased imports and serious injury*'.[91]

In *Farmed Salmon*, the Commission noted that, at the provisional determination stage, there were no other factors contributing to the injury apart from the increase in low priced imports.[92] At the final stage, however, the Commission examined the change in consumption patterns; the change in export performance of Union producers; excess capacity by EU producers; the effects of competition between EU producers; the higher than normal fish mortality; and higher transport costs for EU producers but concluded that no material injurious effects resulted from these factors.[93]

4.8 *Union Interest*

Before imposing safeguard measures, the Commission examines, as it does in anti-dumping and anti-subsidy proceedings, whether any compelling reasons exist which could lead to the conclusion that it is not in the Union interest to impose safeguard measures. In practice, however, the EU has so far always imposed safeguard measures when it found that the other conditions for the imposition of safeguard measures were met.

5 Imposition of safeguard measures

5.1 *Provisional and Definitive Measures*

It is the sole competence of the Commission to impose provisional (for not more than 200 days) or definitive safeguard measures.[94] Compared to the previous Regulation on safeguards,[95] the basic Regulation grants more power to the Commission and reduces the power of the Council and the Member States.

The Commission is still subject to the control of the Member States in accordance with the comitology rules. In cases of urgency[96] the Commission can adopt provisional measures and submit them at the latest fourteen days later to the Safeguards Committee (thereby removing also the *prior* consultation obligation). If the Safeguards Committee delivers a negative opinion by qualified majority, the Commission shall repeal the measures. Otherwise, the measures remain in force. Thus, in the absence of a qualified majority against the measures in the Committee, the measures will remain in force.

With regard to definitive safeguard measures and measures to revoke or amend measures,[97] the Commission must submit a draft of the measures to the Safeguard Committee,[98] which shall express its vote by qualified majority:

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[88] Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (31 July 2000), paras 8.97–8.102.

[89] Appellate Body Report, *supra* n. 69, paras 179 and 185.

[90] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 Feb. 2002), para. 215.

[91] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1.

[92] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recital 89.

[93] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, OJ L33/8 of 5 Feb. 2005, at recitals 87–97. Similar factors were also examined in *Citrus Fruits*. Please refer to Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), OJ L104/67 of 8 Apr. 2004, at recitals 69–89.

[94] Art. 15(6) basic Regulation.

[95] Council Regulation (EC) No. 260/2009 of 26 Feb. 2009 on the common rules for imports (codified version), [2009] OJ L84/1.

[96] Art. 15(6) of the basic Regulation, which renders Art. 8 of Regulation 182/2011 applicable.

[97] Except when safeguard measures are imposed on certain non-market economy countries.

[98] Art. 15(6) of the basic Regulation, which renders Art. 5 of Regulation 182/2011 applicable.

– If the Committee delivers a positive opinion, the Commission adopts the safeguard measures;

– If the Committee delivers a negative opinion or if there is no opinion, the Commission may not adopt the measures. It may then either submit an amended version of the measures to the Committee within two months or submit the draft measures to the Appeal Committee within one month.

In the latter case, the Appeal Committee expresses its vote by qualified majority. The Appeal Committee is a high-level horizontal committee, the level of representation of which may not be lower than the members of the committee of Permanent Representatives (COREPER), i.e. at least at the level of the Heads of Mission of the Member States' representations in Brussels.[99] If the Appeal Committee delivers a positive opinion, the Commission adopts the safeguard measures. If the Appeal Committee delivers a negative opinion or if there is no opinion, the Commission may not adopt the measures.

In other words, no definitive safeguard measures can be imposed unless a qualified majority of Member States approves them. This somewhat enhances the Member States' power as the referral to the Safeguards Committee is automatic.

While the general rule is that the members of the Safeguards Committee meet in person, a written procedure may apply 'in duly justified cases'.[100] With the Trade Omnibus, only a majority of Member States can put an end to the written procedure and request oral consultations. This entails a further reduction of the Member States' prerogatives.[101]

5.2 *Publication of Measures*

Article 3.1 of the WTO Agreement on Safeguards requires publication of a report setting out the findings and conclusions on all pertinent issues of fact and law. The EU publishes the regulations imposing provisional and definitive safeguard measures in the L-series of the Official Journal of the European Union.

In addition, Articles 12.1 (b) and (c) of the WTO Agreement on Safeguards require a WTO Member to immediately notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports; and when taking a decision to apply a safeguard measure. With respect to the temporal element in these notification requirements, the Appellate Body has in the past found that a five-day delay is consistent with the requirement of '*immediate*' notification.[102] Panels have in the past found delays of forty, twenty-three and twenty-six days to be violations of the immediacy requirement.[103]

In practice, the EU carries out the notifications pursuant to Articles 12.1 (b) and (c) at the same time and has always notified the Committee on Safeguards before the entry into force of the definitive safeguard measures.[104]

In addition, Article 12.4 of the WTO Agreement on Safeguards mandates notification of the Committee on Safeguards prior to taking provisional safeguard measures. So far, the EU has always notified the Committee on Safeguards before taking a provisional safeguard measure[105] and even complied with this requirement in the *Certain Steel Products* case where provisional safeguard measures were imposed together with the initiation.[106]

5.3 *Form of the Measures*

Although safeguard measures can take a variety of forms, the EU has a clear preference for safeguard measures in the form of TRQs as they keep the EU market open and ensure the availability of an adequate supply to meet demand. Imports in excess of the quota are then typically subject to an additional duty.

