

A nutshell guide to safeguard action

Gustav Brink

BCom LLB LLD

Extraordinary Lecturer in Mercantile Law, University of Pretoria

OPSOMMING

'n Neutedopgids tot beveiligingsoptrede

Beveiligingsoptrede stel 'n anomalie in wêreldhandel daar, aangesien dit lynreg indruis teen verskeie van die geyskte beginsels in internasionale handelsreg, insluitend die beginsels van mees begunstigde nasie, die tariefkonsessies deur 'n land onderneem en die beperking op die gebruik van volumebeheermaatreëls. Beveiligingsmaatreëls verskil in 'n belangrike opsig van anti-dumping- en kontraregmaatreëls aangesien eersgenoemde gemik is teen billike internasionale handel en laasgenoemde twee teen onbillike internasionale handel. As gevolg van hierdie onderskeid word "ernstige skade" aan die plaaslike bedryf wat die vergelykbare of direk mededingende produk vervaardig vereis, eerder as die minder streng "wesenslike skade"-toets wat in anti-dumping- en kontraregoptrede vereis word. Die Wêreldhandelsorganisasie se Ooreenkoms op Beveiligingsmaatreëls vereis ook breedvoerige en gepubliseerde wetgewing, regulasies of beleid aangaande die prosedures wat gevolg staan te word alvorens dusdanige ondersoeke uitgevoer mag word. Suid-Afrika het eers in 2004 regulasies in dié verband gepromulgeer en kon dus nie voor 2004 sulke ondersoeke onderneem nie.

Hierdie artikel ondersoek die prosedures wat gevolg staan te word en die substantiewe vereistes wat gestel word in beveiligingsmaatreëlondersoeke en dui aan dat die Internasionale Handelskommissie se huidige prosedure, soos uiteengesit in die enigste beveiligingsondersoek tot op hede, tekort skiet gemeet aan die regulasies en aan administratiewe geregtigheid.

Selfs nog minder is in Suid-Afrika oor die onderwerp geskryf as oor anti-dumping- en kontraregoptrede en die veld lê tans braak.

1 INTRODUCTION

Safeguards pose an anomaly to several of the general principles of international trade law under the General Agreement on Tariffs and Trade (GATT) and as administered by the World Trade Organisation (WTO). In terms of Article I of GATT 1994, the WTO Members undertake to extend "most favoured nation" status to all other WTO Members, while Members undertake to make specified tariff concessions in terms of Article II thereof. Article XI requires the general elimination of quantitative restrictions. Safeguard measures, however, can negate all of these requirements, as will be shown in paragraphs 3 and 4 of this article.

Safeguard measures differ in one important aspect from the other two trade remedies available to WTO Members, that is, anti-dumping and countervailing measures, in that whereas those remedies are aimed against *unfair* injurious international trade, safeguards are aimed at protecting the domestic industry against injury caused by *fair* trade.¹ Accordingly, the rules governing safeguard

¹ WTO *Argentina – safeguard measures on imports of footwear* WT/DS121/ABR (adopted 12 January 2000) para 94.

action are more restrictive than those governing the other remedies.² The purpose of safeguard measures is to provide the domestic industry an opportunity to adjust to international competition, hence the requirement in the Safeguard Regulations (SGR) that the domestic industry must submit an adjustment plan.³

This article briefly sets out the key substantive and procedural issues pertaining to safeguard action to provide an introduction to the topic as very little has been written on the topic in South Africa⁴ and as only one safeguard investigation has been conducted in South Africa to date.⁵

2 LEGISLATION AND INSTITUTIONS

2.1 Legal framework

In South Africa safeguard investigations are governed by the International Trade Administration Act⁶ (ITA Act) and the Safeguard Regulations,⁷ while cognisance

2 This provides the rationale for the inclusion of the preamble to the Safeguard Regulations (SGR), which provides as follows:

- “(a) A safeguard measure may only be imposed in response to a rapid and significant increase in imports of a product as a result of an unforeseen development, where such increased imports cause or threaten to cause serious injury to the Southern African Customs Union industry producing the like or directly competitive product;
- (b) A safeguard measure may be applied as a customs duty and/or a quantitative import restriction;
- (c) If a quantitative import restriction is used, it should not normally reduce imports below a level lower than the average during the preceding three years;
- (d) Safeguard measures shall be applied to imports from all countries even if the imports, which cause serious harm, originate mainly or only from one country;
- (e) A safeguard measure must be progressively liberalized at regular intervals throughout its period of validity;
- (f) A safeguard measure can only be in place for a period not exceeding 4 years, but the application thereof may be extended by up to 6 years under certain conditions, including that there must be a further liberalization of the measure;
- (g) Any safeguard measure imposed for a period exceeding 3 years must be reviewed at its halfway term.
- (h) A safeguard measure may not be re-imposed for a certain period after a safeguard measure had been in place on the same product;
- (i) If SACU introduces a safeguard measure it may be forced to compensate its trading partners affected by such measure;
- (j) The investigation of the merits of a safeguard measure and the implementation of a safeguard measure are subject to prescribed notifications and consultations between SACU, its trading partners and the World Trade Organisation.”

3 SGR 21.2.

4 The only South African publications to date are De Lange *Business guide to trade remedies in South Africa and the Southern African Customs Union: Anti-dumping, countervailing and safeguard legislation, practices and procedures* (2003); Brink “Safeguarding South Africa’s clothing, textiles and footwear industries” Tralac Trade Brief 2/2006; Brink “Agricultural safeguards” Tralac Trade Brief 3/2006; Brink “Safeguards in South Africa: What lessons from the first investigation?” Tralac Working Paper 7/2007 (the latter three articles are all available at www.tralac.org).

