Unforeseen Developments, GATT Obligations and South Africa's Safeguard Investigations

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Abstract

South Africa is one of the oldest users of trade remedies in the form of anti-dumping and countervailing, but is a newcomer to the use of safeguards. Since increasing its use of safeguards in 2012, the country has become one of the biggest users of safeguards. To date, South Africa has completed nine safeguard investigations, six of which resulted in the imposition of safeguard measures. In conducting safeguard investigations, attention must be given to various aspects. This article considers the requirements that there must have been a surge in imports as a result of unforeseen developments and General Agreement on Tariffs and Trade 1994 (GATT) obligations. While several of the International Trade Administration Commission of South Africa (the Commission) reports set out the current tariff position, few of them indicate what South Africa's GATT obligations are, thus falling short of the requirements to impose measures. The article shows that few, if any, of South Africa's safeguard investigations have evaluated unforeseen developments in line with the requirements of GATT, as interpreted by the World Trade Organization (WTO) Dispute Settlement Body, as many of these alleged developments either did not relate to the subject product or were not, in fact, unforeseen. The article further shows that the Commission has failed, in every investigation, to link the unforeseen developments and GATT obligations to the surge in imports, as often the unforeseen developments occurred years prior to any increased imports. Finally, the article proposes that the Commission amend its method of analysing unforeseen developments and increased efforts be made to establish the link between these developments and GATT obligations and the increased imports.

Keywords: trade remedies; safeguards; international trade; World Trade Organization; General Agreement on Tariffs and Trade; International Trade Administration Commission of South Africa

1. Introduction

From a trade perspective, safeguards are measures that may be taken against a surge of imports that cause injury to the domestic industry producing a like or directly competitive product.[1] It is one of the three trade remedies, while the other two remedies, namely anti-dumping and countervailing measures, are aimed against unfair trade practices, safeguards are aimed against fair international trade.[2] Before a safeguard measure may be imposed, it must be shown that imports increased significantly as a result of unforeseen developments and obligations a country, or Member, has incurred under the General Agreement on Tariffs and Trade 1994 (GATT).[3]

The World Trade Organization (WTO) Appellate Body Report (ABR) on *Argentina – Footwear (EC)*, noted that the remedy provided by Article XIX of the GATT is of an emergency character that may be invoked only where a Member is confronted by developments it had not foreseen when it incurred that obligation.[4]

Although South Africa is one of the oldest and largest users of the anti-dumping and countervailing instruments,[5] it is relatively a latecomer to safeguards. It only initiated its first safeguard investigation in 2006 and its second investigation in 2012. However, since 2012, it

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1 For a general history of safeguards, see F Piérola, *The Challenge of Safeguards in the WTO* (Cambridge UP 2014), 3–82; F Piérola-Castro, *WTO Agreement on Safeguards and Article XIX of GATT: A Detailed Commentary* (Cambridge UP 2022), 375-402; Y-S Lee *Safeguard Measures in World Trade: The Legal Analysis* (3rd edn, Edward Elgar 2014), 3–52; S Rai, *Recognition and Regulation of Safeguard Measures under GATT/WTO* (Routledge 2011), 15–31.

2 In ABR *Argentina – Safeguard Measures on Imports of Footwear* (hereinafter *Argentina – Footwear (EC)*) para 94 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds121_e.htm>, the WTO Appellate Body held that 'it is essential to keep in mind that a safeguard action is a "fair" trade remedy. The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures'. See also ABR Korea – Definitive Safeguard Measure on imports of Certain Dairy Products (hereinafter *Korea – Dairy*) para 87 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds98_e.htm>; and ABR United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (hereinafter *US – Line Pipe*) para 83 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds202_e.htm>.

3 Art XIX:1 1(a) of the GATT; ABR *Argentina – Footwear (EC)* para 84; *Korea – Dairy* para 76–77; PR *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (hereinafter *US – Lamb*) para 7.11 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds177_e.htm>; Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches (hereinafter *Argentina – Preserved Peaches*) para 7.12 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds238_e.htm>; and Ukraine – Definitive Safeguard Measures on Certain Passenger Cars (hereinafter *Ukraine – Passenger Cars*) para 7.52–7.57 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds468_e.htm>.

4 ABR *Argentina – Footwear (EC)* para 93 (emphasis added). See also ABR *Korea – Dairy* para 86.

5 G Brink, *Anti-Dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade* (Content Solutions 2002) 2–3.

is the joint seventh largest initiator of safeguard investigations[6] and the joint sixth largest imposer of safeguard measures in the world.[7]

This article opens by briefly discussing the relevant WTO and South African legal requirements in safeguard investigations.[8] Thereafter, it considers what 'unforeseen developments' and 'GATT obligations' are, followed by a discussion that looks at how imports are determined to have increased as a result of unforeseen developments and GATT obligations. These factors as cause of increased imports are also analysed in the context of South Africa's safeguard investigations.[9] The article ends with a conclusion and recommendations.

2. WTO and South African Legal Requirements for Safeguards

Two WTO agreements apply to safeguards.[10] The first one is the GATT, which provides for safeguards under Article XIX. Article XIX:1(a) states as follows:

> *If, as a result of unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, *any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury* to domestic producers in that territory of like or directly competitive products, *the contracting party shall be free*, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, *to suspend the obligation* in whole or in part or to withdraw or modify the concession.[11]

The second is the Agreement on Safeguards. However, the Agreement on Safeguards contains no provisions on either unforeseen developments or on GATT obligations. Rather, it contains

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6 WTO, 'Safeguard Measures' <https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm> accessed 17 May 2024.

7 ibid.

8 Since the article only deals with unforeseen developments, GATT obligations and the link between increased imports and these requirements, these are the only 'relevant' provisions that will be considered.

9 For discussion purposes, some investigations are grouped together as the alleged or found unforeseen developments and GATT obligations are often either the same or similar. For instance, there were two investigations into frozen potato chips, and six on steel products (hot-rolled steel, cold-rolled steel, screws, threaded fasteners, bolts, and structural steel).

10 See Lee (n 1) 66–69; Piérola (n 1) 136–139; Rai (n 1) 37–39; G Brink, *Safeguards in South Africa: What Lessons from the First Investigation?* Tralac Working Paper 7/2007 7–10 <https://www.tralac.org/publications/article/4572-safeguards-in-south-africa-what-lessons-from-the-first-investigation.html>; G Brink, 'A Nutshell Guide to Safeguards' (2008) 71 THRHR 542 <https://repository.up.ac.za/handle/2263/8422>.

11 Emphasis added in PR European Union – Safeguard Measures on Certain Steel Products (hereinafter *EU – Steel Safeguards*) para 7.78 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds595_e.htm>.

provisions on the contents of an application; how injury and a causal link between the increased imports and the injury are to be determined; the investigation procedures; the various notifications and consultations that must take place; and safeguard measures. Since these issues are not relevant to the current article, the discussion of the Agreement falls outside of the scope of this contribution.

The WTO Appellate Body stressed that 'any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994'.[12] Referring to Article 1 and Article 11.1(a) of the Agreement on Safeguards that describe the precise nature of the relationship between Article XIX of the GATT and the Agreement,[13] the Appellate Body concluded that there was

> nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable . . . Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures . . .[14]

The WTO Panel Report (PR) *US – Lamb* rejected the argument that the requirements of Article XIX of the GATT not reflected in the Agreement on Safeguards had been overridden by the requirements of the Agreement and confirmed that all provisions of both Article XIX of the GATT and the Agreement on Safeguards must be given meaning and effect.[15] Accordingly, notwithstanding the absence of any reference to unforeseen developments and GATT obligations in the Agreement on Safeguards, these are substantive obligations applicable to safeguard investigations. Therefore, the article looks at these two obligations, and the links between them and the increase in imports.

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[12] ABR *Argentina – Footwear (EC)* para 84. See also ABR *Korea – Dairy* para 76–77.

[13] ABR *Argentina – Footwear (EC)* para 82.

[14] ibid par. 83 (original emphasis, underlining added).

[15] See n 3 PR *US – Lamb*) para 7.11. See also PRs *Argentina – Preserved Peaches* para 7.12; and *Ukraine – Passenger Cars* para 7.52–7.57. Note that in PR United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products (hereinafter *US – Safeguard Measure on PV Products*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm> the parties and the Panel simply accepted that the Article XIX requirements applied in safeguard investigations and did not argue or comment on the issue. For a discussion on the evolution on this point, where Panels first determined that only the Agreement on Safeguards had to be applied, but the Appellate Body rejected this, see Rai (n 1), 34–39.

In *US – Safeguard Measure on PV Products*,[16] the Panel pointed out that the relevant portion of Article XIX of GATT contains three main elements:

- the existence of unforeseen developments;
- imports must have increased *as a result of* the unforeseen developments; and
- imports must have increased *as a result of* the effect of obligations incurred under GATT, including tariff concessions.[17]

In the view of the Appellate Body, there is in Article XIX:1(a), a grammatical link between the first clause, relating to unforeseen developments and GATT obligations, and the phrase 'is being imported' in the second clause of Article XIX:1(a).[18] Likewise, a Panel has noted that the elements 'unforeseen developments' and 'the effect of GATT obligations' are circumstances that investigating authorities must demonstrate under Article XIX:1(a) before a safeguard measure may be applied.[19]

In PR *Indonesia – Steel and Iron Products*,[20] the Panel found that a measure imposed by Indonesia could not be regarded as a safeguard measure since Indonesia had not incurred any GATT obligations in respect of the subject product. The Panel further noted that the suspension, withdrawal, or modification of a GATT obligation or concession that '*precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*', is a defining feature of a safeguard measure.[21]

Having established that both unforeseen developments and GATT obligations are WTO requirements for the imposition of a safeguard measure, the article now considers the legal position in South Africa,[22] where safeguards are nominally regulated under three legal

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16 PR *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products (*hereinafter *US – Safeguard Measure on PV Products)*< https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm>.

17 ibid para 7.14-7.17. Note that Lee (n 1) 29 indicates that the GATT concession obligation 'does not impose any analytical obligation before the application of a safeguard measure'.

18 ABR *Argentina – Footwear (EC)* para 92.

19 PR *Ukraine – Passenger Cars* para 7.57.

20 PR *Indonesia – Safeguard on Certain Steel and Iron Products* (hereinafter *Indonesia – Steel and Iron Products*) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds518_e.htm>.