The only exception to this system TRQs was in *Farmed Salmon.* It was found in that case that a price element needed

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[99] The Appeal Committee consists of Member States and is chaired by the Commission. The Appeal Committee adopted its rules of procedure on 29 Mar. 2011 in accordance with Art. 3(7) of Regulation 182/2011. Art. 1(5) of the rules of procedure provides that '*the Commission shall set the date of the appeal committee meeting in close cooperation with the Member States, in order to enable Member States and the Commission to ensure an appropriate level of representation.*
To this effect, the Commission shall consult Member States on various options for date of the meeting. Member States may make suggestions on this regard and indicate the level of representation that they consider appropriate which should be of a sufficiently high and horizontal nature, including at Ministerial level. As a general rule, representation should not be below the level of members of the committee of Permanent Representatives of the governments of the Member States. The Commission shall take the utmost account of such suggestions.' (Underlining added).

[100] Art. 3(5) of the basic Regulation, which refers to Art. 3(5) of Regulation 182/2011.

[101] Before, in accordance with Art. 4(4) of Regulation 260/2009, any Member State could request oral consultations. It may be noted that the new rule that only a majority of Member States can put an end to the written procedure, also derogates from the general rule of comitology procedures, enshrined in Art. 3(5), second subparagraph, of Regulation 182/2011, that '*the written procedure shall be terminated without result where, within the time limit referred to in the first subparagraph, the chair so decides or a committee member so requests*'.

[102] Appellate Body Report, *supra* n. 41, para. 129.

[103] Panel Report, *supra* n. 40, paras 7.137 and 7.145 and Panel Report, *supra* n. 88, para. 8.199, respectively.

[104] *See* e.g. WTO Document G/SG/N8/EEC/1 and G/SG/N10/EEC/1 of 11 Sept. 2002 (for *Certain Steel Products*), WTO Document G/SG/N/8/EEC/2 and G/SG/N/10/EEC/2 and G/SG/N/11/EEC/2/Suppl.1 of 16 Mar. 2004 (for *Citrus Fruits*), and WTO Document G/SG/N/6/EU/1 of 27 Mar. 2018 (for *Steel Products*).

[105] *See* e.g. WTO Document G/SG/N7/EEC/3 and G/SG/N11/EEC/3 of 16 Aug. 2004 (notification on 12 Aug. 2004 whereas provisional measures were published on 14 Aug. 2004) for *Farmed Salmon.*

[106] WTO Documents G/SG/N6/EEC/1 and G/SG/N7/EEC/1 and G/SG/N11/EEC1 of 2 Apr. 2002 (notification on 27 Mar. 2002 whereas provisional measures were only published on 28 Mar. 2002).

to be introduced for all imports, since during the period of provisional measures, imports continued at price levels below the cost of production of Union producers. A minimum price level based on the Union producers' average production costs was therefore established but with a phase-in period (which was later extended by forty days) in order to prevent market disturbances. This minimum price element applied to imports falling within the TRQ as well as those falling outside the TRQ.[107] Imports below the minimum import price were therefore subject to a duty equivalent to the difference between the minimum price and the import price, regardless of whether they were imported under the TRQ or not. Certain imports in excess of the TRQ were made subject to an additional duty, specified in Annex I of the Regulation imposing definitive measures (see below on the determination of the additional duty).

5.4 *Setting and Allocation of the Quotas*

TRQs are typically allocated to the main exporting countries (with a 'rest' category for all others) and are normally set at the average import level during the previous three years with adjustments if warranted.

In *Certain Steel Products*, for example, the TRQs for the provisional measures were based on the average of the annual level of imports in the years 1999, 2000 and 2001, plus 10% thereof. Also, because provisional safeguard measures were scheduled to be in operation for only six months, the quotas were set at 50% of the annual figure.[108] Unlike in *Citrus Fruits* and *Farmed Salmon* (and the final safeguard measures in *Certain Steel Products*), no country-specific tariff quotas were specified and therefore the provisional TRQ was a global quota, administered on a first-come, first-served basis. At the final stage, the quotas were allocated among those countries having a substantial interest, i.e. country-specific quotas were imposed but for hot rolled coils a single global quota was imposed. According to the Commission, a normal allocation would have resulted in a large number of relatively small quota allocations to countries with a substantial interest and only a small percentage (less than 7.5%) of the global tariff quota would have remained available for exporters in other countries.[109]

Similarly, a system of TRQs was established in *Citrus Fruits* whereby the tariff quota was based on the average import volume for the most recent three-year period for which import statistics were available (i.e. 1999/2000 to 2001/2002). To reflect the duration (154 days) of the provisional safeguard measures, the TRQ as established on an annual basis was proportioned. To preserve the traditional trade flows, the amount of tariff quotas was divided between those countries having a substantial interest (only China in this case) and those countries not having a substantial interest (all other countries). Therefore, a specific quota was assigned to China and another specific quota was assigned to other countries. Because the quota for other countries based on historical import data would have been very low, this was increased to 3% of the EU consumption (but it did not affect China's quota) to allow competition or newcomers to enter the market.[110] At the final stage, the quotas were increased with the yearly average import quantity from non-EU countries to accession countries in the years 2000 to 2002 to reflect the scheduled EU enlargement.[111]

In *Farmed Salmon*, the Commission again imposed provisional safeguard measures in the form of a TRQ whereby the tariff quotas were allocated amongst the countries/regions having a substantial interest in supplying the product concerned with a part reserved for other countries. After consultation with Norway and the Faeroe Islands, it was decided to assign a specific tariff quota to each of these countries based on the proportions of the total quantities supplied during the three-year period from 2001 to 2003 with an additional quota for other countries. The TRQs were subsequently increased by 5% to reflect growth in consumption.[112] At the final stage, an additional quota was allocated to Chile. Initially, no quota was set for Chile because imports for Chile in the second semester of 2003 were below 3% (and therefore excluded from the provisional measure). At the definitive stage, however, it was found that Chilean imports for 2003 were not representative (because of technical reasons concerning border controls) and the quota for Chile was therefore based on average imports in 2001, 2002 and an adjusted figure for 2003.[113] In addition, it was found that the increase in consumption was actually higher than previously estimated

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[107] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8, at recitals 100–105.