5 See *Commission report 237: Investigation into remedial action in the form of safeguards against the increased imports of lysine: preliminary determination* (11 May 2007).

6 71 of 2002.

7 The SGR were initially promulgated through N1808 in GG 26715 on 27 August 2004. The SGR were amended through N662 in GG 27762 of 8 July 2005 to make provision for agri-

has to be taken of Article XIX of GATT 1994 and of the WTO Agreement on Safeguards.⁸ In terms of the Agreement on Safeguards no safeguard action may be undertaken until such time as the relevant laws, regulations and procedures have been “established and made public in consonance with Article X of GATT 1994”.⁹ Since South Africa only promulgated its regulations in August 2004, no safeguard investigations could be (or were) undertaken prior to this date.

The object of the ITA Act is “to foster economic growth and development in order to raise incomes and promote investment and employment in the Republic”.¹⁰ Any application of safeguard measures should therefore be in line with this stated purpose. This is especially important as public interest plays a crucial role in safeguard investigations.¹¹ The ITA Act defines a safeguard measure as “a remedy or procedure for use in response to disruptive competition”,¹² provides that the International Trade Administration Commission (the Commission) “must investigate and evaluate . . . applications in terms of section 26 with regard to safeguard measures”¹³ and that “[a]ny person may, in the prescribed form, apply to the Commission for . . . (c)(iii) safeguard duties; or (d) the imposition of a safeguard measure other than a customs duty amendment”.¹⁴ All other provisions relating to safeguards are contained in the SGR.

2.2 Institutions

A number of institutions play an important role in safeguard investigations. By far the most important of these is the Commission, which is the independent authority responsible for all investigative aspects of the process, as will be shown in greater detail in paragraph 4. If the Commission makes a preliminary determination that the increased imports are causing serious injury, it may request the Commissioner for the South African Revenue Service (SARS) to impose a provisional payment in the amount and for the period requested by the Commission.¹⁵

In terms of the ITA Act all final recommendations should be made to the Southern African Customs Union (SACU) Tariff Board, which, in turn, will

cultural safeguards, but no other amendments were effected. All references in this article are to the amended regulations. Note that although s 60 of the ITA Act provides for the issue of non-binding guidelines to date the Commission has not issued any such guidelines pertaining to safeguard investigations.

8 In *Degussa v International Trade Administration Commission* unrep case 22264/2007 (T) 11 12 14–15 the Commission confirmed that its investigations are conducted in accordance with the requirements of the WTO Agreement on Safeguards. Seriti J found (26) that “the Safeguard Agreement . . . is binding on South Africa as South Africa is a member of the World Trade Organisation”, thereby confirming the applicability of not only the Agreement on Safeguards, but also of Article XIX of GATT 1994.

9 A 3.1 of the Agreement on Safeguards.

10 S 2.

11 SGR 20.1(f) and 20.2. See also para 3 9 below.

12 S 1(2).

13 S 16(1)(b). Note that s 16(1)(d) also empowers the Commission to investigate safeguard matters that the Minister of Trade and Industry refers to it or that it considers on its own initiative.

14 S 26(1).

15 S 57A(1) of the Customs Act 91 of 1964. See, however, the qualification on the imposition of provisional payments in s 30(5)(a) of the ITA Act and as discussed in para 4 2 below and the maximum duration of 200 days as provided for in SGR 17.2.

make a recommendation to the SACU Council of Ministers.¹⁶ At the time of writing no appointments had been made to the SACU Tariff Board and the SACU Council of Ministers has requested the Commission to continue taking all trade remedy decisions on behalf of all SACU Members.¹⁷

In practice, however, once the Commission has made an affirmative final determination, it will recommend to the Minister of Trade and Industry that a definitive safeguard measure be imposed. The Minister of Trade and Industry will request the Minister of Finance to impose the applicable safeguard duty.¹⁸ However, if the recommendation is that a safeguard measure other than a duty, for example, a quota, be imposed this will have to be administered by the Commission itself.¹⁹ Likewise, if the Minister accepts a recommendation to terminate an investigation the Commission will have to publish the termination notice in the *Gazette*.

3 SUBSTANTIVE ELEMENTS

3.1 Introduction

The WTO Appellate Body has found that Article XIX of GATT 1994 and the Agreement on Safeguards apply equally to safeguard investigations and that authorities may not rely exclusively on the provisions of the latter.²⁰ Accordingly, in determining the substantive elements of a safeguard investigation, the requirements of both these documents need to be considered in conjunction with the requirements of the SGR.²¹

Safeguard action may only be undertaken “[i]f, as a result of unforeseen circumstances and the effect of obligations incurred by a contracting party under this Agreement . . . any product is being imported . . . in such increased quantities and under such conditions as to cause or threaten to cause serious injury to

16 S 30(2)(b) and 30(3) of the ITA Act.

17 It is submitted that this delegation and the actual procedure followed are both *ultra vires*. The Council of Ministers’ decision-making powers is not the type of power that can be delegated to a national body such as the Commission. In addition, even if it were accepted that such powers could be delegated, the *delegatus delegare non potest* rule would clearly indicate that in such instances the Commission, and not the Minister, would have to make the final determination.

