국제학석사학위논문

Analysis on the Legal Conflicts of WTO Safeguards Jurisprudence

세이프가드 분쟁 판례의 법적 문제점 분석

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이 시 은

Analysis on the Legal Conflicts of WTO Safeguards Jurisprudence

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ABSTRACT

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On-going trade protectionism movements led by the United States go against the years of trade world's efforts to promote economic growth through trade liberalization. Due to current turmoil protective situation, the major trade scenes and rules are expected to go under possible changes. Safeguard measures have been in the center of attention since the United States revived the safeguard system by adopting the measure as one of trade policy strategies to protect their domestic industry. Accordingly, the implementations and the attempts to implement the safeguard measures have surged over a couple years. These increases are noticeable considering that for the past twenty years, the safeguard system had been technically abandoned after contentious rulings of WTO dispute settlement body in the late 1990s.

The purpose of this thesis is to study the controversial issues of the safeguard system and to understand how the WTO jurisprudence caused major

countries who had used safeguard measures for decades to abandon the measure. This thesis seeks its reasoning in the Panel and the Appellate Body reports of the six WTO safeguards dispute settlement cases adopted from late 1990s to early 2000s. Different legal reasonings of the Panel and the Appellate Body and their distinct rulings established a legal impediment by failing to give a clear guidance on how to apply a valid safeguard measure to member countries. The main analysis proceeds as follows. First, this paper studies the contradictory rulings of the Panel and the Appellate Body on each provision of the Agreement on Safeguards. Second, the distinction of the Panel's understanding and the Appellate Body's rulings are demonstrated respectively and elaborated how it evolved over time through the different cases. In the conclusion, this thesis suggests the future prospects of safeguard system under the WTO surveillance along with the problems the WTO dispute settlement body is facing.

Key words: Safeguards, WTO Dispute Settlement Body, GATT XIX, Agreement on Safeguards

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Chapter I.

Introduction

1.1 General Background and Motivation

Recent turmoil situation in the trade world has caused agitations of many World Trade Organization (WTO) Member countries. Since the General Agreement on Tariffs and Trade (GATT) period, participating countries of multilateral trade negotiation rounds have progressively put efforts to promote the liberalization and growth of international trade. Contrary to historic achievements, current conflicts among the major countries like the United States and China insinuate that the trade world is going toward the opposite direction, the protectionism. This trade protectionism trend was initiated by the United States. It started during the Obama administration and the President Trump ignited the fire and spread the movement across the borders. As a means to protect domestic industries, Trump administration revived the safeguard measures which the United States have neglected for almost twenty years after losing all the initial dispute settlement cases in the WTO. Accordingly, the 'WTO Agreement on Safeguards' (hereinafter "Safeguards Agreement") has been attracting the attention, and the resurrection of this abandoned system has

brought up the issues regarding safeguards system that has been overlooked for years.

During GATT years, safeguard measures had been predominantly utilized by developed countries such as US, EU, Canada and Australia. On the contrary, after the early rulings of WTO safeguard cases, major countries technically have discarded this trade remedy measure and developing countries have been the main users for the past 20 years, until recently. This trend has changed drastically since the President Trump reinitiated the utilization of the measure. The graphs below show the number of safeguards investigation initiated each year. The decreasing trend in safeguard investigation initiation since 2014 has changed since last year mainly due the 'Trump Effect.' If this tendency of trade protectionism continues, a domino effect could emerge that even more countries will try to take advantage of safeguard system as an emergency import restriction to protect their own domestic markets. When EU and other major countries start imposing safeguard measures, there is a possibility that safeguard could be a major protection tool in the near future. In this regard, more scrutinized research and analysis on this new surging component of trade protectionism is deemed essential to alleviate the tension in the international trade scene.