[108] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recitals 65–70.

[109] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1, at recitals 694–698.

[110] Commission Regulation (EC) No 1964/2003 of 7 Nov. 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ L 290/3, at recitals 119–125.

[111] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recital 117.

[112] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recitals 100–102.

[113] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8, at recital 108.

and the quotas were therefore increased by 10% (instead of 5% at the provisional stage).[114]

Quotas are normally allocated on a first-come, first-served basis, the method which reportedly implies the least administrative burden.[115] In other words, quotas are normally allocated in chronological order from the dates on which customs declarations of release for free circulation are accepted by the customs authorities.

In *Citrus Fruits*, however, it was considered more appropriate to use a system of import licenses that reflected historical import patterns whereby traditional importers (importers that had imported 50 tonnes or more in one or more of the past three years) were allocated 85% (reduced to 75% at the final stage) of the quota for China while new importers were allocated 15% (increased to 25% at the final stage) of the quota for China. The reason for setting up such system was that a first-come, first-served system would harm the sales of the EU producers in the first part of the year (as all importers would purchase an import licence from the outset, before the quota runs out). It would also disrupt traditional trade flows and might have prevented newcomers from entering the market. The quantity for which a traditional importer could obtain a license was limited to the maximum quantity imported over the past three years. For other importers, the maximum quantity for which a license could be obtained was 20% of the tariff quota available for China. The same threshold applied for the quota from other countries since traditional importers did not previously import from China.[116]

5.5 *Determination of the Additional Duty*

An additional duty payable on imports above the quota is established by calculating an underselling margin on the basis of a non-injurious price, i.e. a price at which the Union producers can recover their costs and make a reasonable profit.

In *Certain Steel Products*, the non-injurious price was constructed by taking the respective cost of production for each product and adding a reasonable profit margin of 8%. This price was then compared with the average price per ton of the imported product. The difference between these two prices was expressed as a percentage of the Community border price of the imported product at a CIF level (price of cost + insurance + freight). In order to avoid rates at a prohibitive level, a ceiling was fixed at 26%.[117]

In *Citrus Fruits*, the additional duty was calculated on the basis of a target price at which the Union producers would achieve a profit of 6.8% on turnover minus the average import price in the period 2001/2002 to 2002/2003 at the same level of trade, adjusted to CIF Union border customs duty. The 6.8% profit margin was based on an assessment of actual profits achieved in period 1998/1999 to 2001/2002 and this resulted in an underselling level of 22%. Unlike in *Certain Steel Products*, the additional duty was not an *ad valorem* (i.e. expressed as a percentage) duty, but a fixed duty of EUR 155 per tonne.[118] At the final stage, it was found that the additional duty determined at the provisional stage proved to be inadequate to reduce the level of imports in the short term. The level of the additional duty was therefore recalculated on the basis of a target price at which the Union producers would achieve a profit of 6.8% on turnover, adjusted to take account of transport costs to ensure a proper comparison with imports delivered to the main geographical area for consumption. This amount was then compared to the average import price in the period April 2003 to December 2003 at the same level of trade, adjusted to CIF Union border, customs duty, post-importation costs and with importers' profit added. This resulted in a level of underselling of 57.9% of the CIF import price. The fixed duty was then set at EUR 301 per tonne.[119]

The additional duty in *Farmed Salmon*, in the form of a fixed duty, was set at a level such as to provide adequate relief to the Union producers and was based on the level of underselling. The level of underselling was provisionally calculated on the basis of the weighted average non-injurious price per ton of the Union product, based on the cost of production of the Union product plus a level of profit of 5%. This non-injurious price was subsequently compared to the preliminary weighted average price per ton of the imported product concerned during the first quarter of 2004. The difference between these two prices was expressed as a percentage of the CIF Union border price of the imported product and resulted in underselling margin of 17.8% which was then converted into a fixed duty per ton (EUR 469 per tonne WFE).[120]

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[114] *Ibid.*, at recital 109.

[115] *Ibid.*, at recital 108.

[116] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recitals 125–133.

[117] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recitals 65–70.

[118] Commission Regulation (EC) No 1964/2003 of 7 Nov. 2003 imposing provisional safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2003] OJ L 290/3, at recitals 120.

[119] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recital 115.

[120] Commission Regulation (EC) No 1447/2004 of 13 Aug. 2004 imposing provisional safeguard measures against imports of farmed salmon, [2004] OJ L267/3, at recital 104.