18 Ss 55(2) and 56(1) of the Customs Act.

19 In practice this will be enforced by the Commission’s Directorate for Import and Export Control.

20 See *Footwear* (fn 1) para 81, where the Appellate Body held that “[t]he GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the *WTO Agreement*, and, as such, are both ‘integral parts’ of the same treaty, the *WTO Agreement*, that are ‘binding on all Members’. Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time. They apply equally and are equally binding on all WTO Members.” (Emphasis in original, footnote omitted.) See also *WTO Korea – Definitive safeguard measure on imports of certain dairy products* WT/DS98/AB/R (adopted 12 January 2000) para 75; *WTO United States – safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia* WT/DS177/AB/R; WT/DA178/AB/R (1 May 2001) para 69.

21 Note that the ITA Act contains no substantive elements on safeguards.

domestic producers . . . of the like or directly competitive products” in the importing country.²²

This indicates that a number of conditions must be met before safeguard measures may be applied. First, there has to be unforeseen circumstances. Second, the effect of the obligations incurred by a WTO Member must be taken into consideration. Third, there must be a domestic industry producing the like or directly competitive product, that is, it must be determined who constitutes the industry. Fourth, Article XIX.1(a) requires that the product must be imported “in such increased quantities and under such conditions as to cause or threaten serious injury”.²³ This requirement is higher than the requirement of “material injury” which is applied in anti-dumping and countervailing investigations. Fifth, it must be shown that the injury is caused or threatened in respect of the like or directly competitive product. Last, the serious injury or threat thereof must be caused by the significantly increased imports.

The following paragraphs consider each of these issues.

3.2 Unforeseen developments

To date South Africa has conducted only one safeguard investigation.²⁴ It is submitted that a safeguard was used when the correct remedy would have been an anti-dumping investigation against China, as imports from China increased significantly faster than imports from other countries and at prices that appear to have constituted dumping.²⁵

An “unforeseen development” is defined as an event or chain of events that was unforeseen at the time the WTO Member negotiated its concessions.²⁶ In the case of South Africa, this means that the development must have been unforeseen in 1994, that is, when South Africa negotiated its other concessions in the Uruguay Round of negotiations.²⁷ The Appellate Body has found that “unforeseen” and “unexpected” should be regarded as synonymous.²⁸ In the *Lysine* investigation the Commission accepted the applicant’s allegation that the expansion of capacity and oversupply in the world, most of which took place in China after 1994, was unforeseen in the context required by Article XIX of GATT 1994.²⁹

22 A XIX.1 of GATT 1994.

23 These words are repeated in a 2.1 of the Agreement on Safeguards. Note that, unlike in anti-dumping and countervailing investigations, no provision is made for the material (or serious) retardation of the establishment of an industry.

24 See *Commission report 237* (fn 5).

25 Note that several participating interested parties in the *Lysine* investigation made submissions in this regard – submissions available on the public file at the Commission.

26 The WTO Appellate Body in *Footwear* (fn 1) para 91 also drew a distinction between “unforeseen” and “unforeseeable”.

27 See *Commission report 237* (fn 5) 7. The GATT Panel held in para 9 of its *Report of the intersessional working party on the complaint of Czechoslovakia concerning the withdrawal by the United States of a tariff concession under the terms of Article XIX*, (“Hatters’ Fur”), GATT/CP/106 (adopted 22 October 1951) that unforeseen developments “should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated”.

28 *Footwear* (fn 1) para 91.

29 *Commission report 237* (fn 5) 8.

3.3 Obligations incurred

In the *Lysine* investigation it was argued on behalf of one exporter that a safeguard measure could only be imposed to the extent of the concession that existed prior to the last concession made, that is, a safeguard measure in the form of a duty could only be imposed to the level of the bound rate of duty under the Tokyo Round of multilateral trade negotiations.³⁰ The WTO Appellate Body, however, held in *Footwear* that “we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions”.³¹

It therefore appears that this requirement could only have an impact in cases where a developing or least developed country has not incurred any concessions as regards the product under consideration, that is, where there is no bound rate on the product. In such instances the importing country will be free to increase the applicable duty to the rate required to prevent serious injury without having recourse to a safeguard measure and all its intricacies.

3.4 Domestic industry

There must be a domestic industry producing the like or directly competitive product. The Agreement on Safeguards contains no guidelines as to how industry standing should be determined and only provides that “a ‘domestic industry’ shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products”.³² The SGR, however, defines industry on the same basis as for anti-dumping and countervailing investigations, that is, at least 25% of the producers by production volume must support an application and at least 50% of those producers voicing an opinion on the application must support it. This provides some form

30 Documents available on the public file of the *Lysine* safeguard investigation.

31 WTO *Footwear* (fn 1) para 91.

32 A 4.1(c) of the Agreement on Safeguards. This was further elaborated on in the *Lamb* case, where the Appellate Body held that “[t]he term ‘domestic industry’ is defined as meaning, at least, the producers of ‘a major proportion of the total domestic production’ of the products at issue. In our view, the requirement for competent authorities to evaluate the ‘bearing’ that the relevant factors have on the ‘domestic industry’ and, subsequently, to make a determination concerning the overall ‘situation of that industry’, means that competent authorities must have a *sufficient* factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the ‘domestic industry’. The need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the ‘domestic industry’. Indeed, a determination made on the basis of insufficient data would not be a determination about the state of the ‘domestic industry’, as defined in the Agreement, but would, in reality, be a determination pertaining to producers of something less than ‘a major proportion of the total domestic production’ of the products at issue . . . We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to *all* those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the ‘domestic industry’. What is sufficient in any given case will depend on the particularities of the ‘domestic industry’ at issue”: WTO *Lamb* (fn 20) paras 131–132.

of certainty in the market as opposed to the vague definition of “a major proportion” of the industry.