21 PR *Indonesia – Steel and Iron Products* para 7.40 (emphasis in original).

22 For a general discussion of safeguard investigations in South Africa, see Brink (n 10) 540–555; and Brink (n 10).

instruments,[23] being the International Trade Administration Act (ITA Act),[24] the Customs and Excise Act (Customs Act),[25] and the Amended Safeguard Regulations (SGR).[26] The ITA Act defines a 'safeguard measure' as 'a remedy or procedure for use in response to disruptive competition',[27] but fails to define what disruptive competition is. It provides that the International Trade Administration Commission (the Commission)[28] must conduct safeguard investigations[29] and that any person may apply for the imposition of safeguard duties[30] or for 'the imposition of safeguard measures other than a customs duty'.[31] However, the ITA Act does not contain any reference to unforeseen developments and GATT obligations or the requirement that the increased imports must be linked thereto.

On the other hand, the Customs Act[32] provides for the imposition of provisional safeguard duties[33] and definitive safeguard duties,[34] but makes no reference to the substantive requirements in safeguard investigations. Like the ITA Act, it is silent on unforeseen developments and GATT obligations.

The SGR stipulate that 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*',[35] thus emphasising the importance of unforeseen developments in a safeguard investigation. The SGR require that the domestic industry submit evidence of the unforeseen developments that led to the surge in imports[36] and that the Commission consider whether there is sufficient evidence on record to establish a *prima facie* case that the industry's injury is 'as a result of an unforeseen

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23 Note that some other legislation may apply indirectly, such as relevant provisions of the Constitution of the Republic of South Africa Act 108 of 1996, the Promotion of Access to Information Act 2 of 2000, and the Promotion of Administrative Justice Act 3 of 2000.
24 International Trade Administration (ITA) Act 71 of 2002.
25 Customs and Excise (Customs Act) Act 91 of 1964.
26 Amended Safeguard Regulations, N662 in GG 27762 of 8 July 2005 (SGR).
27 S 1(2) of the ITA Act.
28 All references to the 'Commission' refer to the International Trade Administration Commission of South Africa.
29 S 16(1)(b) of the ITA Act.
30 S 26(1)(c)(iii) of the ITA Act.
31 S 26(2) of the ITA Act.
32 Customs Act.
33 S 57A (1) of the Customs Act.
34 S 57(1) of the Customs Act.
35 Para (a) of the Pre-Amble to the SGR (emphasis added).
36 SGR 11.3(e).

surge of imports'[37] before it can initiate an investigation. The initiation notice must set out information on 'the unforeseen developments that led to the increase in imports'[38] and it must be specifically considered in the Commission's final determination of whether 'any increase in imports can be attributed to unforeseen developments'.[39] The Commission's preliminary[40] and final reports[41] (CRs) on investigations must include a discussion on unforeseen developments. Finally, no definitive safeguard measure may be imposed unless the Commission finds that imports increased 'as a result of unforeseen developments and of the effect of the obligations incurred by the Republic' under GATT.[42] Despite these provisions, the Regulations do not contain a definition of unforeseen developments nor of GATT obligations.

The Commission confirmed that it conducts its investigations in line with the requirements of the Agreement on Safeguards,[43] while in *Degussa v International Trade Administration Commission*, the court found that 'the Safeguard Agreement . . . is binding on South Africa as South Africa is a Member of the World Trade Organisation' [sic].[44] Nevertheless, it is submitted that the decision in the *Degussa* case is ambiguous, as the fact that South Africa is a Member of the WTO and has ratified the WTO Agreement does not mean that any of the WTO Agreements can find direct application in South Africa. In this regard, Malan AJA in the case of *Progress Office Machines v SARS* found that:

37 SGR 13.1. Note that this choice of words, that is, 'an unforeseen surge of imports', is unfortunate, as the Panel in *Argentina – Preserved Peaches* in para 7.23–7.24, specifically found that it is not the increase in imports that must be unforeseen, but an unforeseen development that must have led to the increased imports.

38 SGR 14.2(e).

39 SGR 20.1(c).

40 SGR 18.2(h).

41 SGR 20.4(b).

42 SGR 1.2(a).

43 *Degussa v International Trade Administration Commission* (unreported case 22264/2007 (T)), 11, 12, 14–15. See also CR 656 (*Structural Steel*), para 1.1 <http://www.itac.org.za/upload/document_files/20210922110308_Report-656.pdf>, where the Commission indicates that '[t]his investigation is conducted … giving due regard to the World Trade Organisation (sic) Agreement on Safeguards … read in conjunction with Article XIX of the General Agreement on Tariffs and Trade (GATT 1994)'; and CR 551: Investigation into Remedial Action in the Form of a Safeguard against the Increased Imports of Certain Flat Hot-Rolled Steel Products: Final Determination (12 April 2017) (hereinafter *Hot-Rolled Steel*), para 1.1 <http://www.itac.org.za/upload/document_files/20190527103852_Report-No.-551.pdf>, where the Commission indicates that '[t]his investigation is conducted … giving due regard to the World Trade Organisation (sic) Agreement on Safeguards'. Note that EC Schlemmer, 'Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie' *TSAR* (2010.4) 757, indicates that international agreements that have not specifically been incorporated into municipal law cannot find direct application, nor can declarations by an authority that it applies international law give direct application of such international law.

44 *Degussa* (n 43) 26. See also Brink (n 10) 542 n 8.

> The WTO Agreement was approved by Parliament on 6 April 1995 and is thus binding on the Republic in international law but it has not been enacted into municipal law. Nor has the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade been made part of municipal law. No rights are therefore derived from the international agreements themselves . . . The text to be interpreted . . . remains the South African legislation and its construction must be in conformity with s 233 of the Constitution.[45]

While in *International Trade Administration* v *SCAW*,[46] Deputy Chief Justice Dikgang Moseneke held that 'the Anti-Dumping Agreement is binding on the Republic in international law, even though it has not been specifically enacted into municipal law',[47] he went further to point out that Parliament has enacted legislation to give effect to the Anti-Dumping Agreement and Regulations have also been prescribed in this regard.[48] Like the Anti-Dumping Agreement, the Agreement on Safeguards, as stated before, is one of the specialised agreements under Annex 1A to the WTO Agreement and as such, equally applicable to South Africa. However, as the Agreement on Safeguards has not been promulgated into South Africa's municipal law, it does not find direct application and no party can rely on its provisions in a court of law. It does, however, bind South Africa at international level and failure to abide by its provisions opens South Africa up to dispute settlement by other WTO Members in the WTO Dispute Settlement Body.

3. Unforeseen Developments

3.2 Introduction

In early investigations under the WTO, investigating authorities did not consider unforeseen developments in the belief that it was not a requirement under the Agreement on Safeguards, but the Appellate Body ruled that all safeguard measures 'must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT'.[49] Article XIX does not contain a definition of unforeseen developments. As early as in 1951, in *US – Hatter's Fur*, the issue of unforeseen developments was considered in dispute settlement. The GATT Working

[45] *Progress Office Machines v SARS* [2007] SCA 118 (RSA) para 6.
[46] *International Trade Administration v SCAW* CCT 59/09 [2010] ZACC 6.
[47] ibid para 25.
[48] ibid.
[49] ABR *Argentina – Footwear (EC)* para 84 (footnote omitted). See also ABRs *Korea – Dairy* para 76–77; United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (hereinafter *US – Lamb*) para 72; and *US – Line Pipe* para 7.298–7.299; and PR *Ukraine – Passenger Cars* para 7.57; Lee (n 1) 54–63; Piérola (n 1) 136–139; and Rai (n 1) 36–49.

Party considered unforeseen developments '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'.[50] The Appellate Body in *Korea – Dairy* indicated that the phrase 'as a result of unforeseen developments' means that the developments which led to increased imports must have been 'unexpected'.[51]

In the same vein, in *Argentina – Footwear (EC)*, the Appellate Body concluded that the developments must have been 'unexpected'.[52] Interestingly, in *US – Steel Safeguards*, the Panel highlighted that what 'was "unforeseen"[53] when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today'.[54]

The Appellate Body has held that safeguard measures may only be imposed where the Member itself did not foresee or expect the developments at the time it incurred such obligations,[55] thereby indicating that there is a subjective element to the determination. However, the Panel in *US – Steel Safeguards* cautioned that what was unforeseen also required an objective analysis and that it should be determined not only 'what the specific negotiators had in mind but rather what they could (reasonably) have had in mind'.[56] The investigating authority's report does not specifically have to use the words 'unforeseen developments', but the circumstances must be identified as such.[57]

Where a safeguard investigation considers a wide range of products, such as all fasteners, the unforeseen developments must be demonstrated in respect of each type of product in the public report.[58]

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50 Working Party Report *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade* (hereinafter *US – Fur Felt Hats*) para 9.

51 ABR *Korea – Dairy* para 84 (footnotes omitted).

52 ABR *Argentina – Footwear (EC)* para 91.

53 See ABR *Korea – Dairy* para 84, where the Appellate Body found that there is a difference between 'unforeseen and unforeseeable'. See also Lee (n 2) 59–61; and Piérola (n 1) 143.

54 PR United States – Definitive Safeguard Measures on Imports of Certain Steel Products (hereinafter *US – Steel Safeguards*) para 10.42. < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm >.

55 ABR *Argentina – Footwear (EC)* para 93.

56 PR *US – Steel Safeguards* para 10.43. See also PR *US – Safeguards on PV Products* para 7.15, which indicated that '"unforeseen developments" have both subjective … and objective … elements'.

57 PR *US – Lamb* para 7.31.

58 ABRs *US – Lamb* para 72; *Argentina – Footwear (EC)* para 92; and *Korea – Dairy* para 85; and PR *US – Steel Safeguards* para 10.44.

In South Africa, the SGR make it clear that the unforeseen developments must already be established by the domestic industry in its application,[59] and that the Commission must consider this both in its merit assessment[60] and its final determination,[61] and must report thereon both in its preliminary and final reports.[62] However, the regulations do not define 'unforeseen developments'.

3.2 What Constitutes Unforeseen Developments?

As indicated above, in *US – Hatter's Fur*, the Working Party defined unforeseen developments as developments that took place after the relevant tariff concession had been negotiated and where the negotiators could not have reasonably foreseen such developments.[63] In this case the unforeseen circumstance was the speed at which women's fashion (for fur hats) had changed. Although the change in fashion was foreseeable, the speed at which the change happened was not.