At the final stage, an additional duty, on top of the minimum price element, was established at the difference between the level of the non-injurious target price of the Union producers and the minimum price element. This difference was calculated on the basis of the weighted average non-injurious price per ton of the Union product, based on the cost of production of the Union product plus a profit on turnover of 14% (only 5% at the provisional stage). This non-injurious price was compared with the minimum price element. The difference between these two prices resulted in an initial duty payable of EUR 330 per tonne (WFE).[121]

5.6 *Liberalization of Safeguard Measures*

Typically, TRQs are increased, and additional duties decreased on an annual basis to meet the WTO requirement of liberalization of safeguard measures over time. In *Certain Steel Products*, the quotas as established at the provisional stage were yearly increased by 5% and the additional duties were yearly decreased by 10%.[122]

Likewise, the quotas in *Citrus Fruits* were yearly increased by 5%, but no liberalization took place with respect to the additional duty.[123] The Regulation imposing the final safeguard measures, however, did state that the level of duty could be reviewed, and such a review took place in 2005 (pursuant to Article 7.4 WTO Agreement on Safeguards). However, it was determined to keep the definitive safeguard measures unchanged (i.e. no increase in liberalization of the measures and no decrease of the additional duty).[124]

In *Farmed Salmon*, the established quota was increased by 10% on an annual basis, and the additional duty was scheduled to decrease on an annual basis by 5%.[125]

5.7 *Shipping Clause*

Paragraph 2 of Article 15(5) of the basic Regulation provides that while any safeguard measure applies to every product which is put into free circulation after their entry into force, such measure shall not prevent the release for free circulation of products already on their way to the EU provided that the destination of such products cannot be changed. This so-called 'shipping clause' does not yet have an equivalent in EU anti-dumping and anti-subsidy law but has been consistently applied in all three cases in which measures have been imposed at the *provisional* stage (*Certain Steel Products, Citrus Fruits*, and *Farmed Salmon*). Exceptionally, the *Definitive* Regulation in *Farmed Salmon* also contained such a provision.[126] Presumably, this exception was motivated by the inclusion of a minimum price element at the definitive stage which was absent from the provisional measures.

5.8 *Safeguard Measures Against Developing Countries*

Article 18 of the basic Regulation provides that no safeguard measures may be applied to a product originating in a developing country member of the WTO, as long as that country's share of imports does not exceed 3% provided that developing country members of the WTO with less than 3% import share collectively account for not more than 9% of the total imports.

In practice, the EU has always listed the developing countries with an import share of less than 3% in a separate annex and has excluded these countries from the application of the safeguard measure. In all three cases where definitive measures were imposed (*Certain Steel Products, Citrus Fruits*, and *Farmed Salmon*), the Commission did not inquire into whether the developing countries accounted for more than 9% of the total imports. It simply stated that '[i]n conformity with Community legislation and the international obligations of the Community, the safeguard measures should not apply to any product originating in a developing country as long as its share of imports of that product into the Community does not exceed 3 %'. In all cases therefore, the Commission did not apply the 9% rule.

5.9 *Duration of Safeguard Measures*

Article 19(1) basic Regulation provides that the duration of the safeguard measures must be '*limited to the period of time necessary to prevent or remedy serious injury and to facilitate adjustment on the part of the Union producers*'. In addition, safeguard measures cannot exceed a duration of four years and this maximum period of four years includes the period during which provisional safeguard measures are in force – unlike anti-dumping and anti-subsidy measures

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[121] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8, at recitals 110–111.

[122] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1, at recital 696.

[123] Commission Regulation (EC) No 658/2004 of 7 Apr. 2004 imposing definitive safeguard measures against imports of certain prepared or preserved citrus fruits (namely mandarins, etc.), [2004] OJ L104/67, at recital 120.

[124] Notice regarding consultations on the application of safeguard measures imposed on imports concerning certain prepared or preserved citrus fruits by Commission Regulation (EC) No 658/2004, [2005] OJ C322/7.

[125] Commission Regulation (EC) No 206/2005 of 4 Feb. 2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L33/8, at recital 116.

[126] *Ibid.*, Art. 7.

where the maximum five-year period starts running from the imposition of the definitive measures. In practice, safeguard measures imposed by the EU have lasted less than two years in *Certain Steel Products*, four years in *Citrus Fruits* and were supposed to apply for four years in *Farmed Salmon* but in the end only lasted less than nine months because a parallel anti-dumping investigation had resulted in the imposition of provisional anti-dumping measures on imports of farmed salmon from Norway, the main target of the safeguard case.

The duration of a safeguard measure can be extended beyond the four-year period provided it is determined that (1) the safeguard measure continues to be necessary to prevent or remedy serious injury and (2) there is evidence that Union producers are adjusting. Such extensions need to be adopted on the basis of the same procedures as the initial safeguard measures. An extended safeguard measure cannot be more restrictive than it was at the end of the initial period.[127] In other words, if the safeguard measure is extended beyond the initial four-year period, further liberalization of the safeguard measures is mandated.

Unlike anti-dumping and anti-subsidy measures, safeguard measures cannot be extended indefinitely. Article 19(5) basic Regulation explicitly states that the total period of a safeguard measure – including the period of application of the provisional measure, final measure and extension of the safeguard measure – cannot exceed eight years. In other words, no product can be subject to safeguard measures for a period longer than eight years. In practice, the maximum duration for which safeguard measures have been in place in the EU is four years since there has never been an extension of a safeguard measure.

Moreover, unlike under the anti-dumping and the anti-subsidy basic Regulations, in case of safeguards there is no possibility to immediately initiate a new safeguard investigation (and impose a new safeguard measure): Article 21(1) of the basic Regulation provides that when imports of a product have already been subject to a safeguard measure, no further measure can be imposed on that product until a period equal to the duration of the previous measure has elapsed and such period shall not be less than two years. In other words, if a product has been subject to safeguard measures for eight years, i.e. the maximum duration allowed under the basic Regulation, no new safeguard measures can be imposed on the same product for another eight years.

However, a short safeguard measure (i.e. a safeguard measure with a duration of 180 days or less) can be re-imposed on a product if (1) at least one year has elapsed since the date of introduction of a safeguard measure and (2) such safeguard measure has not been applied to the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.[128] The EU has never imposed such short 'emergency' safeguard measures. This is also because EU complainants typically use the anti-dumping or anti-subsidy instruments to seek further protection once safeguard measures have ceased to exist.