3 5 Increased imports

Article XIX.1(a) of GATT 1994 provides that a product must be imported “in such increased quantities and under such conditions” as to cause serious injury to the domestic industry, while the Agreement on Safeguards provides that a safeguard measure may only be imposed if the product “is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products”.³³

The WTO Appellate Body found that “this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been *recent enough, sudden enough, sharp enough, and significant enough*, both quantitatively and qualitatively, to cause or threaten to cause ‘serious injury’”.³⁴ For this purpose an end point-to-end point analysis is insufficient, that is, an authority must not only show that imports had increased over the period of the review, but that there had been a sharp increase in imports over the most recent period for which data are available.³⁵

3 6 Like product

A “like product” is defined as a product identical to the imported product or, in the absence of such a product, another product that has characteristics closely resembling those of the product under investigation.³⁶ In anti-dumping investigations the Commission has developed criteria to determine whether products are “like”.³⁷ A “directly competitive product”, however, has a significantly wider ambit than a “like product”. In determining whether products are “directly competitive” a wider analysis should therefore be used, although the scope thereof

33 A 2.1 of the Agreement on Safeguards.

34 WTO *Footwear* (fn 1) para 131 (emphasis added).

35 *Idem*. See also WTO *US – definitive safeguard measure on imports of wheat gluten from the European Communities* WT/DS166/AB/R (adopted 19 January 2001) para 8.31–8.33. Note, however, that the WTO Panel in *WTO Argentina – definitive safeguard measure on imports of preserved peaches* WT/DS238/R (adopted 15 April 2003) para 7.37–7.69 took an opposing view when it held that although imports had increased significantly between 1998 and 2000, the volume of imports in 2000 was still lower than in 1996 and that cognisance should have been taken of the development of imports over the full period and not on the basis of a base year that was not properly motivated.

36 SGR 2. See also the definition of “like product” in the Anti-Dumping Regulations and in the Countervailing Regulations. Note that neither “like product” nor “directly competitive product” is defined in either Article XIX of GATT 1994 or in the Agreement on Safeguards.

37 See reg 1 of the Anti-Dumping Regulations. These criteria were first developed in the *Unmodified starch* investigation, where the Board on Tariffs and Trade, predecessor to the Commission, had to determine whether different types of starch could be regarded as like products for the purposes of an anti-dumping investigation. See *Board Report 3486: Investigation into alleged dumping of unmodified starches, exported from or originating in Belgium, Denmark, France, Germany, the Netherlands, Portugal, Switzerland and Thailand (04/07/1994)*. Note that these criteria have not been included in the definition of “like product” in either the Countervailing Regulations or the SGR.

has yet to be properly formulated or tested.³⁸ Thus, it is quite possible that butter and margarine, although not like products for purposes of anti-dumping investigations as they are manufactured from different raw materials, follow different production processes, have different physical characteristics and are classified under different tariff subheadings, could be held to be directly competitive products in safeguard investigations as more emphasis would be placed on the fungability of the products.³⁹

3.7 Serious injury

In line with the definition contained in the Agreement on Safeguards⁴⁰ “serious injury” is defined in the SGR as the “significant overall impairment” of the domestic industry producing the like or directly competitive product.⁴¹ In determining the presence of serious injury the Commission is required to evaluate data regarding a number of injury factors, including the rate and volume of the increase in imports and the domestic industry’s sales volumes, profit and loss, output, market share, productivity, capacity utilisation, employment and any other relevant factors placed before the Commission.⁴² Although not a requirement in terms of the SGR, the Commission also requires the submission of price information in its questionnaire.⁴³ The serious injury requirement as set out in the SGR differs to a certain degree from that required by the Agreement on Safeguards insofar as the latter requires an investigating authority to “evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms . . .”⁴⁴ and the other listed factors. The WTO Appellate Body has held on several occasions that all injury factors listed in the Agreement on Safeguards must be evaluated in each investigation along with all other relevant factors,⁴⁵ including those for which the investigating authority has received insufficient evidence.⁴⁶ Accordingly, there is a

38 The closest approximation to having this tested came about in WTO *Japan – taxes on alcoholic beverages* WT/DS8/R; WT/DS10/R; WT/DS11/R (adopted 1 November 1996), where the WTO panel para 6.22 specifically indicated in a challenge relating to national treatment under a 3 of GATT 1994 that while all like products are necessarily directly competitive products, the opposite is not necessarily true.

39 In *Alcoholic beverages* (fn 38) para 6.22 the WTO Panel indicated that the “appropriate test to define whether two products are ‘like’ or ‘directly competitive’ is the marketplace”.

40 A 4.1 of the Agreement on Safeguards.

41 SGR 8.1.

42 SGR 8.3.

43 See question E4 in the *Safeguard investigations: application questionnaire* (www.itac.org.za accessed 13 Sept 2007).

44 A 4.2(b) of the Agreement on Safeguards.

45 *Footwear* (fn 1) para 136; *Wheat gluten* (fn 35) para 49–56; *Preserved peaches* (fn 35) para 7.96 and 7.133(a).