While concessions are generally negotiated when a country becomes a Member of the WTO, the US took one step further, and in *US – Safeguards on PV Products*, the Panel indicated that

> US negotiators could not have foreseen, at the time that the United States acceded to GATT 1947, at the time that the United States acceded to the WTO, *or at the time that the United States agreed to China's accession to the WTO* …[64]

Thus, the US not only considered its obligations at the time it became a WTO Member, but also at the time that China became a WTO Member seven years later, as there was a series of negotiations between the US and China before the US agreed to extend its tariff concessions under GATT to China.[65]

In *Argentina – Footwear (EC)*, the Appellate Body held that the requirement of 'unforeseen developments' described a certain set of 'circumstances' and went further to indicate that

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59 SGR 11.3(e).
60 SGR 13.1.
61 SGR 20.1(c).
62 SGR 18.2(h) and 20.4(b).
63 Working Party Report *US – Fur Felt Hats* para 9. See also ABRs *Argentina – Footwear (EC)* para 91; and *Korea – Dairy* para 84; Lee (n 1) 54–65; Piérola (n 1) 143–152; Piérola-Castro (n 1) 25–35; and Rai (n 1) 40–41.
64 USITC supplemental report, (Exhibit CHN-6) 5, as quoted in PR *US – Safeguards on PV Products* para 7.21 (emphasis added).
65 PR *US – Safeguards on PV Products* para 7.47.

> [a]lthough we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the conditions set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.[66]

In this sense, the Appellate Body believed that there was a 'logical connection' between the words 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions' in the first clause of Article XIX:1(a) and the conditions contained in the second clause of that article.[67]

In *Argentina – Preserved Peaches*, the Panel found that Argentina's determination that the entry of the imports, or the way in which the peaches were being imported, was unforeseen, did not meet its Article XIX obligations as there was no mention that the developments themselves were unforeseen.[68] In this investigation, worldwide production of preserved peaches had decreased significantly between 1992/1993, that is, prior to Argentina negotiating its GATT obligations, and also before the production recovered to a similar level in 1999/2000. The Panel found that the Argentine negotiators should have foreseen the equivalent level of production in 1999/2000.[69]

In *EU – Steel Safeguards*, the Panel defined a 'development' as 'an event constituting a new stage in a changing or evolving situation', and 'unforeseen' as 'not anticipated or expected'.[70]

This definition in line with previous findings that unforeseen developments are developments that were unexpected[71] and that known events could develop into something that was not foreseen.[72] The same Panel further noted that when the relevant obligations were incurred is determinant in deciding whether a development was unforeseen.[73]

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66 ABR *Argentina – Footwear (EC)* para 92. See also PR *Ukraine – Passenger Cars* para 7.57.
67 ABR *Argentina – Footwear (EC)* para 92. See also ABR *Korea – Dairy* para 85; and PR *Ukraine – Passenger Cars* para 7.51–7.52.
68 PR *Argentina – Preserved Peaches* para 7.24.
69 ibid para 7.30. For the actual volumes, see id para 7.19.
70 PR *EU – Steel Safeguards* para 7.81.
71 ABRs *Korea – Dairy* para 84; and *Argentina – Footwear (EC)* para 9.
72 PR *US – Steel Safeguards* para 10.84.
73 ibid para 7.82. See also ABR *Korea – Dairy* para 86; PR *US – Steel Safeguards* para 10.79, 10.80 and 10.85; and Working Party Report *US – Fur Felt Hats* para 12.

Whether a development was unforeseen will depend on the circumstances of each case. Thus, the Panel in *EU – Steel Safeguards* agreed that 'the Russian financial crisis, the Asian financial crisis, the continued strength of the US market, and the persistent appreciation of the dollar, taken together, could constitute unforeseen developments'.[74] In *India – Iron or Steel Products*, the Panel considered India's finding that a significant increase in steel excess capacity; decreased demand for steel in important markets; currency depreciation in Russia and Ukraine; and increased demand and prices in India, were unforeseen developments. It also noted that the extent and timing of production capacity or demand changes could be unforeseen, even where it was foreseen that there would be some changes over time.[75]

In *US – Safeguards on PV Products*, the US cited as unforeseen developments that China would implement a series of industrial policies, plans and support programmes favouring renewable energy product manufacturing, including chrystalline silicon photo voltaic (CSPV) products). This led to the development and expansion of Chinese CSPV capacity in excess of domestic consumption, resulting in increased exports to the US. The effectiveness of anti-dumping and countervailing duties on imports from China was limited, leading to global supply chain changes to export non-covered products to the US. The US based its latter argument on the fact that as soon as it had imposed such measures following an earlier CSPV investigation, Chinese producers reorganised their production facilities. Before measures could be imposed against these new imports, the imports switched to third countries and increased further, mainly through ramped-up production by Chinese companies in those third countries.[76] In considering all these developments, the Panel found that the US had appropriately identified developments that could not have been foreseen by US negotiators.[77]

In *EU – Steel Safeguards*, the EU identified three 'cumulative' developments:

(a) 'unprecedented' overcapacity in the steel sector, which persisted despite measures taken to narrow it, and which was fuelled by government support; (b) greater use of trade-restrictive measures in third-country markets, including applied tariff increases, minimum import prices, mandatory national standards, and local content requirements, and a steady

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74 PR *EU – Steel Safeguards* para 7.83.

75 PR India – Certain Measures on Imports of Iron and Steel Products (hereinafter *India – Iron or Steel Products*) para 7.90–7.99 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds518_e.htm >.

76 PR *US – Safeguards on PV Products* para 7.21.

77 ibid para 7.26.

increase in trade defence measures on steel, a significant portion of which was by the United States, one of the world's largest steel importers; and (c) the United States' Section 232 measures.[78]

The Panel found that the EU had addressed interested parties' submissions on unforeseen developments and how the unforeseen developments had led to increased imports';[79] had sufficiently indicated the timing of each unforeseen development and then determined whether that development was unforeseen;[80] and noted that the EU had indicated that overcapacity had increased significantly, contrary to economic expectations and measures taken to address such overcapacity.[81] In view of the EU's descriptions of its findings, the Panel considered in this case that nothing more was required to identify the overcapacity as an unforeseen development.[82] As regards the use of trade remedies, the Panel noted that the EU did not simply refer to the number of trade remedies in general, but specifically referred to 'the unprecedented and increased number of such measures taken by third countries' and the trade diversion caused thereby.[83] The Panel agreed that although the use of trade remedies may fluctuate over time, a sudden increase in the use of such remedies could constitute an unforeseen development.[84] The Panel also found that trade restrictive measures applied by a WTO Member in violation of its GATT obligations could be regarded as an unforeseen development.[85]

The Panel in *India – Iron and Steel Products* also considered that an unforeseen increase in production capacity for steel in 2015 was, together with other factors, an unforeseen development.[86]

In *US – Steel Safeguards*, the Appellate Body confirmed that unforeseen developments must be established separately for each product subject to a safeguard measure.[87]

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78 ibid para 7.92 (footnotes omitted).
79 ibid para 7.93 (footnote omitted).
80 ibid para 7.94.
81 ibid para 7.101.
82 ibid.
83 ibid para 7.110.
84 ibid.
85 ibid para 7.116.
86 PR *India – Iron or Steel Products* para 7.94–7.97.
87 ABR United States – Definitive Safeguard Measures on Imports of Certain Steel Products (hereinafter *US – Steel Safeguards*) para 319 < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds248_e.htm> (emphasis in original). See also PR *US – Steel Safeguards* para 10.126.

In summary, an unforeseen development is something that was not foreseen at the time a country entered into its GATT obligations, that change in a way or magnitude that could not have been foreseen, or where there was an unexpected confluence of several developments.

3.3 Reporting on Unforeseen Developments

Article 3.1 of the Agreement on Safeguards provides that the 'competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law'.

The Appellate Body has indicated that unforeseen developments and GATT obligations are pertinent issues that need to be included in the published reports.[88] Thus, a report that does not set out 'a demonstration of the existence of unforeseen developments', would not meet the obligations under Article XIX of GATT.[89] At the same time, Panels have found that there is no prescribed format for a report and that it may consist of different parts.[90]

In *Argentina – Preserved Peaches*, the Panel noted that even where parties to a dispute agree on the obligations that the imposing Member negotiated during the Uruguay Round, the imposing Member would violate its obligations if those obligations are not indicated in the report.[91] The Panel further stated that it was insufficient for the investigating authority to refer to unforeseen developments only in its final conclusion.[92]

The Panel in *Ukraine – Passenger Cars*, confirmed that an investigating authority must demonstrate the presence of unforeseen developments before a safeguard measured is applied,[93] while in *Argentina – Preserved Peaches*, the Panel considered that at least some discussion as to why developments were unforeseen at the time the investigation was initiated must be included in the investigating authority's public report.[94]

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88 ABR United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (hereinafter *US – Lamb*) para 76. See also ABR *US – Steel Safeguards* para 279; and PR *Ukraine – Passenger Cars* para 7.56.

89 ABR *US – Line Pipe* para 7.298.

90 ABR *US – Steel Safeguards* para 10.49–10.50; and ABR *US – Safeguard Measure on PV Products* para 7.20 and n 38.

91 PR *Argentina – Preserved Peaches* para 7.29.

92 ibid para 7.33.