5.10 *Collection of Provisional Duties if Definitive Measures Are Not Imposed*

Article 7(4) of the basic Regulation provides that where provisional safeguard measures are repealed because no serious injury or threat of serious injury exists, the customs duties collected as a result of the provisional measures shall be automatically refunded as soon as possible.

Of the three cases mentioned above in which safeguard measures were imposed, this situation only occurred in *Certain Steel Products.* In this case, out of twenty-one investigated products, provisional measures were imposed on fifteen products. Out of these fifteen products subject to provisional measures, definitive safeguard measures were only imposed on seven products. Out of the eight products for which no definitive measures were imposed, the provisional duties for five products were refunded immediately because of a finding of no serious injury or threat thereof,[129] while for three out of these eight products, the Commission continued its investigation but eventually decided not to impose definitive safeguard measures and therefore the provisional duties on these three were later therefore refunded as well.[130]

While Article 7(4) of the basic Regulation appears to imply that a refund would only take place when there is a finding of absence of serious injury (or threat of serious injury), the definitive Regulation also provided for refunds of provisional duties when no final safeguard measure was imposed due to other reasons than an absence of serious injury (or threat of serious injury). Refunds were also provided when there was no finding of increase in imports.[131]

Notes

[127] Arts 19(2) and (3) basic Regulation.

[128] Art. 21(2) basic Regulation.

[129] Commission Regulation (EC) No 1695/2002 of 27 Sept. 2002 terminating certain safeguard proceedings and establishing a system of monitoring, in relation to certain steel products and providing for the refund of certain duties, [2002] OJ L261/124.

[130] Commission Regulation (EC) No 142/2003 terminating the safeguard proceedings relating to certain steel products and providing for the refund of certain duties, [2003] OJ L23/9.

[131] Commission Regulation (EC) No 1695/2002 of 27 Sept. 2002 terminating certain safeguard proceedings and establishing a system of monitoring, in relation to certain steel products and providing for the refund of certain duties, [2002] OJ L261/124, at recital 25.

6 Prohibition of grey area measures

The WTO Agreement on Safeguards negotiated during the Uruguay Round broke new ground in establishing a prohibition against so-called 'grey area' measures. It provides that Members shall not seek, take or maintain any voluntary export restraints, orderly marketing agreement or any other similar measures on the export or the import side.[132] Since 1995, the EU has not imposed grey area measures on WTO members.

7 Compensation and retaliation

With the exception of a reference to the EU's obligation '*to see that consultations are conducted under the auspices of the WTO Committee on Safeguards*' in Article 15(4) of the basic Regulation, the EU's basic Regulation does not contain any provisions with respect to compensation and possible retaliation by exporting countries.

However, as is the case for every other WTO Member and as acknowledged in Article 24(1) of the basic Regulation,[133] the provisions of the WTO Agreement on Safeguards need to be complied with by the EU. Article 8.1 of the WTO Agreement on Safeguards provides that a WTO member imposing (or extending) a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations between it and the exporting members which would be affected by such a measure. To this effect, the country imposing (or seeking to impose) a safeguard measure has an obligation to enter into consultations pursuant to Article 12.3 of the WTO Agreement on Safeguards so that concerned WTO members can agree on any adequate means of trade compensation for the adverse effect of the measures on their trade.

Indeed, Article 12.3 of the WTO Agreement on Safeguards obliges WTO members that propose to apply or extend a safeguard measure to provide adequate opportunity for consultations with the Members exporting the product concerned. The fact that the obligation to provide an opportunity for consultations arises when a Member is '*proposing to apply*' a measure, necessarily means that the consultations must take place prior to the implementation of the measure.

The obligation under Article 12.3 of the WTO Agreement on Safeguards is to provide interested parties with '*sufficient information and time to allow for the possibility, through consultations, of meaningful exchange on the issues identified*'.[134] This means that when the notification does not contain important details about the proposed measure, such as the proposed numerical quota share for individual exporting members, there is a violation of Article 12.3 of the WTO Agreement on Safeguards.[135] Similarly, when insufficient time is provided to allow exporting members to analyse the measure, consider the consequences, conduct domestic consultations and prepare for consultations with the WTO member imposing the safeguard measure,[136] there would be a violation of Article 12.3 of the WTO Agreement on Safeguards.

The EU's practice so far has been to offer consultations pursuant to Article 12.3 of the WTO Agreement on Safeguards at the same time as the notice pursuant to Article 12.1(b) and 12.1(c) of the WTO Agreement on Safeguards is given. In that notice, the EU then expresses that it '*is prepared to consult with those Members having a substantial interest as exporters of the product concerned, with a view to*, inter alia, *reviewing the information provided in this notification, exchanging views on the measure proposed, and reaching an understanding on ways to achieve the objective set out in Article 8.1 of the Agreement*'.[137]

When no agreement can be reached between the importing country and the exporting countries pursuant to Article 12.3 of the WTO Agreement on Safeguards, the exporting countries have the right to retaliate pursuant to Article 8.2 of the WTO Agreement on Safeguards. The right to retaliate, however, is seriously curtailed by Article 8.3 of the WTO Agreement on Safeguards which provides that the right to retaliate is suspended for the first three years as long as the safeguard measure has been taken as a result of an *absolute* increase in imports and the measure conforms to the provisions of the WTO Agreement on Safeguards.

This means that, provided that when there was an absolute increase in imports, there is no possibility for retaliation when a safeguard measure is only imposed for three years. Indeed, even when a safeguard measure does not comply with the provisions of the WTO Agreement on Safeguards, Article 23(2)(a) of the

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[132] Art. 22(b) of the WTO Agreement on Safeguards.