46 In *Wheat gluten* (fn 35) paras 55–56 the Appellate Body held that “[t]he focus of the investigative steps mentioned in Article 3.1 is on ‘interested parties’, who must be notified of the investigation, and who must be given an opportunity to submit ‘evidence’, as well as their ‘views’, to the competent authorities. The interested parties are also to be given an opportunity to ‘respond to the presentations of other parties’. The Agreement on Safeguards, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.

However, in our view, that does *not* mean that the competent authorities may limit their evaluation of ‘all relevant factors’, under Article 4.2(a) of the Agreement on Safeguards, to the factors which the interested parties have raised as relevant. The competent authorities

duty on the Commission to investigate *all relevant factors* that have a bearing on the state of the industry and not only those listed in the SGR and such other factors on which interested parties have submitted information.

3 8 Link between increased imports and injury

Before a safeguard measure may be imposed the Commission must show that the serious injury experienced by the industry is caused⁴⁷ by the surge of imports. The WTO Appellate Body has found that that in the determination of causal link “it is the *relationship* between the *movements* in imports (volume and market share) and the *movements* in injury factors that must be central to a causation analysis and determination”.⁴⁸

As regards causation the WTO Panel in *Wheat gluten* held that

“Article 4.2(b) SA contains an explicit textual link to Article 4.2(a) SA. It stipulates that ‘[t]he determination made in subparagraph (a) *shall not be made unless*’ the investigation demonstrates the existence of the causal link between increased imports and serious injury. Article 4.2(a) and (b) require a Member: (i) to demonstrate the existence of the causal link between increased imports and *serious* injury; and (ii) not to attribute injury being caused by other factors to the domestic industry at the same time to increased imports. We consider that, read together, these two propositions require that a Member demonstrate that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause *serious* injury. This is not to say that the imports must be the sole causal factor present in a situation of serious injury. There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of ‘serious’ as defined in the Agreement.”⁴⁹

The Panel continued to add that where several factors, including increased imports, are “sufficient *collectively* to cause a ‘significant overall impairment of

must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly mentioned in Article 4.2(a) of the Agreement on Safeguards. Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of ‘other factors’. If the competent authorities consider that a particular ‘other factor’ may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an ‘other factor’, they must investigate fully that ‘other factor’, so that they can fulfil their obligations of evaluation under Article 4.2(a). In that respect, we note that the competent authorities’ ‘investigation’ under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply ‘*include*’ these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors” (emphasis in original, own underlining, footnote omitted).

47 See in general *Lamb* (fn 20) para 162–188; *Wheat gluten* (fn 35) para 60–92; WTO *United States – definitive safeguard measures on imports of circular welded carbon quality line pipe from Korea* WT/DS202/AB/R (adopted 8 March 2002) para 200–222.

48 *Footwear* (fn 1) para 144, quoting with approval from para 8.237 of the Panel Report (emphasis in original).

49 WTO *United States – definitive safeguard measures on imports of wheat gluten from the European Communities* WT/DS166/R (adopted 19 January 2001) para 8.138 (emphasis in original).

the position of the domestic industry', but increased imports alone are not causing injury" no safeguard measure may be imposed.⁵⁰

The Appellate Body took this one step further, adding that the Agreement on Safeguards requires that the injurious effects caused by increased imports must be distinguished from the injurious effects caused by other factors and that the authorities must attribute to increased imports the injury caused thereby and to other relevant factors the injury caused by such other factors. "In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*."⁵¹

In the *Lysine* investigation the importers argued extensively that the domestic producer was to blame for its own woes, as it had exported a significant volume of product (approximately 2 500 tons *vis-à-vis* the approximately 4 500 tons that were imported) at prices significantly lower than the price at which products were being imported into the market and that these sales, which the industry itself acknowledged to be made at a loss, could have been made on the domestic market at significantly higher prices. It was estimated that this could have added several million rand to the industry's bottom-line. In addition, the industry had lost well over half of its export volumes during the investigation period and exports had previously contributed a major proportion of its total sales. The importers accordingly requested that the Commission determine the impact of the decreased exports on overheads per unit in its determination of production costs and not attribute the increased unit production costs to increased imports. Last, it was submitted that the industry had entered into a joint venture in Denmark and had suffered significant losses which could not be attributed to the increased imports. In its essential facts letter the Commission only referred to the first of these issues and appears not to have considered either of the other two points. It appears therefore that the Commission has failed to apply the standard set by the WTO Appellate Body, which may leave its final decision open for judicial review.⁵²

3.9 Public interest

Since safeguard measures are aimed against fair international trade, in addition to all the other requirements listed above, it must be shown that the imposition of a safeguard measure would be in the public interest.⁵³ In this regard the SGR provide that the Commission in its final determination must consider whether "the imposition of a safeguard measure would be in the public interest".⁵⁴ It should be noted that this is a *positive* standard, that is, it must be shown that it would be *in* the public interest rather than that it *would not be against* the public interest to impose a safeguard measure.⁵⁵

⁵⁰ *Ibid* para 8.139 (emphasis in original).

⁵¹ *Wheat gluten* (fn 35) para 69.

⁵² Note that the Commission's final decision had not been published at the time of writing.

⁵³ A 3.1 of the Agreement on Safeguards provides that the investigating authority must provide interested parties with the opportunity "to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest".

⁵⁴ SGR 20.1(f).