Figure 1. Safeguard investigations initiated under the WTO system (as of 22/10/2018)

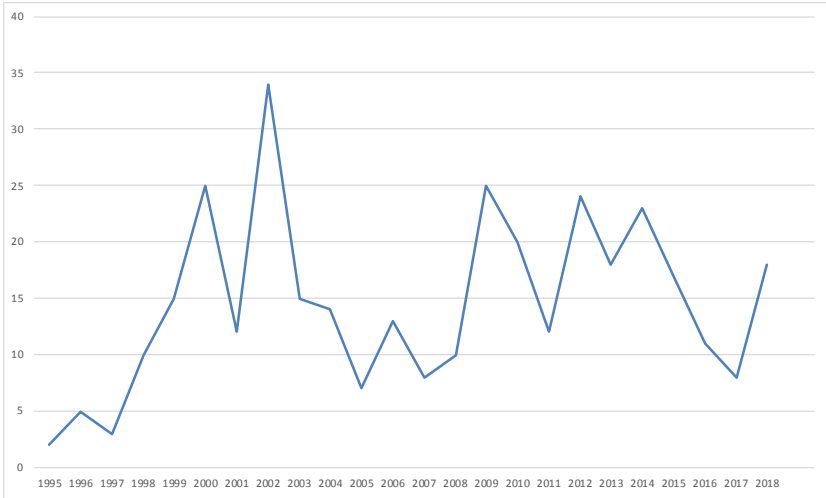
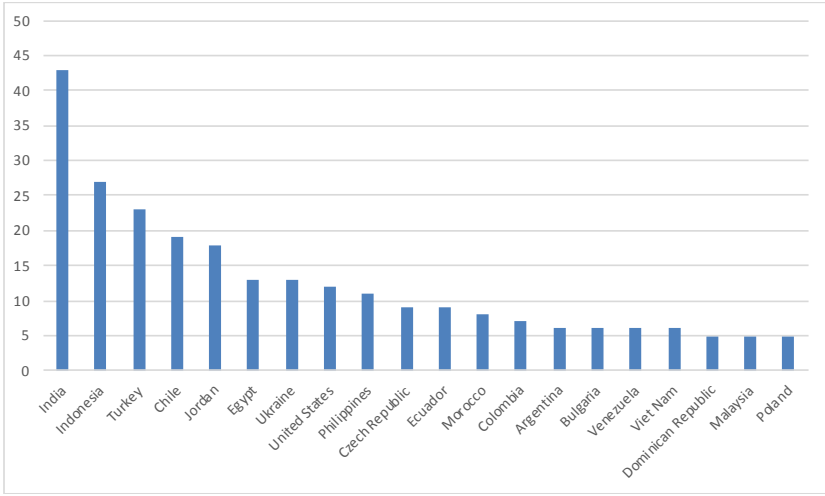


Figure 2. Top 20 countries: Initiations of safeguard investigations (as of 22/10/2018)



1.2 Purpose and Structure of the Study

The verbiage of the Agreement on Safeguards (Safeguards Agreement – SA) has contributed to confusions and different interpretations of main articles by the Panel and the Appellate Body (AB), accordingly, led to distinct decisions between the two WTO adjudicating parties. Ambiguities of the current disciplines in the SA has caused uncertainty regarding the proper application of the measure. Without a clear text and consistent rulings that provide proper guidelines on how to comply to the rules and apply valid safeguard measure, the WTO members may not take a risk to implement the measure. The purpose of this paper is to learn major controversies existed under the current structure of safeguard system. To understand the issues regarding safeguard system, this paper will focus on two aspects. First, past WTO safeguards dispute settlement cases will be examined to analyze the distinct rulings between the Panel and the AB. In the earlier rulings, the AB contradicted the Panel's decision on most of the main provisions which contributed to major controversies of safeguard disputes. Different rulings will be compared and elaborated by each provision. Second, the interpretations of the agreement by the Panel and the AB will be examined and how their understandings of the articles had been chronically elaborated in different cases. The Panel is deemed to have more contextual and practical understandings of the provisions, while the AB's rulings were based

on active legal interpretations. Their understandings and rulings of each provision at issue will be studied to reach such conclusion. Also, the reasonings for their conclusions had evolved and elaborated in the later cases. It pays attention to how those elaboration had been conducted.

This paper proceeds as follows. In the first chapter, general background and motivation for this study will be suggested. In the first part of the second chapter, overview of safeguard system including a brief history and characteristics of the measure will be discussed. In the second part, key legal elements of SA will be studied. These key elements will be incorporated in the chapter three where the legal conflicts of WTO safeguards jurisprudence will be analyzed. After studying the contradictory rulings of the Panel and the AB, their interpretations of the provisions with more elaborations will be demonstrated respectively in chapter 4. On basis of the findings of this paper and the previous literatures, chapter 5 will suggest the future prospects of safeguard system and the possible solutions for the discussed issues.