[133] Which provides that the basic Regulation shall not preclude the fulfilment of obligations arising from special rules contained in agreements concluded between the Union and third countries.

[134] Appellate Body Report, *supra* n. 41, para. 136.

[135] *Ibid.*, paras 136–142. Please note, however, that there is no obligation that the measure i.e. finally implemented is exactly the same as the proposed measure as the modalities of the measure may change following consultations.

[136] Appellate Body Report, *supra* n. 90, paras 86–113.

[137] *See* e.g. WTO Document G/SG/N8/EEC/1 and G/SG/N10/EEC/1 of 11 Sept. 2002 (for *Certain Steel Products*) and WTO Document G/SG/N/8/EEC/2 and G/SG/N/10/EEC/2 and G/SG/N/11/EEC/2/Suppl.1 of 16 Mar. 2004 (for *Citrus Fruits*).

WTO Dispute Settlement Understanding states that a Member shall not make a determination to the effect that a violation has occurred except through reference to dispute settlement. By the time a panel and/or the Appellate Body might find a violation of the WTO Agreement on Safeguards, a safeguard measure that lasts less than three years may well already have expired.

Given that the EU has always imposed safeguard measures on the basis of an *absolute* increase of imports (see above section 4.5)), has never been found by the WTO Dispute Settlement System to have violated the WTO Agreement on Safeguards, and, with the exception of *Citrus Fruits*, has not imposed safeguard measures for more than three years, the EU has not so far faced retaliatory action by other WTO members for its safeguard measures.

8 Avoidance of double and triple counting

In many cases in which the EU initiated safeguard investigations, there was a potential overlap between safeguard measures on the one hand, and anti-dumping and/or anti-subsidy measures on the other hand. In the *WWAN Modems* case, for example, the EU decided to deploy all three trade defence instruments almost simultaneously.[138]

In *Certain Steel Products*, several of the products for which safeguard measures were imposed were already subject to anti-dumping and/or anti-subsidy measures at the time of the imposition of safeguard measures (both at the provisional and the definitive stage). The potential of providing a level of protection higher than necessary was acknowledged at the provisional stage when the Commission stated that:

> *Certain of the 15 products concerned are subject to existing trade defence measures by the Community. These measures will be examined in the course of the investigation to establish what steps, if any, require to be taken to avoid the combination of the different types of measure giving a higher level of protection than is necessary.*[139]

Subsequently, the Commission published a Notice concerning this issue by which it informed interested parties that in the event definitive safeguard measures were adopted, it might be considered necessary to amend existing levels of anti-dumping or countervailing duties. A reference was made to this Commission Notice in the Regulation imposing definitive safeguard measures and the Commission stated that it would examine this issue expeditiously in relation to the products subject to both safeguard and anti-dumping/anti-subsidy measures.[140] The Commission later amended the AD measures and provided that when both an anti-dumping duty and a safeguard duty would normally be payable and where the anti-dumping duty was less than, or equal to, the amount of the safeguard duty, no anti-dumping duty would be payable. Where the anti-dumping duty was greater than the amount of the safeguard duty, only that part of the anti-dumping duty which was in excess of the amount of the safeguard duty would be payable. Of course, this only applied once the tariff-quota was exhausted.[141] *Citrus Fruits* and *Farmed Salmon* were different from *Certain Steel Products.* While in the latter proceeding anti-dumping measures had been imposed before the safeguard measures, the opposite happened in *Citrus Fruits* and *Farmed Salmon.*

In *Citrus Fruits*, the definitive safeguard measures expired on 8 November 2007. A few weeks prior to the expiry of the safeguard measures, i.e. on 20 October 2007, an anti-dumping investigation was initiated against *Citrus Fruits from China* and provisional anti-dumping measures were imposed on 5 August 2008. As such, there were no anti-dumping measures and safeguard measures at the same time. Yet the timing illustrates how an EU industry may use the various trade remedies available to enjoy continued protection from imports.

A similar situation happened in *Farmed Salmon* where definitive safeguard measures had been in force from 6 February 2005 and were scheduled to last until 13 August 2008. On 23 October 2004, however, an anti-dumping investigation was initiated against *Farmed Salmon from Norway.* This anti-dumping investigation resulted in the adoption of provisional anti-dumping measures on 23 April 2005. On the same day, the Commission published a Regulation revoking the safeguard measures because:

> *The provisional antidumping measures in relation to imports of farmed salmon originating in Norway would eliminate the unfair price element in these imports. It can also be expected that they will*

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[138] On 30 June 2010 the safeguard and anti-dumping investigations were initiated (Notice of initiation of a safeguard investigation under Council Regulations (EC) No 260/2009 and (EC) No 625/2009 concerning imports of wireless wide area networking (WWAN) modems, [2010] OJ C171/6 and Notice of initiation of an anti-dumping proceeding concerning imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China, [2010] OJ C171/9). On 16 Sept. 2010 the anti-subsidy investigation was initiated (Notice of initiation of an anti-subsidy proceeding concerning imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China, [2010] OJ C249/7).

[139] Commission Regulation (EC) No 560/2002 of 27 Mar. 2002 imposing provisional safeguard measures against imports of certain steel products, [2002] OJ L85/1, at recital 69.

[140] Commission Regulation (EC) No 1694/2002 of 27 Sept. 2002 imposing definitive safeguard measures against imports of certain steel products, [2002] OJ L261/1, at recital 702.