⁵⁵ For an analogous dialogue and the effect of this difference, see WTO *United States – anti-dumping duty on dynamic random access memory semiconductors (DRAMs) of one mega-*
continued on next page

Virtually no guidance is provided as to the establishment of public interest, other than the provisions that “[i]n determining whether a safeguard measure would be in the public interest the need to take note of the trade distorting effect of the surge in imports and the need to restore effective competition shall be given special consideration”.⁵⁶ The Commission, however, disregarded the importers’ submissions that the imposition of the proposed safeguard measure would only create an absolute monopoly that would remove all import competition other than that from China and that the safeguard measure would inevitably result in the ultimate closure of the industry as a result of the surge of imports from specifically China at extremely low prices. The Commission elected to rely on the submission by the Department of Science and Technology that the specific industry played a pivotal role in the biotechnology industry in South Africa.

3 10 Conclusion

Considering the requirements stated in the SGR and/or in the Agreement on Safeguards and the WTO jurisprudence in this regard clearly indicates that there would be scope for a judicial review of the Commission’s final determination if such determination is in line with its essential facts letter, that is, to impose a uniform *ad valorem* safeguard duty against all imports regardless of origin.

4 PROCEDURAL REQUIREMENTS

4 1 Introduction

The ITA Act provides that “[t]he Commission may, before considering an application, give notice of the application in the *Gazette*”.⁵⁷ If it does so, “the Commission must –

- (i) allow interested parties the prescribed time to make written representations concerning the application; and
- (ii) ensure that notice of its decision is subsequently published in the *Gazette*”.⁵⁸

The Commission must notify the Southern African Customs Union (SACU) Secretariat of all safeguard applications⁵⁹ and determine whether another substantially similar matter is serving before the relevant SACU institution⁶⁰ or has been decided upon during the preceding six months.⁶¹ If no such application is

bit or above from Korea WT/DS99/R (adopted 19 March 1999) para 6.42–6.48, where the WTO Panel considered the difference between the WTO requirement of “likelihood” in anti-dumping sunset reviews and the United States’ practice of requiring that it be “not likely” that dumping would recur before it would revoke the anti-dumping duties.

⁵⁶ SGR 20.2.

⁵⁷ S 26(3)(a) of the ITA Act.

⁵⁸ S 26(3)(b) of the ITA Act.

⁵⁹ S 30(1)(a) of the ITA Act. Note that this does not apply to anti-dumping and countervailing applications. Note also that this requirement is suspended i to s 64(2) “until the SACU Agreement has become law in the Republic”. I to a 46 of the SACU Agreement, “[t]his Agreement shall enter into force thirty (30) days after the deposit of the instruments of ratification by all the Member States”. South Africa was the last Member to deposit its instruments of ratification on 15 June 2004, indicating that the SACU Agreement entered into force on 15 July 2004.

⁶⁰ This would include the investigating authority of any of the other SACU member states.

⁶¹ S 30(1)(b) of the ITA Act.

currently before a relevant SACU institution or has been dealt with in the preceding six months, the Commission must further investigate and evaluate the application⁶² and in so doing must “apply any relevant rules of analysis established by the SACU Council [of Ministers] through the formulation of policy mandates, procedures or guidelines contemplated in Article 8(2)” of the SACU Agreement.⁶³ To date no such rules have been established, indicating that the Commission has to rely exclusively on the procedures prescribed by the SGR, Article XIX of GATT 1994 and the Agreement on Safeguards.

4.2 Pre-initiation and merit assessment

An application must be made by or on behalf of the domestic industry in the prescribed form, that is, by completion of the safeguard application questionnaire. The applicant must submit such information as is reasonably available to it to establish a *prima facie* case that “the product under investigation is being imported into the Republic . . . in such increased quantities . . . and under such conditions as to cause or threaten to cause serious injury to the SACU industry that produces like or directly competitive products”.⁶⁴ The application must include a description of the imported and the South African product, industry standing, the basis on which the allegation of increased imports is based, the unforeseen developments that led to the increased imports, the relief sought, the efforts taken or planned to compete with the imports and any other information required by the Commission.⁶⁵

Once the Commission is satisfied that it has received a properly documented application it will determine whether there is *prima facie* evidence of a surge of imports and of serious injury to the domestic industry as a result of such surge in imports. If affirmative, it will initiate a safeguard investigation.

4.3 Preliminary investigation⁶⁶

The investigation is initiated through notice in the *Gazette* and such notice should contain certain minimum prescribed information.⁶⁷ Within seven days after initiation the Commission must “notify the representative of each country of origin and of export that may be significantly affected by a safeguard measure” of the investigation and supply it with a non-confidential version of the application.⁶⁸ It must also inform the WTO Committee on Safeguards “immediately”

62 S 30(3) of the ITA Act.

63 S 30(4) of the ITA Act.

64 SGR 4.1.

65 SGR 11.3. Note that although SGR 11.4 indicates that the application will be returned to the applicant if it does not contain the information indicated in SGR 11.3 unless such deficiencies are rectified within 7 days after a deficiency letter has been sent out, the Commission in the *Lysine* investigation initiated and proceeded with the investigation without the applicant having indicated the relief sought or the efforts taken or planned to compete with imports. Although interested parties indicated that this was a fatal error and that the Commission could not have initiated the investigation, the Commission disregarded the comments and continued with the investigation.

66 Note that this analysis is based on a reading of the SGR, rather than relying on the only safeguard investigation conducted by the Commission to date, and taking cognisance of the High Court’s ruling in *Degussa* against the procedure applied by the Commission in that case.