93 PR *Ukraine – Passenger Cars* para 7.53 (emphasis in original). See also ABR *US – Lamb* para 72.

94 PR *Argentina – Preserved Peaches* para 7.23.

In *EU – Steel Safeguards*, the Panel noted the importance of an investigating authority properly explaining all findings on unforeseen developments, GATT obligations, and that imports increased as a result thereof in its published determinations.[95] In *US – Steel Safeguards*, the Panel took into account a detailed explanation in the United States International Trade Commission (USITC) report as to why certain developments were regarded as unforeseen.[96]

4. GATT Obligations

The second obligation under Article XIX that is not included in the Agreement on Safeguards is that the increased imports must be linked to obligations a Member has incurred under the GATT, including tariff concessions.[97] Thus, if a Member did not incur any GATT obligations, it cannot make use of a safeguard. In *Argentina – Footwear (EC)*, the Appellate Body noted that the remedy provided by Article XIX is of an emergency character and may only be applied 'when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen"' when it incurred that obligation.[98] In the same dispute, the Appellate Body noted that the importing Member had to demonstrate that it has incurred GATT obligations.[99] In South Africa, the SGR clarify that a safeguard measure may only be imposed where the Commission has found evidence that South Africa's GATT obligations had impacted its ability to act against increased imports.[100]

Although in *Argentina – Preserved Peaches*, the parties agreed on what was regarded as Argentina's GATT obligations, the Panel found that Argentina's report did not contain any reference to these obligations[101] and therefore found Argentina's actions inconsistent with its obligations. In *Dominican Republic – Safeguard Measures*, the Panel indicated that there was an obligation on the importing Member to identify the obligations it incurred under GATT that are linked with the increase in imports.[102]

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95 PR *EU – Steel Safeguards* para 7.124–7.148.
96 PR *US – Safeguard Measure on PV Products* para 7.21.
97 For a general discussion, see Piérola (n 1) 157–162; Piérola-Castro (n 1) 35–40.
98 ABR *Argentina – Footwear (EC)* para 93.
99 ibid para 91.
100 SGR 1.2. Note that, unlike the requirement that 'unforeseen developments' must be addressed in the Commission's preliminary (SGR 18.2(h)) and final report (SGR 20.4(b)) and must be considered in the Commission's final determination (SGR 20.1(c) and 20.4(b)), there is no requirement that GATT (or WTO) obligations must be so addressed.
101 PR *Argentina – Preserved Peaches* para 7.29.
102 PR Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric (hereinafter *Dominican Republic – Safeguard Measures*) para 7.145–7.146 <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds514_e.htm>. See also PRs *EU – Steel Safeguards* para 7.170; and *US – Safeguards on PV Products* para 7.52–7.60.

In *EU – Steel Safeguards*, the Panel noted that GATT obligations are one of a number of cumulative circumstances required before a Member may apply a safeguard measure, and that a Member had to identify these GATT obligations in its published report.[103] The EU had argued that it was 'evident' from its reports that it had incurred GATT obligations, but the Panel noted that it was not up to other Members to have to determine what these obligations were and that the importing Member was obliged to identify the relevant obligations.[104]

Since different obligations may apply to a product, the Panel in *Ukraine – Passenger Cars* held that the report had to clearly identify 'the specific relevant obligation(s)' and that authorities had to clearly indicate which obligations resulted in the increased imports.[105]

More recently, in PR *Indonesia – Iron or Steel Products*, the Panel indicated that the importing Member had to factually demonstrate that it has incurred obligations under GATT.[106] The Panel further found that the suspension, withdrawal, or modification of a GATT obligation 'that *precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*,' was a defining feature of a safeguard measure.[107] Since the Panel found that Indonesia had not incurred any GATT obligations on the subject product, it concluded that Indonesia could not have made use of a safeguard measure.[108]

Accordingly, no safeguard measure may be imposed unless the investigating authority shows that the importing country had incurred GATT obligations, typically either in the form of tariff concessions or limitations on volume restrictions, on the subject product.

5. Increased Imports *as a Result of* Unforeseen Developments and GATT Obligations

No safeguard measure may be imposed unless the investigating authority can show that imports increased *as a result of* unforeseen developments and GATT obligations. In *EU – Steel*

103 PR *EU – Steel Safeguards* para 7.167.
104 ibid para 7.168.
105 PR *Ukraine – Passenger Cars* para 7.96.
106 PR *Indonesia – Iron or Steel Products* para 7.52.
107 ibid para 7.40 (emphasis in original).
108 ibid para 7.34–7.38 (emphasis in original).

Safeguards, the Panel noted that 'the phrase "as a result of" connects the unforeseen developments and the injurious increase in imports'.[109]

It is not sufficient to merely for an investigating authority to show that there were unforeseen developments without linking the developments and GATT obligations to the increase in imports. Thus, the Panel in *US – Steel Safeguards* held that an investigating authority had to explain how unforeseen developments resulted in increased imports.[110] It indicated that this explanation could sometimes be as simple as bringing two sets of facts together, but that it may require a much more detailed analysis in other situations.[111] It noted that the complexity of the facts would dictate the extent to which the relationship needs to be explained.[112] It further noted that in the case under consideration, although the report indicated unforeseen developments that could potentially have resulted in increased imports, it failed to demonstrate that these developments actually resulted in increased imports,[113] since the fact that exports to one market were displaced from such market, did not, in and of itself, imply that such displaced exports would be redirected to the market of the importing Member.[114] The Panel found that Article XIX of GATT required a demonstration that the unforeseen development resulted in increased imports into the importing Member.[115] In the case under consideration, the Panel found that the USITC report did not 'link these steel market displacements to the specific increased imports *into the United States* at issue'.[116] Finally, it found that as an unforeseen development could impact more than one economic sector, or could affect different segments of an industry differently, the investigating authority had to clearly link increased imports of the subject products to the unforeseen developments.[117]

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[109] PR *EU – Steel Safeguards* para 7.84 (footnote omitted). See also ABRs *Korea – Dairy* para 85; *Argentina – Footwear (EC)* para 92; *US – Lamb* para 72; and *US – Steel Safeguards* para 315–318 and 322; and PRs *US – Steel Safeguards* para 10.104; and *Argentina – Preserved Peaches* para 7.17 and 7.24. See also, with different wording, PR *India – Iron and Steel Products* para 7.105–7.106, 7.110 and 7.114. The report of the GATT Working Party in *US – Fur Felt Hats* described the requirement as being that 'the increased imports must be the result of unforeseen developments' para 4(a)(ii), 7 and 11–12.
[110] PR *US – Steel Safeguards* para 10.115.
[111] ibid para 10.115.
[112] ibid.
[113] ibid para 10.122.
[114] ibid para 10.123.
[115] ibid.
[116] ibid para 10.123 (emphasis in original).
[117] ibid para 10.127. See also PR *Ukraine – Passenger Cars* para 7.16.

In *EU – Steel Safeguards*, the Panel noted that the phrase 'as a result of' did not establish a causation requirement and that it implied a lower threshold than a causation requirement.[118] Notwithstanding this, the Panel then considered the EU's written accounts of each of the unforeseen developments. It noted that the EU report failed to establish a link between unforeseen developments and increased imports; failed to provide evidence on the volume of imports affected by US trade remedies; and failed to provide evidence supporting its determination that countries affected by US measures would redirect their exports from the US to the EU.[119] These findings appear to contradict the Panel's finding that the requirement to show that imports increased 'as a result of' unforeseen developments and GATT obligations did not equate to a causation analysis. Piérola supports the author's view, indicating that '[i]f there is an "effect", there must be a "cause"', thus concluding that the Appellate Body's finding in *US – Steel Safeguards* confirmed that the logical connection between the unforeseen developments and GATT obligations on the one hand, and increased imports on the other, is a causal link.[120]

In *US – Safeguards on PV Products*, the Panel considered that it was not necessary for the investigating authority to link each individual unforeseen development to the increased imports, provided it showcased was sufficient evidence to find that the unforeseen developments in their totality resulted in increased imports.[121]

6. Analysis of South African Investigations

6.1 Introduction

To date, South Africa has completed nine safeguard investigations, resulting in the imposition of six definitive safeguard measures. The following analysis sorts investigations by product type and then considers the Commission's determination of unforeseen developments, GATT obligations and whether imports increased *as a result of* these two circumstances.

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118 PR *EU – Steel Safeguards* para 7.127.
119 ibid para 7.129–7.148.
120 Piérola (n 1) 141.
121 PR *US – Safeguard on PV Products* para 7.36.

6.2 Lysine

6.2.1 Introduction

Lysine was South Africa's first safeguard investigation.[122] It was initiated on 11 May 2007[123] and a provisional duty was imposed on the same day,[124] culminating in a final measure of 27 per cent.[125] The period to determine increased imports was from 2002 to 2006.[126]

6.2.2 Unforeseen Developments

In *Lysine*, the domestic industry alleged that the unforeseen developments that led to the increase in imports were that until 2003, China was a net importer of lysine and had an installed capacity of 100 000 tonnes, being 12 per cent of the world capacity. Within three years, China had increased its capacity to 480 000 tonnes which translates into 38 per cent of world capacity, while the market in China was virtually static. This led to Chinese producers exporting their surplus capacity, forcing down world prices.[127]

The Commission found that the expansion of capacity and worldwide oversupply, which occurred after South Africa had negotiation its tariff concessions, could not have been foreseen at the time the concessions were negotiated. Consequently, it found these to be unforeseen developments.[128]

6.2.3 GATT Obligations

Although the final report indicates that the applied duty was zero, there is nothing in the report to indicate what the *bound* rate, that is, the tariff concession under GATT, was. South Africa also increased the applied duty to 10 per cent after the safeguard lapsed.[129] This indicates that the bound rate (the concession) was higher than the applied rate. Accordingly, the Commission failed to set out South Africa's GATT obligations and how these obligations resulted in the increase in imports.

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122 CR 250: Investigation into Remedial Action in the Form of Safeguards against the Increased Imports of Lysine: Final Determination (6 September 2007) (hereinafter *Lysine*) <http://www.itac.org.za/upload/document_files/20141006012142_Report-250.pdf>.

123 N 560 in GG 29874 of 11 May 2007.

124 N 561 in GG 29874 of 11 May 2007.

125 CR 340: Increase in the Rates of Customs Duty on Lysine and Its Esters; and Feed Supplements Containing by Mass 40 per Cent or More Lysine, Whether or Not Containing Added Antibiotics or Added Melengestrol Acetate: Final Determination (4 June 2010) (hereinafter *Lysine Duty*) para 11 <http://www.itac.org.za/upload/document_files/20140928115326_Report-340.pdf>.

126 ibid para 5.2.

127 ibid para 4.2.

128 ibid para 4.3.

129 CR 340: (*Lysine Duty*) para 11.

6.2.4 Increased Imports as a Result of Unforeseen Developments and GATT Obligations

Statistics show that imports increased significantly over the investigation period, including in the final year, both in absolute and relative terms.[130]

The applicant alleged that the increased imports could be linked to worldwide overcapacity, mostly as a result of China's increased capacity, and that this overcapacity was unforeseen.[131] The Commission, however, made no finding in this regard, and only concluded that imports of the product had increased significantly.[132]

6.2.5 Conclusion

Although it appears that the Commission reached the correct decision in respect of all three issues, it failed to properly set out these issues in its report as it did not indicate what the GATT obligations were, and as it failed to indicate how the increase in imports was the *result* of unforeseen developments and GATT obligations.