[141] Council Regulation (EC) No 778/2003 of 6 May 2003 amending Commission Decision No 283/2000/ECSC and Council Regulations (EC) No 584/96, (EC) No 763/2000 and (EC) No 1514/2002 with regard to the anti-dumping measures applicable to certain hot-rolled coils and to certain tube and pipe fittings, of iron or steel, [2003] OJ L114/1, at recitals 9 and 10.

slow down the quantitative import increase originating in Norway, the largest source of imports into the Community. Therefore, in the particular circumstances of this case, it is considered that anti-dumping measures are sufficient to address the injury, which the community industry is suffering, and it is no longer necessary to maintain the safeguard measures.[142]

Accordingly, there was no parallel application of anti-dumping and safeguard measures because as soon as the anti-dumping measures were imposed, the safeguard measure was revoked.

Farmed Salmon, however, was unusual in that there had been a gap between the duration of the provisional safeguard measures and the final safeguard measures. The provisional safeguard measure entered into force on 15 August 2004 and was scheduled to last until 6 February 2005. Denmark, however, referred the Commission's decision to the Council and since the Council did not take a decision within three months of the referral, the provisional safeguard measure was revoked on 6 December 2004. The initiation of the anti-dumping investigation (which was requested on 8 September 2004, i.e. after the provisional safeguard measure was referred to the Council), may have been the result of the referral to the Council. Indeed, the referral to the Council was an indication that there was opposition to the imposition of safeguard measures and the EU industry might therefore have decided to seek protection in the form of anti-dumping measures.

In the currently ongoing *Steel Products* investigation, many anti-dumping and anti-subsidy measures were and are in place at the time that the safeguard investigation was initiated. Fifteen out of twenty-six product categories are already subject to anti-dumping or anti-subsidy measures with respect to one or more WTO members. Similar double- and triple-counting may therefore arise once again.

Nowadays, the legal framework addressing the avoidance of double- and triple-counting is Regulation (EU) 2015/477 of the European Parliament and of the Council of 11 March 2015 on measures that the Union may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures. This Regulation created a new comprehensive framework to deal with double and triple remedies.[143] Regulation 2015/477 tries to avoid double and triple remedies in Article 1 providing that:

{w}here the Commission considers that a combination of anti-dumping or anti-subsidy measures with safeguard tariff measures on the same imports could lead to effects greater than is desirable in terms of the Union's trade defence policy, it may adopt such of the following measures as it deems appropriate, in accordance with the examination procedure referred to in Article 3(2): (a) measures to amend, suspend or repeal existing anti-dumping and/or anti-subsidy measures; (b) measures to exempt imports in whole or in part from anti-dumping or countervailing duties which would otherwise be payable; (c) any other special measures considered appropriate in the circumstances.

9 General system of preferences and safeguards

The GSP allows developing countries to pay fewer or no duties on exports to the EU, giving them access to the EU market and contributing to their growth. This GSP is provided for by Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008.[144] Products originating from some beneficiary countries are thus subject to no or lower duties.

However, Chapter VI of Regulation (EU) No 978/2012 provides for safeguards and surveillance provisions for products originating in beneficiary countries. Article 22 (1) of the Regulation states that normal Customs Tariff duties may be reintroduced on products originating in beneficiary countries when they are 'imported in volumes and/or at prices which cause, or threaten to cause, serious difficulties to Union producers of like or directly competing products'. The threshold of injury is lower than in the basic SG Regulation, which requires '*serious injury*'. Here, only '*serious difficulties*' are necessary to trigger safeguard measures. Article 23 of Regulation (EU) No 978/2012 states that:

{s}erious difficulties shall be considered to exist where Union producers suffer deterioration in their economic and/or financial situation. In examining whether such deterioration exists, the Commission shall take account, inter alia, of the following factors concerning Union producers, where such information is available: (a) market share; (b) production; (c) stocks; (d) production capacity; (e) bankruptcies; (f) profitability; (g) capacity utilisation; (h) employment; (i) imports; (j) prices.

Moreover, the definition of the product at issue is more restrictive than in the basic SG Regulation since Article 22(3) of Regulation (EU) No 978/2012 states that *'{f}or the purpose of this Chapter, "like product" means a product which is identical, i.e. alike in all respects, to the product under*

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[142] Commission Regulation (EC) No 627/2005 of 22 Apr. 2005 revoking Regulation (EC) No 206/2005 imposing definitive safeguard measures against imports of farmed salmon, [2005] OJ L104/4, at recital 4.

[143] Regulation (EU) 2015/477 of the European Parliament and of the Council of 11 Mar. 2015 on measures that the Union may take in relation to the combined effect of anti-dumping or anti-subsidy measures with safeguard measures, [2015] OJ L83/11.

[144] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 Oct. 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008, [2012] OJ L303/1.

consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'. As to procedure, it is quite similar to the basic SG Regulation. Article 24(2) of Regulation (EU) No 978/2012 states that an investigation can be initiated either by a Member State, by any legal person acting on behalf of Union producers, or by the Commission itself.

To date, *Indica Rice* is the only case which was initiated on the basis of this Regulation. Indeed, Cambodia and Myanmar have benefitted from an exemption from customs duties on Indica rice. However, following a request from Italy and an allegation of serious difficulties for Union producers, the Commission has started an investigation into imports of Indica rice originating in Cambodia and Myanmar.[145]

10 Conclusions

The EU's experience with safeguard investigations has been limited. Out of the six investigations that were concluded, only three investigations resulted in the imposition of safeguard measures and of these three measures only one of the measures lasted as long as initially foreseen at the time of imposition of the measures. Two investigations are currently ongoing.