67 SGR 14.1 and 14.2.

68 SGR 14.4. Note that, unlike in anti-dumping and countervailing investigations, the trade representatives of the countries under investigation are not informed of the receipt of an application prior to initiation.

upon initiation of the investigation.⁶⁹ Unlike in anti-dumping and countervailing investigations there is no requirement on the Commission to directly inform interested parties and these parties have to identify themselves as cooperating interested parties during the course of the investigation.⁷⁰

When the Commission considers a section 26(1)(c) application it may request the Commissioner for the South African Revenue Service (SARS) to impose a provisional payment⁷¹ (duty) on the product for a period not exceeding 200 days.⁷² This provision relates exclusively to section 26(1)(c) applications and does not extend to section 26(1)(d) applications. Accordingly, when an industry requests the imposition of a safeguard other than a customs duty, that is, when it requests the imposition of a quota or a tariff quota, no provisional payment may be imposed.⁷³ It must inform the WTO Committee on Safeguards *prior* to the imposition of a provisional safeguard measure, but the Commission failed to do this in the *Lysine* investigation.⁷⁴

The SGR provide that the Commission must provide all parties with 20 days of initiation,⁷⁵ but may give an extension for the submission of information.⁷⁶ All information submitted within this period should be taken into consideration in the preliminary determination. In the *Lysine* investigation, however, the Commission instructed the Commissioner for SARS to impose a provisional safeguard measure of 160% on the same day the investigation was initiated, thereby failing to give any party the opportunity to submit any information.⁷⁷ This had the effect of immediate barring all imports. On review the Commission argued that it was not required to give interested parties an opportunity to co-operate before it could impose provisional payments and that this was provided for in the Agreement on Safeguards, where the requirements of Articles 2 through 7 and 12 only need to be met after a provisional measure has been put in place.⁷⁸ I have previously indicated that this argument is flawed, as the layout of the SGR follows a specific order; the ITA Act provides that if a notice procedure is followed parties must be given the opportunity to respond; the preliminary report must be made available to “participating interested parties” and that the Commission would not be able so to make the report available to parties if it is not aware of the identity of the participating interested parties, as it makes no legal sense that a preliminary determination is made before an investigation has been initiated.⁷⁹

69 A12.1 of the Agreement on Safeguards.

70 See the definition of “participating interested parties” in SGR 2.

71 S 30(5)(a); SGR 17.1.

72 SGR 17.2.

73 Note that this qualification is unique to South Africa and is not a requirement of the WTO.

74 See *Degussa* 14.

75 SGR 15.1.

76 SGR 15.2.

77 See N445 in *GG* 29899 of 11 May 2007 imposing the provisional measure, whereas the investigation was initiated per N560 in *GG* 29874 of 11 May 2007.

78 See, however, *Brink* (2007) (fn 4) 14–15 and 22–23 where it is indicated that the wording of SGR 17, 18 and 19 makes it clear that a preliminary determination cannot be taken unless interested parties have had the opportunity to identify themselves as participating interested parties and have had the opportunity to make representations. This view was upheld by the court in *Degussa* 28–32.

79 *Brink* idem 22 indicated that “[w]hen the layout [of the SGR] is carefully considered, it becomes apparent that SGR 11 to SGR 21 forms a unit dealing with the flow of investigations.

The Commission's argument was also rejected by Seriti J in *Degussa*⁸⁰ where it was held that the provisions of the Promotion of Administrative Justice Act⁸¹ required administrative fairness, including that interested parties be given an opportunity to make representations especially as "the 'drastic measure' taken by the first respondent have (*sic*) a much more negative impact on the applicants than the negative impact that could have been caused by the giving of notice and an opportunity to make representations . . ."⁸²

It therefore follows that in future safeguard investigations the Commission will have to grant parties the opportunity to identify themselves as participating interested parties and to make representations before it can proceed to a preliminary determination.

4.4 Final investigation

4.4.1 Final investigation

Once the Commission's preliminary report has been published, participating interested parties have 14 days to submit comments on the report.⁸³ Unlike in anti-dumping investigations, no provision is made in the SGR for an essential facts letter to be sent to parties. In the *Lysine* investigation, however, following the Commission's failure to provide parties an opportunity to submit information prior to its preliminary determination, the Commission issued an essential facts letter setting out the facts it anticipated taking into account in its final determination.⁸⁴ The Commission also held a public hearing on public interest. In addition, in terms of the SGR the Commission is obliged to "provide for consultations with the representatives of countries that have a substantial interest in a general safeguard investigation within 14 days after the imposition of a provisional payment"⁸⁵ and, if the Commission anticipates recommending a definitive safeguard

It first deals with the requirements of a properly documented application in SGR 11. Once these requirements have been met, the merit evaluation is considered in SGR 13. Once all these requirements have been met, the SGR move on to initiation and notification in SGR 14. The next step, as provided for by SGR 15, is the responses by interested parties. SGR 16 indicates what happens when parties do not cooperate, before SGR 17 deals with provisional measures. Once provisional measures have been imposed, ITAC must publish a preliminary report as per SGR 18. Thereafter, in SGR 19, parties are provided with the opportunity to comment, before ITAC can make a final determination in terms of SGR 20. Definitive measures may then be imposed in terms of SGR 21" (footnote omitted).

80 *Degussa* 31.

81 3 of 2000.

82 *Degussa* 31.

83 SGR 19.1.

84 While *in casu* the issuing of the essential facts letter is supported, it is submitted that there would be no need for such a letter if the proper procedures were followed and parties had the opportunity to (a) submit information prior to any preliminary determination being made; (b) make oral representations; and (c) participate in the public hearings on public interest.