6.3 Frozen Potato Chips I and II

6.3.1 Introduction

Frozen potato chips were responsible for both the second and third safeguard investigations. The first of these investigations was initiated on 23 November 2012 and terminated on 8 March 2013[133] after the Commission conceded that it had not followed the correct investigation procedures and that any final determination could be legally challenged.[134] On the same day, the Commission initiated a new investigation into the same product, *Frozen Potato Chips II*.[135] The investigation period to determine increased imports was from July 2008 to June 2012. Imports had increased significantly to June 2010, but then decreased in each of the following two years.

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[130] CR 250 (*Lysine*) para 5.2.

[131] ibid para 5.2.

[132] ibid.

[133] See WTO G/SG/N/9/ZAF/1 (13 March 2013), para 3.

[134] Note that no final report was issued. However, in WTO G/SG/N/9/ZAF/1 (13 March 2013), para 4, the Commission indicates that '[d]ue to an error in the chain of notification of this investigation to the WTO Safeguard Committee, the Commission decided to terminate the investigation'.

[135] N 175 of GG 36207 of 8 March 2013. See also WTO G/SG/N/6/ZAF/3 (13 March 2013), para 1. CR 457: Investigation into Remedial Action in the Form of a Safeguard against the Increased Imports of Frozen Potato Chips: Final Determination (18 December 2013) (hereinafter *Frozen Potato Chips II*) para 4.2 <http://www.itac.org.za/upload/document_files/20150727021633_scan0084.pdf>

A provisional duty was imposed on 5 July 2013,[136] followed by the imposition of the final measure of 61.42 per cent on 25 July 2014.[137]

6.3.2 Unforeseen Developments

In both the *Frozen Chips* investigations, the applicant alleged the following unforeseen developments:

- When South Africa became a signatory to the WTO Agreement, it did not foresee the 'importance and subsequent potential for growth in domestic supply and demand of frozen chips and the opportunity for job creation' as the Southern African Customs Union (SACU) 'market for frozen potato chips at that time was in its infancy'; [138]
- South Africa had just emerged from isolation under apartheid era sanctions and had little experience with exposure to global supply chains;[139]
- Following 1994, there had been a proliferation of Quick Service Restaurants (QSRs), with McDonalds only entering the market in 1995. It was alleged that the QSR industry barely existed in 1994, and that by the time of the investigation, there were already 170 MacDonald's outlets; [140]
- Excessive investment took place in the EU frozen potato chip industry post-1994;[141]
- The financial crisis that dampened demand in the EU for frozen potato chips since 2008 created surplus capacity with producers in Europe;[142]
- The unforeseen developments in the EU took place while customs duties on imports of frozen potato chips from the EU were being phased out under the free trade agreement between South Africa and the EU.[143]

In its final determination on unforeseen developments, the Commission found the unforeseen developments to be the proliferation of QSRs and the excess frozen potato chips capacity in

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136 N 468 in GG 36633 of 5 July 2013.
137 N 575 in GG 37855 of 25 July 2014.
138 *Frozen Potato Chips I* Application 36; *Frozen Potato Chips II* Application 36.
139 *Frozen Potato Chips I* Application 36; *Frozen Potato Chips II* Application 36.
140 *Frozen Potato Chips I* Application 36; *Frozen Potato Chips II* Application 36; CR 457 (*Frozen Potato Chips II*) para 4.2.1.
141 *Frozen Potato Chips I* Application 36; *Frozen Potato Chips II* Application 36; CR 457 (*Frozen Potato Chips II*) para 4.2.2.
142 *Frozen Potato Chips I* Application 36; *Frozen Potato Chips II* Application 36.
143 *Frozen Potato Chips I* Application 38; *Frozen Potato Chips II* Application 38.

the EU.[144] It further found (without any allegation by the applicant in this regard) that the EU had not adhered to its WTO subsidy commitments on fruit and vegetables, indicating that while the EU had committed to reducing subsidies in this category from €14.5 million in 1994 to €9.9 million in 2000, it had made budgetary commitments of €114.3 million Euros in that year.[145]

The Commission then discussed the arguments by other interested parties. Parties argued that there were already 107 McDonalds outlets in South Africa by 2008, that is, before the surge in imports. As the argument goes, this number increased to 145 by 17 March 2011 and further rose to 153 by 14 June 2011, while imports were decreasing. Parties alleged that the small additional number of McDonalds outlets could not have been responsible for the increase in imports. Interested parties also argued that McDonalds sourced more than 95 per cent of all its raw materials domestically[146] and that it uses fresh rather than frozen potato chips. The parties further argued that Wimpy, another QSR chain, had more than 500 outlets by 2011,[147] while KFC had more than 600 outlets,[148] and there were already several hundred other QSRs, indicating that the McDonalds market share was rather small. There were several hundred QSR in South Africa in 1994, which is when South African negotiated its GATT obligations. Despite this, the Commission, while taking note of the interested parties' arguments, found that there had been an increase in the number of outlets of McDonalds from 107 in 2008 to 153 in mid-2011, a period that coincided with the surge in imports.[149]

The parties further argued that there had been excess capacity in the EU since at least in the year 2000 and that there was no record evidence linking the excess capacity to the increasing imports in 2010. Moreover, there was no record of evidence showing that the excess capacity was any higher in 2010, 2011 and 2012 than in previous years.[150] The Commission found there had been a significant increase in frozen potato chips exports from the EU to South Africa from (4,971 tonnes in 2008/2009 to 30,337 tonnes in 2009/2010, before decreasing to 30,156 tonnes in 2010/2011 and to 24,605 tonnes in 2011/12) and that this was unforeseen.[151]

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144 CR 457 (*Frozen Potato Chips II*) para 4.2.
145 ibid para 4.3.
146 ibid para 4.4.
147 Wimpy, 'Our Story', <https://wimpy.co.za/our-story/> accessed 15 July 2022.
148 News24, 'More KFC Stores on the Way' <https://www.news24.com/fin24/more-kfc-stores-on-the-way-report-20111004> accessed 15 July 2022 and G Daniels, 'More Meat on that Chicken Bone' <https://mg.co.za/article/2011-10-17-kfc-more-meat-on-that-chicken-bone/> accessed 15 July 2022.
149 CR 457 (*Frozen Potato Chips II*) para 4.4.
150 ibid para 4.4.
151 ibid para 4.4, Table 11.

The Commission further noted that the EU's frozen potato products exports to non-EU countries doubled within a period of three years.[152] Again, this statement requires some analysis. First, EU exports to South Africa increased in the first year, and then decreased for two consecutive years, whereas its worldwide exports increased each year. Thus, while its exports to South Africa *decreased* by 15 per cent in 2010/2011 and by another 18 per cent in 2011/2012, to the rest of the world such exports *increased* by 13 per cent and 27 per cent, respectively. This indicates that exports to South Africa developed in a completely different trend compared to other countries. It is difficult to determine how the Commission found this to be an unforeseen development causing increased exports to South Africa. These exports also apply to 'frozen potato *products'* and not only to 'frozen potato *chips*'. Accordingly, there is nothing on record to show that the increased exports from the EU related only to the subject product.

The EU argued that its subsidy commitment changed because of the enlargement of the EU, suggesting that the Commission could not simply compare the subsidy commitments the EEC undertook in 1994 to its subsidy payments in 2010. The EU further indicated that *no* export subsidies had been *paid* on fruit and vegetables since 2008, while interested parties raised the point that the document the Commission relied on did not contain any reference to 'any *potato* products'.[153] Nonetheless, and without verifying the information, the Commission found that the EU's WTO notification that it had *budgeted* for an amount of €114.3 million of export subsidies on 'fruit and processed vegetables was evidence that it had actually *paid* subsidies on frozen potato chips.[154] There is no record of evidence in the report to support the Commission's conclusion.

The Commission made no findings regarding the allegations that South Africa did not foresee the potential for growth in domestic supply and demand of frozen potato chips, and was just coming out of isolation under apartheid-era sanctions with little exposure to global supply chains.[155] Moreover, it made no findings that the global financial crisis of 2008 dampened

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152 ibid para 4.4.
153 ibid para 4.4 (emphasis added).
154 ibid para 4.3 (emphasis added).
155 Since South Africa became a democracy in 1994, it means that this 'unforeseen development' had actually taken place some 16 years before the increase in imports. It is difficult to see how this could have resulted in a sudden increase in imports so many years later.

demand for frozen potato chips in the EU, or that import duties were phased out under the trade development and cooperation agreement. Although the Commission did not specifically rely on these alleged unforeseen developments, it did not reject them either. Thus, it is unclear what role they played in the Commission's decision.

It is submitted that most of these developments could not be regarded as unforeseen and even if they could, they were not linked to the increase in imports.

6.3.3 GATT Obligations

In the section dealing with the product description and tariff dispensation, the Commission Report (CR) indicated the existing tariff structure,[156] stating a general duty of 20 per cent, while imports from the EU are exempt from duties.[157] The CR did not contain any indication of the bound rate for frozen potato chips or any other GATT obligations, and the 'summary of findings'[158] only referred to unforeseen developments; increased imports; serious injury; causal link and public interest; with no finding made regarding GATT obligations.[159]

6.3.4 Increased Imports as a Result of Unforeseen Developments and GATT Obligations

In the CR, the section on increased imports did not contain any reference to either unforeseen developments or GATT obligations.[160] Aside from silence on GATT obligations, the report did not indicate how the unforeseen developments contributed to the increase in imports or not.[161] Regardless of this, the Commission concluded that the opening of 38 new McDonalds outlets was an unforeseen development, despite McDonalds making use of *fresh* rather than *frozen* potato chips and its 38 new outlets representing an increase of less than 0.2 per cent in the number of QSRs in South Africa.[162] The Commission also did not explain the decrease in imports experienced in the last two years under investigation despite more QSRs opening in that period.

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156 CR 457 (*Frozen Potato Chips II*) para 2.1.2.

157 Note that this exemption flows from a free trade agreement, which is entered into voluntarily, which means it does not constitute a GATT obligation. See ABR *Indonesia* –Safeguard on Certain Steel or Iron Products <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds490_e.htm>para 5.63–5.65. See also PR *Indonesia – Iron or Steel Products* para 7.20.

158 CR 457 (*Frozen Potato Chips II*) para 9.

159 ibid para 9.

160 ibid para 5.