This reluctance to impose safeguard measures may result from the fact that under the WTO rules, the EU must offer compensation to the main WTO suppliers affected by the protective measures. Furthermore, the imposition of safeguard measures is normally directed against imports from all sources rather than one specific country and therefore enlarges the pool of countries that may refer the matter to the WTO Dispute Settlement Body and therefore operates as a deterrent to impose such measures.

Another factor that may explain the relative scarcity of safeguard investigations in the EU is that the safeguard instrument is not as attractive as the anti-dumping and the anti-subsidy instrument for Union producers. Contrary to anti-dumping and anti-subsidy measures, safeguards target fair trade and therefore amount to an admission by domestic industries that they cannot compete with fairly traded imports.

Moreover, TRQs, the EU's preferred form of safeguard measures, do not directly affect the prices charged for imported products, which may continue to hurt the Union industry.

Finally, in a globalized trade environment, the fact that safeguard measures are imposed against imports from all sources may lead related companies of EU producers to also become subject to safeguard measures.

As a result, the anti-dumping and the anti-subsidy instruments are normally more attractive to EU producers since these instruments target perceived 'unfair' trade and can be initiated against a limited number of countries. This is also reflected in the fact that most initiations of safeguard proceedings were replaced and/or complemented by anti-dumping and/or anti-subsidy investigations either shortly after or even at the same time, such as in the *WWAN Modems* case. Moreover, contrary to safeguard measures which punish companies across the board,[146] the anti-dumping instrument and the anti-subsidy instrument typically differentiate between the situation of the exporting *companies* that might engage in unfair trading practices.

In summary, the EU, like other developed country WTO members, thus far has used safeguard measures only occasionally. Where they have been used, they have been applied in a relatively liberal manner. That having been said, the reality remains that safeguard measures, including those of the EU, are very blunt that punish the guilty and the innocent alike. Furthermore, the application of safeguard measures by the EU tends to have a snowball effect, as happened in 2002 and is now starting to happen again. It is therefore to be hoped that the EU will continue to apply safeguard measures only exceptionally and, when it does so, in a liberal manner. The two – at the moment of writing – ongoing safeguard investigations will provide an indication of the EU's future trade policy in this regard.

Notes

[145] Notice of initiation of a safeguard investigation concerning imports of Indica rice originating in Cambodia and Myanmar, [2018] OJ C100/30.

[146] *See* Vermulst, Pernaute & Lucenti, *Recent EC Safeguards Policy: Kill Them All and Let God Sort Them Out?*, 38(6) J. World Trade 955–984 (2004).

Annex 1 Safeguard Measures

No	*Product*	*Country*	*Date of Initiation*	*Provisional Measures*	*Definitive Measures*	*Termination*	*Measures*	*Comments*
1	Steel products	*Erga omnes*	28 March 2002 (OJ C77/39); twenty-one products	28 March 2002 (OJ L85/1); fifteen products	28 September 2002 (OJ L261/1); seven products	28 September 2002 (OJ L261/124) for eleven products; 28 January 2003 (OJ L23/9 for three products that were still under investigation when the definitive measures were imposed); and 6 December 2003 (OJ L321/11) for all remaining products	Tariff rate quota with additional duty for imports outside quota	Parallel anti-dumping and anti-subsidy measures in force
2	Citrus Fruits	*Erga omnes*	11 July 2003 (OJ C162/2)	8 November 2003 (OJ L290/3)	8 April 2004 (OJ L104/67)	8 November 2007 (expiry)	Tariff rate quota with additional duty of 101 EUR per tonne for imports outside quota	Midterm review concluded in December 2005 that kept the pace of liberalization.
3	Citrus Fruits	China	11 July 2003 (OJ C162/2)	8 November 2003 (OJ L290/3		10 December 2003 (OJ L323/11)		Followed by anti-dumping proceeding against imports from China
4	Salmon	*Erga omnes*	6 March 2004 (OJ C58/7)	14 August 2004 (OJ L267/3)	5 February 2005 (OJ L33/8)	23 April 2005 (OJ L104/4)	Tariff rate quota with additional duty of 366 and 508 EUR per WFE for imports outside quota. MIP for imports within and outside the quota	Followed by anti-dumping proceeding against Norway
5	Textile products	*China*	29 April 2005 (OJ C104/21)			9 July 2005 (OJ C170/9)		In June 2005, the EU and China agreed to quantitative limits, on six products subject to the investigation.
6	Strawberries (frozen)	*Erga omnes*	6 July 2005 (OJ C165/2)			4 April 2006 (OJ C80/7)		Followed by anti-dumping investigation against China
7	WWAN modems	*Erga omnes*	30 June 2010 (OJ C171/6)			26 January 2011 (OJ C24/19)		Parallel anti-dumping and anti-subsidy investigations against China (also terminated)
8	Indica Rice	*Cambodia and Myanmar*	16 March 2018 (OJ C100/30)	Ongoing at time of writing. To be concluded within twelve months of the date of publication of the Notice of Initiation				Initiated pursuant to Article 24 of the GSP Regulation
9	Steel products	*Erga omnes*	26 March 2018 (OJ C111/29)	Ongoing at time of writing				

Annex 2 Surveillance Measures

No	*Product*	*Country*	*Surveillance Measures*	*Termination*
1	Steel Products	*Erga omnes*	18 December 1995 (OJ L305/23)	31 December 2000 (after multiple extensions)
2	Steel Products	*Erga omnes*	18 January 2002 (OJ L16/3)	31 December 2012
3	Footwear	China	27 January 2005 (OJ L24/8)	31 January 2006 (expiry of prior surveillance)
4	Iron and Steel Products	*Erga omnes*	28 April 2016 (OJ L115/37)	
5	Aluminium Products	*Erga omnes*	25 April 2018 (OJ L106/7)	