85 SGR 6.1.I–SGR 6.2 these consultations should be finalised within 30 days after the preliminary report has been made available. Note that the consultations must be provided for within 14 days *after imposition of a provisional payment* whereas the conclusion of consultations is only 30 days after the *report has been issued*. Experience in the single safeguard investigation and in anti-dumping cases to date shows that the preliminary report will normally only be issued several days after the preliminary determination has been published.

measure, it must provide the exporting countries with an additional opportunity for consultations with a view to discuss certain pertinent issues relating to the proposed measure.⁸⁶

4.4.2 Definitive measures

Once it has been determined that serious injury was caused to the domestic industry as a result of the surge of imports, the Commission may recommend a definitive safeguard measure. This measure could take the form of a quota (quantitative restriction), a tariff or a combination thereof, while the tariff could be an *ad valorem*, specific or a formula duty.⁸⁷ If, however, the Commission had imposed a provisional safeguard measure it can only impose a definitive safeguard *duty* and not a quota or a tariff quota.⁸⁸

A safeguard measure may only be imposed to the extent required to mitigate the serious injury experienced by the domestic industry and to facilitate the adjustment of the domestic industry.⁸⁹ Where a quota is recommended, the quota must be determined in line with the provisions of the SGR and the Agreement on Safeguards.⁹⁰ The Commission must notify the Committee on Safeguards before the imposition of any definitive safeguard measure.⁹¹

If a measure is imposed for a period exceeding one year, the measure must be liberalised at regular intervals.⁹²

4.4.3 Compensation to trade partners

Paragraph (i) of the pre-ambule to the SGR provides that “[i]f SACU introduces a safeguard measure it may be forced to compensate its trading partners affected by such measure”; while article 8.1 of the Agreement on Safeguards requires that

86 SGR 6.3 provides as follows: “The Commission shall provide representatives of countries that have a substantial interest in a general safeguard investigation 30 days for consultations prior to the application or extension of a definitive safeguard measure with a view to, *inter alia*,

- (a) reviewing the information relating to
 - (i) evidence of serious injury or threat thereof caused by increased imports;
 - (ii) the precise description of the product involved;
 - (iii) the proposed measure;
 - (iv) the proposed date of introduction;
 - (v) the expected duration of the measure; and
 - (vi) the timetable for progressive liberalization;
- (b) exchanging views on the measure; and
- (c) discussing ways to maintain a substantially equivalent level of concessions and other obligations *vis-à-vis* that country.”

See also SGR 21.4.

87 An *ad valorem* duty refers to a duty applied on the declared value of the imported product, eg 10%; a specific duty refers to a duty expressed as a value, eg R1,50/kg, that does not change along with changes in the declared value; and a formula duty refers to a duty that decreases as the declared value increases and *vice versa*. Thus, if a formula duty of R10,00/kg less 100% is imposed and a product is imported at a price of R6,00/kg, the duty will be the difference between the formula and the declared value, ie R4,00/kg, but no duty would be payable if the declared value exceeded R10,00/kg.

88 See Brink (2007) (fn 4) para 4.2.

89 SGR 21.1.

90 See SGR 21.11 to 21.14.

91 A 12.1(c) of the Agreement on Safeguards.

92 SGR 21.8.

the countries affected by a definitive measure must be compensated “for the adverse effects of the measure on their trade”, provided that a Member’s rights to seek compensation “shall not be exercised for the first three years that a safeguard measure is in effect”.⁹³ In its essential facts letter in the *Lysine* investigation the Commission specifically proposed that the measure be imposed for a period of two years and 11 months only, thus negating the requirement to compensate its trading partners.⁹⁴

5 CONCLUSION

Safeguards are not an easy instrument to use and come with a whole host of requirements, including that compensation must be given to trade partners if a safeguard measure negatively affects the concessions made in favour of such trading partners. The Commission’s procedures in its first, and to date only, safeguard investigation fell significantly short of the requirements not only of the ITA Act, the SGR and the Agreement on Safeguards, but also of the requirements of administrative justice.

It is submitted that close legal scrutiny of this case and any future safeguard investigations may contribute to ensuring a fair process.

⁹³ A 8.3 of the Agreement on Safeguards.

⁹⁴ Note, however, that this issue might still arise. The Commission effectively threatened the exporters that if they insisted on the court’s ruling in the *Degussa* case being implemented, that is, the withdrawal of the provisional safeguard duty, the safeguard measure would be imposed for a full 2 years and 11 months, whereas the measure would be imposed retroactively if the provisional duty remained in place. Leaving aside the fact that this shows total disregard for the court, the Commission’s statement is based on an incorrect interpretation of the Customs Act, which provides that a safeguard measure can only be retroactively imposed if provisional measures are in place. Of more importance, however, is the fact that a 6 of the Agreement on Safeguards provides that “[t]he duration of any such provisional measure *shall be counted* as a part of the initial period” of any safeguard measure, while SGR 17.3 provides that “[t]he period for which provisional measures are in force *shall be regarded as part of the total duration* for which safeguard measures are in force” (emphasis added). No reference is made in either of these two provisions that the provisional payments will not be counted as part of the duration of the definitive measure if the provisional payment has lapsed. Considering the “drastic” impact of the provisional measure, as confirmed in *Degussa*, it is submitted that regardless of whether the provisional payment lapsed or not, the duration of such provisional payments should be counted towards the total duration of the definitive measure. Accordingly, if the provisional payments remain in place for a period of 200 days before being withdrawn, the duration of the definitive measure must be reduced by an equivalent amount.