161 ibid para 4.4 and 9.3.

162 ibid para 4.4 and 9.1.

6.3.5 Conclusion

The Commission's analysis did not refer to GATT obligations at all. The unforeseen developments were found to be unsubstantiated and unfounded, and the addition of just 38 McDonalds outlets, which did not even use the subject product (since it used *fresh* chips), in a market of more than 2 000 QSRs, could not have resulted in a significant increase in imports. There was no record evidence that the EU provided *any* subsidies on the subject product during the investigation period, and although the excess capacity in the EU could, in theory, be regarded as an unforeseen development, this excess capacity existed for several years before the start of the investigation period. The Commission failed to draw any link between the original excess capacity and the increased imports several years later.[163] Record evidence shows that the trend in EU exports to South Africa developed differently to the EU's exports to third countries, but the Commission failed to address this issue.

Although several other unforeseen developments were alleged, the Commission made no finding in respect of them, leaving the alert reader to guess whether they constitute unforeseen developments or not. It is therefore submitted that the Commission's findings on unforeseen developments, GATT obligations and the increase in imports as a result of unforeseen developments and GATT obligations were seriously flawed.

6.4 Steel products

6.4.1 Introduction

The Commission has conducted six safeguard investigations into various steel products. These can be classified into three sub-sectors: basic steel (hot-rolled steel; cold-rolled steel); fasteners (hexagon screws; threaded fasteners; bolts); and structural steel. Two of these investigations were initiated in 2016, one each in 2018 and 2019, and two in 2020. However, for the greater part, the alleged unforeseen developments were the same for all steel products. Therefore, the discussion of unforeseen developments will cover all steel products. Where necessary, the discussion will be individualised. Since the bound rates (GATT obligations) for the products may differ, they will be analysed by product category. Similarly, the discussion on whether unforeseen developments and GATT obligations resulted in increased imports will analyse all steel products together.

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[163] Piérola (n 1) 141–142 indicates that '[i]t would appear that a coincidence in time between the unforeseen developments and increased imports could also give a first indication of a potential causal link'.

A few months apart in 2016, the steel industry lodged its first two safeguard investigations. *Hot-Rolled Steel* was initiated on 24 March 2016,[164] while *Cold-Rolled Steel* was initiated on 29 July 2016.[165] Although the alleged unforeseen developments were found to be identical, a safeguard duty of 12 per cent was eventually imposed on hot-rolled steel,[166] whereas the investigation into cold-rolled steel was terminated.[167]

On 20 April 2018, the Commission initiated the first of the three fasteners safeguard investigations, *Hexagon Screws*, which resulted in a safeguard duty in excess of 50 per cent.[168] Next followed *Threaded Fasteners*, which was initiated on 1 March 2019, which also ended with the imposition of duties in excess of 50 per cent.[169] The third investigation, *Bolts*, which was initiated on 15 May 2020, resulted in the imposition of a safeguard duty of 31.8 per cent.[170]

Finally, just a month after the initiation of the *Bolts* investigation, on 19 June 2020, the Commission initiated *Structural Steel*, which was terminated after the Commission decided that there had not been a significant increase in imports that met the requirements of 'the WTO and the SGR'.[171]

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164 See n 43 CR 551 (*Hot-Rolled Steel*).

165 CR 555: Investigation into Remedial Action in the Form of a Safeguard against the Increased Imports of Cold-Rolled Steel Products: Final Determination (31 August 2017) (hereinafter *Cold-Rolled Steel*) 81 <http://www.itac.org.za/upload/document_files/20171003024011_Report-555.pdf>

166 CR 551 (*Hot-Rolled Steel*) 64.

167 CR 555: (*Cold-Rolled Steel*) 81.

168 CR 596: Investigation into Remedial Action in the Form of a Safeguard against the Increased Imports of Other Screws Fully Threaded with Hexagon Heads Made of Steel: Final Determination (24 January 2019) (hereinafter *Hexagon Screws*) 91 <http://www.itac.org.za/upload/document_files/20190218095756_Report-596.pdf>.

169 CR 620: Investigation into Remedial Action in the Form of a Safeguard Measure against the Increased Imports of Threaded Fasteners of Iron or Steel: Bolt Ends & Screw Studs and Other Hexagon Nuts (Excluding Those of Stainless Steel and Those Identifiable for Aircraft): Final Determination (30 January 2020) (hereinafter *Threaded Fasteners*) 51 <http://www.itac.org.za/upload/document_files/20200811055550_Report-620.pdf>.

170 CR 661: Investigation into Remedial Action in the Form of a Safeguard Measure against the Increased Imports of Bolts with Hexagon Heads of Iron or Steel: Final Determination (18 May 2021) (hereinafter *Bolts*) 48 <https://www.itac.org.za/pages/services/trade-remedies/investigation-reports?search=1&k=&rno=661&tno=&submit=>.

171 CR 656: Investigation into Remedial Action in the Form of Safeguard Measures against Increased Imports of U, I, H, L and T Sections of Iron or Non-Alloy Steel, not Further Worked than Hot-Rolled, Hot-Drawn or Extruded, of a Height of 80 mm or More and other Angles, Shapes and Sections of Iron or Non-Alloy Steel, not Further Worked than Hot-Rolled, Hot-Drawn or Extruded Steel Products: Final Determination (1 April 2021) (hereinafter *Structural Steel*) 101 <https://www.itac.org.za/pages/services/trade-remedies/investigation-reports?search=1&k=&rno=656&tno=&submit=>.

6.4.2 Unforeseen Developments

The CRs indicated that the applicants alleged the following unforeseen developments in the different steel investigations:

- The unprecedented steep rate of increase in global steel production capacity (including the subject product);[172]
- The increased and/or unused capacity in and exports from China;[173]
- The significant downturns in economies and the resultant contraction in demand for steel;[174]
- The global overcapacity and oversupply of steel, including increased exports by steel-producing countries;[175]
- The additional investments in new capacity despite the existing over-capacity;[176]
- The imposition of trade remedies (anti-dumping, countervailing and/or safeguard measures) by other countries;[177] and
- The 'confluence of circumstances'.[178]

In response, the participating interested parties argued that:

- The increase in worldwide capacity and imports subsequent to 1994 was not unforeseen, as both capacity and imports increased at faster rates prior to 1994 than thereafter;[179]
- The expansions in China were known at the time of negotiations;[180]

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172 CRs 551 (*Hot-Rolled Steel*) 26; 555 (*Cold-Rolled Steel*) 24; 596 (*Screws*) 28; 620 (*Threaded Fasteners*), 19; 661 (*Bolts*) 19; and 656 (*Structural Steel*) 36.

173 CRs 551 (*Hot-Rolled Steel*) 26, 27; 555 (*Cold-Rolled Steel*) 32; 596 (*Screws*) 29, 36; 620 (*Threaded Fasteners*) 21, 23; 661 (*Bolts*) 19, 21–23; and 656 (*Structural Steel*) 38, 45. See also R Friedman 'Does the Process of Attaining Safeguard Protection Have an Impact on the Mechanism's Contribution to Developmental Success? A case study of the South African steel industry' (BA Hon (International Relations) dissertation, University of Witwatersrand, undated) 13–14.

174 CR 551s (*Hot-Rolled Steel*) 25; 555 (*Cold-Rolled Steel*) 24; 596 (*Screws*) 28; 620 (*Threaded Fasteners*) 21; 661 (*Bolts*) 21–22; and 656 (*Structural Steel*) 36.

175 CRs 551 (*Hot-Rolled Steel*) 25; 555 (*Cold-Rolled Steel*) 24; 596 (*Screws*) 28; 620 (*Threaded Fasteners*) 21; 661 (*Bolts*) 21–22; and 656 (*Structural Steel*) 37.

176 CRs 551 (*Hot-Rolled Steel*) 25; 555 (*Cold-Rolled Steel*) 24, 37; 596 (*Screws*) 36; and 656 (*Structural Steel*) 37.

177 CRs 596 (*Hexagon Screws*) 28; 620 (*Threaded Fasteners*) 22; 661 (*Bolts*) 23–24; and 656 (*Structural Steel*) 47. See also Friedman (n 173), 13 & 16.

178 CRs 596 (*Hexagon Screws*) 28; 620 (*Threaded Fasteners*) 22; 661 (*Bolts*) 23–24; and 656 (*Structural Steel*) 47. See also Friedman (n 173), 13 & 16.

179 CRs 551 (*Hot-Rolled Steel*) 27; 555 (*Cold-Rolled Steel*) 26, 30–31 & 33; and 656 (*Structural Steel*) 41 and 51–52.

180 CRs 551 (*Hot-Rolled Steel*) 27; and 555 (*Cold-Rolled Steel*) 27.

- The alleged unforeseen developments did not relate to the product that is the subject of the investigation;[181]
- The Commission had decreased duties to zero despite increased imports; [182]
- The industry privatised pre-1994, therefore the restructuring of the industry as a result of the bound rate of 10 per cent is inaccurate;[183]
- The competition between the domestic industry and imports was 'much fiercer' in the period prior to the investigation period;[184]
- A mere reference to global overcapacity does not translate into an unforeseen development that resulted in increased imports into South Africa;[185]
- There had been no recent surge in imports;[186] and
- Trade remedies in other countries were not recent.[187]

Worthy of note is that none of the interested parties' raised arguments on unforeseen developments were reflected in the *Threaded Fasteners* report, apart from acknowledging that several interested parties submitted comments.[188] This is concerning as it is unclear whether the comments were considered.

In *Cold-Rolled Steel*, the Commission indicated that the most relevant period to determine an unforeseen development in the form of increased world capacity and production was the period 2002–2007.[189] Bearing in mind that the investigation was only initiated in July 2016 and the investigation period ran from January 2012 to December 2015, it is not clear how events that took place prior to 2007 could be considered for purposes of investigating unforeseen developments or how such events could have resulted in increased imports at least five years later.

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181 CRs 551 (*Hot-Rolled Steel*) 27 and 28; 555 (*Cold-Rolled Steel*) 38; 596 (*Hexagon Screws*), 29; 656 (*Structural Steel*) 40; and 620 (*Bolts*) 24. In CR 555 (*Cold-Rolled Steel*) 38, one party commented that 'using the argument that crude steel production increases and therefore cold rolled steel also increases, is just as relevant as claiming that an increase in milk production can be compared with the production of Roquefort cheese'.

182 CR 555 (*Cold-Rolled Steel*) 26.

183 See CR 551 (*Hot-Rolled Steel*) 28, where it is indicated that the steel producer was listed on the stock exchange in 1989, that is, five years before the Uruguay Round of negotiations was completed.

184 CR 596 (*Hexagon Screws*) 30.

185 ibid 30 and 36.

186 ibid 33, 34 and 36.

187 ibid 34.

188 CRs 620 (*Threaded Fasteners*) 8; and 661 (*Bolts*) 8.

189 CR 555 (*Cold-Rolled Steel*) 31.

In *Threaded Fasteners*, the Commission referred to trade remedy measures that were imposed in other countries in 2004 and 2009, despite the surge in imports only taking place between July 2016 and June 2017.[190] In the same vein, in *Bolts*, third country trade remedies were imposed in 2004, 2009 and 2011,[191] but the surge in imports only took place from July 2017 to June 2018.[192] The Commission failed to undertake any analysis of the trade remedies in any of the investigations, that is, it did not consider the volume of trade impacted by the measures, nor indicated what part of the affected exports was rerouted to South Africa. This was evident in *Structural Steel*, where the Commission noted that in 2017, Canada had found that structural steel imports from various countries had injured its domestic industry, but failed to indicate what measures Canada took and how such measures affected the volume of imports into South Africa.[193]

In *Hexagon Screws*, the Commission stated that the applicant had submitted information on the subject product and had also estimated the composition of the subject product within the total production of the fastener industry in finding that the unforeseen development related to the subject product.[194] However, interested parties commented that although the applicant indicated that the broad product category referred to represented approximately 50 per cent of the total production of the fastener industry, the application did not contain any information to show what percentage of the fastener industry is represented by only fully threaded screws with hexagon heads, which was the subject product.[195] There was nothing in the report to indicate that the parties' view was incorrect, as the Commission did not undertake any unforeseen developments analysis in respect of the subject product.

In respect of both *Threaded Fasteners* and *Bolts*, the applicant alleged that the number of fastener producers in China increased from 1 716 in 1991 to 6 800 in 2001 and about 10 000 in 2014.[196] However, China only became a WTO Member in December 2001, which meant that the increase from 1 716 to 6 800 enterprises was known at the time South Africa concluded its concessions vis-à-vis China. This also meant that it was foreseen that the industry in China would continue to grow at a similar pace as between 1991 and 2001.

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190 CR 620 (*Threaded Fasteners*) 25.
191 CR 661 (*Bolts*) 24.
192 ibid 26.
193 CR 656 (*Structural Steel*) 44.
194 CR 596 (*Hexagon Screws*) 32.
195 ibid 29 (underlining in original).
196 CRs 620 (*Threaded Fasteners*) 20; and 661 (*Bolts*) 20.

Friedman indicates that China shifted towards a more sustainable and less aggressive growth path for steel,[197] which appears to counter arguments that the steel industry made in respect of increased capacity and production in China. Despite this information being in the public domain, the Commission failed to take this into consideration.

In *Cold-Rolled Steel*, the evidence which the Commission relied upon shows that the worldwide steel industry grew by between 5.5 and 7.4 per cent each 5-year period between 1950 and 1970.[198] Notwithstanding this, the Commission found that that South Africa could not have foreseen how fast worldwide crude steel production capacity would expand, where such production increased by between 2.5 and 6.2 per cent per 5-year period after 1994 (with only one period, 2000–2005, higher than 4.5 per cent).[199] Bearing in mind the higher rate of production increased prior to South Africa entering into the obligation, it is not clear on what basis the Commission found that the lower subsequent growth was unforeseen.

In *Structural Steel*, the applicant submitted information on various alleged unforeseen developments. This included information on the steep increase in worldwide steel production capacity, contraction in demand in various countries, trade remedial measures imposed by major steel producing countries, and further steel investment projects underway despite over-capacity.[200] It argued that South Africa could not have foreseen the confluence of circumstances which led to the worldwide oversupply of steel.[201]

Various interested parties remarked on the unforeseen developments,[202] including that most of the data related to 'crude' steel production, rather than the subject product; that the downstream industry that uses crude steel as raw materials is different to the primary production and primary products;[203] that no information had been submitted on unforeseen developments relating to structural steel specifically;[204] that the increase in capacity was not unforeseen, as capacity had

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197 Friedman (n 173) 15.
198 CR 555 (*Cold-Rolled Steel*) 29.
199 ibid 29.
200 CR 656 (*Structural Steel*) 36–38; 41–50. Note that these are the exact same unforeseen developments the industry alleged in *Hot-Rolled Steel* and in *Cold-Rolled Steel*. See CRs 551 (*Hot-Rolled Steel*) para 1.3; and 555 (*Cold-Rolled Steel*) para 1.3.
201 CR 656 (*Structural Steel*) 50.
202 ibid 38–41; 51–53.
203 CR 656 (*Structural Steel*) 38–39.
204 ibid 40.

developed at similar or faster rates prior to 1994 and that there the production of crude steel had increased continuously since 1950;[205] that the increase in imports was a direct result of the applicant's inability to service the market and the fact that it became a competitor against the steel merchants; that the import surges in 2015 and 2016 were foreseen as the applicant terminated production;[206] that there had been no sudden surge in capacity; and that worldwide oversupply had decreased by 19 per cent between 2007 and 2017.[207]

> After considering these comments, the Commission found that the worldwide increase in production caused an oversupply of steel and it could not have been foreseen that 'world steel production (including the subject product)' would have increased as much as it did. It further noted that internation demand, 'including the subject product', had decreased, and that this resulted in steel producing countries increasing their exports to third countries.[208]

Although the applicant, in its comments on the preliminary CR, submitted pricing information on structural steel,[209] and indicated that crude steel had to be reworked before it could be processed into the subject product,[210] there was no evidence in the report that the Commission interrogated this. On the contrary, all of the Commission's references to 'the subject product' were in brackets, as if this was an afterthought.

In *India – Iron and Steel Products*, the Panel found that a significant increase in steel excess capacity, decreased demand for steel in important markets, currency depreciation, and increased demand and prices in India, were not necessarily unforeseen developments, as they could occur as part of normal business cycles, although 'the extent and timing of such changes as well as the degree of their impact on the competitive situation in the market can be unforeseen'.[211] However, *Structural Steel* contains no such analysis.[212] It must be borne in mind that the Appellate Body has indicated that if an investigating authority wanted to apply safeguard measures on different products, it would be insufficient to find increased imports as a result of unforeseen developments that pertain to 'a broad category of products that included the specific products subject to' investigation.[213]

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[205] ibid 41, 51–52.
[206] ibid 51.
[207] ibid 53.
[208] ibid 54–55.
[209] ibid 48–50.
[210] ibid 50.
[211] PR *India – Iron and Steel Products* para 7.90–7.99. See also PR *US – Steel Safeguards* para 10.84.
[212] CR 656 (*Structural Steel*).
[213] ABR *US – Steel Safeguards* para 319 (emphasis added).

As found by the Appellate Body, it is insufficient to find unforeseen developments for different products that formed part of the same investigation. Accordingly, it is also insufficient to find unforeseen developments in respect of a broad category of products that do not form part of the investigation. Such unforeseen developments could also not then be attributed to the subject product without any analysis.

Notwithstanding the above, the Commission found the following to be unforeseen developments in the different investigations:

> *(a) It could not have been foreseen in 1994 that world steel production (including the subject product) would have increased to the levels reported.*[214]

In *US – Steel Safeguards*, the Panel indicated that the investigating authority must illustrate that the unforeseen developments relate to the 'specific product(s)' covered by the investigation. The published report must further include 'specific factual demonstrations' of the unforeseen developments that led to increased imports in respect of each specific product.[215] In most of the steel safeguard investigations, the Commission did not have *any* information on the subject product and it merely referred to the subject product in brackets.

> *(b) The growth of fasteners production in China, the growth of exports from China, and the slowdown of China's economy could not have been foreseen.* [216]

Among others, the applicant alleged – and the Commission never indicated a contrary finding, indicating its tacit agreement – that China's economy grew 'at an average of approximately 10 per cent every year over the past three decades', but that growth had slowed to around 7.3 to 7.5 per cent between 2013 and 2015.[217] However, official figures indicated that China's economic (GDP) growth was less than 10 per cent in 21 of the 30 years from 1972 to 2001, when China became a WTO Member.[218] This included four years during the Uruguay Round of negotiations,

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[214] CRs 551 (*Hot-Rolled Steel*) 26; 555 (*Cold-Rolled Steel*) 40; 596 (*Screws*) 39; and 656 (*Structural Steel*) 54.

[215] PR *US – Steel Safeguards* para 10.44 (footnote omitted, emphasis added).

[216] CRs 551 (*Hot-Rolled Steel*) 26; 620 (*Threaded Fasteners*) 24; 661 (*Bolts*) 25; and 656 (*Structural Steel*) 54.

[217] CRs 620 (*Threaded Fasteners*) 21; and 661 (*Bolts*) 21–22. Note that CR 620 (*Threaded Fasteners*) 23 indicates that China's GDP grew by at least 10% '*every* year for three decades' (emphasis added). It has already been indicated that this information is inaccurate.

[218] World Bank, 'China GDP 1960–2024' <https://www.macrotrends.net/countries/CHN/china/gdp-gross-domestic-product> accessed 30 January 2023.

as well as six years between the conclusion of the Uruguay Round and when China became a WTO Member seven years later. By the time China became a WTO Member, South Africa had information on Chinese production and export volumes at least until 2000, which was when South Africa concluded its obligations in respect of China. Therefore, South Africa could not argue that it could not have foreseen that China's capacity would have increased the way it did subsequent to 1994, or that its growth would have slowed as alleged.

(c) Trade remedies imposed by various institutions.[219]

Trade remedy actions by third countries cannot generally be regarded as unforeseen, as they are specifically provided for in GATT and in three WTO agreements. In both WTO disputes in which trade remedies were challenged as unforeseen developments, the panels found that the investigating authority had to do something more than merely indicate that third countries had imposed such remedies. In *US – Safeguards on PV Products*, the Panel indicated that the USITC had not simply referenced third country trade remedies, but had also pointed out the 'rapid changes in the global supply chains and manufacturing processes' that immediately followed the imposition of the trade remedy measures, as well as the significant increase in global capacity of CSPV production.[220]

Likewise, in *EU – Steel Safeguards*, the Panel noted that the EU not only referred to the number of trade remedies in general, but also demonstrated 'the unprecedented and increased number of such measures taken by third countries' and the trade diversion caused thereby.[221] However, in the steel investigations the Commission merely pointed to the trade remedies in third countries several years earlier and failed to indicate how or why they could be regarded as unforeseen developments.

It is unclear how essentially the same unforeseen developments could be applied to investigations initiated as much as four years and three months apart and for sometimes substantially different products, bearing in mind that safeguard measures are 'emergency' measures, and that any surge in imports must be so sudden, sharp, significant and recent as to cause or threaten serious injury to the domestic industry.[222]

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219 CRs 620 (*Threaded Fasteners*) 24; 661 (*Bolts*) 25; and 656 (*Structural Steel*) 54.
220 PR *US – Safeguards on PV Products* para 7.27.
221 PR *EU – Steel Safeguards* para 7.110.
222 ABR *Argentina – Footwear (EC)* para 131.

6.4.3 GATT Obligations

The CRs on the basic steel investigations indicate that South Africa had bound the duties on hot-rolled and cold-rolled steel at 10 per cent;[223] and that South Africa had committed to binding its duties on fasteners (including bolts) 30 per cent.[224] As regards structural steel, the Commission indicated that South Africa had bound its duty on 'cold-rolled steel' (that is, a product irrelevant to the investigation) at 10 per cent ad valorem.[225] Although *Structural Steel* indicated that the Commission had analysed the effects of this (10%) obligation,[226] the report did not contain any evidence of such analysis.

Most of the reports set out the tariff bindings on the subject products and in this respect conform to the requirements under Article XIX of GATT 1994.[227]

6.4.4 Increased Imports as a Result of Unforeseen Developments and GATT Obligations

To determine whether imports increased as a result of unforeseen developments and GATT obligations, three questions must be answered: First, were there unforeseen developments and GATT obligations? Second, was there an increase in imports that meets the requirements of the WTO? Third, was the increase in imports the result of the unforeseen developments and the GATT obligations? The first question was considered above.

Based purely on statistics indicated and not considering whether such increase in imports complied with WTO requirements,[228] there were significant increases in imports – at *some* stage of the investigation – in all the steel investigations.[229] However, the Commission found that the increase in imports in *Structural Steel* did not meet the WTO requirements.[230]

The focus in this section is on the third question. In *Hot-Rolled Steel* and *Cold-Rolled Steel*, the Commission indicated that the 'effect' of the tariff bindings was the restructuring of the

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223 CRs 551 (*Hot-Rolled Steel*) 24; and 555 (*Cold-Rolled Steel*) 23.

224 CRs 620 (*Threaded Fasteners*) 18; and 661 (*Bolts*) 18.

225 CR 656 (*Structural Steel*) 54.

226 ibid 36.

227 CR 555 (*Cold-Rolled Steel*) 22 sets out the applied duties, but does not indicate the bound rate.

228 See for example ABR *Argentina – Footwear (EC)* para 131. The issue of whether the increased imports met the requirements under the WTO will be analysed in a separate article.

229 CRs 551 (*Hot-Rolled Steel*) 30–33; 555 (*Cold-Rolled Steel*) 41; 596 (*Hexagon Screws*) 40; 620 (*Threaded Fasteners*) 25–27; and 656 (*Structural Steel*) 56; 63–67.

230 CR 656 (*Structural Steel*) 63 and 73.

domestic industry.[231] However, this did not speak to the question of what led to the increase in imports. Thus, the Commission answered the wrong question. No attempt was made to link the unforeseen developments or the GATT obligations to the increase in imports, with the unforeseen developments taking place 'over the ensuing two decades' from 1994,[232] yet the unbundling of the industry took place in 2001.[233] The surge in imports was in 2013. It is not clear how unbundling that took place 12 years earlier could have resulted in increased imports, or how increasing global capacity and surplus over 'two decades' could only have caused an increase in 2013.

In *Cold-Rolled Steel*, where the investigation period was from 2012 to 2015, the Commission placed emphasis on the 'more prominent' global steel over-supply from 2002 to 2007,[234] that is, a period ending five years before the base year of the investigation. Further reference was made to an increase in Chinese shipments in 2015 (with emphasis on May 2015),[235] although the surge in imports into South Africa took place in 2013.[236] It also indicated that several countries introduced trade remedies and increased normal customs duties in response to global overcapacity, and that it was expected that increased imports would 'increase dramatically' in the near future owing to the closing of these other markets.[237]

This was the closest the Commission came to indicating the link between any unforeseen developments and increased imports, yet it still failed to interrogate the volume of world exports affected by such measures and the actual volumes diverted to South Africa, especially as this came two years after the surge of imports. It appears that the unforeseen developments were linked to possible future increased imports, rather than actual increased imports.[238]

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[231] The industry was privatised pre-1994, therefore the restructuring of the industry as a result of the binding rate of 10 per cent is inaccurate. See for example CR 551 (*Hot-Rolled Steel*) 28, where it is indicated that the steel producer was listed on the stock exchange in 1989, that is, five years before the Uruguay Round of negotiations was completed.

[232] CR 551 (*Hot-Rolled Steel*) 25.

[233] ibid 29.

[234] CR 555 (*Cold-Rolled Steel*) 31 and 35.

[235] ibid 36.

[236] ibid 41.

[237] ibid 37.

[238] ibid.

In *Screws*, the Commission merely pointed to various developments resulting in worldwide excess supply of the product, but never linked those developments to increased imports into South Africa.[239] The report further contained a statement by the applicant that

> in creating a causal link between the unforeseen development and the increase in imports, it must be noted, that providing an analytical breakdown of the link would not only be extremely difficult, expensive and overly tedious, it would be highly speculative and inaccurate, as there exists no single global framework of statistics, especially on individual items and external effects on their production, distribution, costs, etc. Such an approach would consist of almost exclusively making assumptions without merit … [240]

However, there is no obligation on the applicant to undertake such analysis; the obligation is on the investigation authority. Without undertaking such analysis it cannot make a finding, based on 'objective evidence',[241] that the unforeseen developments resulted in the increased imports.

With regard to the GATT obligation, in *Screws*, the Commission indicated not only that the bound rate was 30 per cent and that this 'obligation […] prevented an increase in the customs duty', but also that the 'increase in the customs duty [to 30 per cent] did not have a significant impact on the volume of imports'[242] and that 'import volumes after the imposition of the duty in March 2017 did not decrease, and instead continued at levels higher than in March 2017'.[243] Although it could have been stated more clearly, it is submitted that this is sufficient to indicate that imports increased as a result of the GATT obligation in the form of a bound rate, as a duty at the maximum level was insufficient to deter increased imports.

In *Threaded Fasteners*, the Commission stated that the measures the US had imposed on steel products in 2018 'might' impact trade patterns of fasteners 'globally' and that affected exporting countries would have to find new markets for their products which 'might' include South Africa. [244] This statement was clearly based on speculation, rather than on any analysis, and related to the global impact, rather than the impact on South Africa. The report further

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239 CR 596 (*Hexagon Screws*) 39.
240 ibid 31.
241 Article 4.2(b) of the Agreement on Safeguards.
242 CR 596 (*Hexagon Screws*) 25.
243 ibid 28.
244 CR 620 (*Threaded Fasteners*) 24.

indicated that Canada imposed anti-dumping and countervailing duties against 'certain carbon steel fasteners and certain stainless steel fasteners'[245] (without indicating whether or to which extent it included the subject product) from China and Chinese Taipei in December 2004, and that the US had imposed anti-dumping duties on 'steel threaded rod' (which forms but a small proportion of the subject product) in February 2009. There was no indication how these trade remedies resulted in increased imports into South Africa between July 2014 and June 2018, which was the investigation period.

Although the report indicated that the unforeseen developments and South Africa's GATT obligations 'led to the surge of imports of the subject products',[246] there was nothing in the report that actually linked the unforeseen developments found or the GATT obligations incurred to the increased imports.

In *Bolts*, the Commission found that 'the growth of Chinese fastener market' [sic]; growth of Chinese exports; slowdown of the Chinese economy and contraction in demand together with unavailable unused capacity and the trade remedies imposed by various countries were events that could be regarded as unforeseen developments, which led to the surge of imports of the subject product. [247] The trade remedies referred to were imposed in 2004, 2009 and 2011, yet the investigation period ran from July 2016 to June 2019. No analysis linked any of the unforeseen developments to the increase in imports, nor did the Commission link the increase in imports to the tariff concession under GATT 1994.

Finally, in *Structural Steel*, the Commission indicated that South Africa bound its customs duty on cold-rolled steel at 10 per cent ad valorem. [248] The report further indicated that once the duty was increased from zero to 10 per cent, imports decreased by 75 per cent over a period of two years.[249] Although the report contained no analysis to show whether such duty was sufficient to protect the industry, the Commission terminated the investigation.

In summary, it is submitted that the Commission failed to link any increase in imports to the unforeseen developments and GATT obligations in any of the investigations.

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245 ibid 22.
246 ibid 24.
247 CR 661 (*Bolts*) 25.
248 CR 656 (*Structural Steel*) 54.
249 ibid 56.

7. Conclusion

The Commission has significant experience in trade remedies and has now concluded nine safeguard investigations. However, its analysis of unforeseen developments has fallen short of the standard set by the WTO Appellate Body and Panels. The Commission often considers information relating to information for product groups significantly wider than the scope of an investigation, and although it normally states the relevant *applied* duty structure, it often fails to indicate the *bound* duty structure, that is, the GATT obligation. The Commission also fails to connect the unforeseen developments and GATT obligations to the increase in imports, often finding that unforeseen developments caused (or resulted in) the increased imports despite several years separating the developments and the increased imports.

These are serious flaws that could lead to affected countries declaring a WTO dispute against South Africa on issues which would be difficult to defend, and third countries could also immediately retaliate against South Africa safeguard measures as these measures do not conform to the provisions of the Agreement on Safeguards.[250]

It is submitted that the Commission needs to undertake a deeper analysis of the unforeseen developments and, especially, how such developments result in increased imports into South Africa. Thus, it is not enough to show that global over-capacity exists, but it must also be shown how such over-capacity resulted in increased imports into South Africa. On the record of evidence contained in the various reports, it is submitted that the Commission would not have been able to establish this link in most instances, simply as a result of the significant lag between the timing of the unforeseen developments and the increased imports.

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