Chapter II

Safeguard System

2.1 Overview of Safeguard System

The WTO was established to improve the welfare of the WTO member states through creating a thriving international trade system that facilitates free trade.[1] While free trade provides economic benefits for member countries, at the same time, they are under political pressure to protect domestic industries and enhance national interests by restricting increasing importation. The Safeguards Agreement (SA) under the WTO was negotiated to grant member countries an 'escape clause' from all the mandates to trade liberalization, and to answer internal demands of national governments' interests. Safeguard measures are always allowed to be implemented temporarily by the WTO member countries as emergency actions in forms of quantitative restrictions or increased duties higher than bound rates.[2] When first discussed, the principal objective of the safeguards negotiations was to substitute grey area measures

[1] World Trade Organization (WTO), "Overview of the WTO," accessed May 9, 2019, https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm
[2] World Trade Organization (WTO), "Agreement on Safeguards," accessed May 9, 2019, https://www.wto.org/english/tratop_e/safeg_e/safeint.htm

such as voluntary export restraints which basically has an open-ended duration and to establish a formal legal discipline to protect troubled domestic industries.

Historically, safeguard measures first emerged in the United States Reciprocal Trade Agreement of 1942 with Mexico[1], then the Executive Order by President Truman stipulated safeguard systems for international trade agreements.[2] Later, this "escape clause" adopted in the GATT Article XIX and allow contracting countries of trade concessions to withdraw or modify their duties when increased imports caused or threaten to cause serious injury to a domestic industry. This clause was subsequently negotiated during the Uruguay Round which created the SA. The SA is an expansion and modification of GATT Article XIX.[3] SA came into effect in 1995 along with the inception of the WTO.

The GATT and WTO provisions allow certain kinds of "administered protection" to give members opportunities to escape from their concession under the special circumstances without re-negotiating the agreements.

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[1] Agreement on Reciprocal Trade, December 23, 1942, US-Mexico, Article XI, 57 Stat. 833, 845-866: "If, as a result of unforeseen development and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the prevent such injury."

[2] see Executive Order No 9832 of February 25, 1947, 3 CFR 624 (1947)

[3] Yong-Shik Lee (2005), "Safeguard Measures in World Trade: The Legal Analysis", Kluwer Law International, p.5.

"Administered protection" includes trade remedy measures such as anti-dumping measures, countervailing duties, and safeguard measures. The AB in *United States – Line pipe* mentioned that safeguard measures are extraordinary remedies compared to the other two trade remedy measures which is applied temporarily only in emergency situation, as in the form of import restriction, regardless of the existence of an unfair trade action on the exporters' side. In this respect, safeguard measures could be imposed against the WTO members who practice fair trade and limit their advantages of trade concessions.[1] On the other hand, antidumping measures and countervailing duties are applied to counteract unfair and illegal trade practices. Also, when applying, they target selective countries or particular companies and an imposing country is required to prove material injury or threat thereof. Regarding these two trade remedies, no compensation needs to be consulted. On the other hand, safeguard measure should be implemented on MFN basis with non-selective targets, and the existence of serious injury must be proved for the implementation.

SYKES (2003) suggested the three perspectives toward the employment of safeguard measure.[2] First view considers safeguard system as an inefficient

[1] The Appellate Body Report, *United States – Line Pipe*, para.80

[2] Sykes, Alan O. (2003). "The Safeguards Mess: A Critique of Appellate Body Jurisprudence," World Trade Review 2, p. 285.

protectionism which simply leads to a proliferation of excessive protection. Second, safeguard could alleviate political pressure of trade negotiators by providing protection for domestic industries. Third, the violations of provisions found in the dispute settlement rulings has little significance in regard of the prolonged dispute settlement process. National governments may still adopt the measures temporarily while the dispute resolution is in the process. This temporary opportunity has put advantages for safeguard measures over other devices such as voluntary restraints. SYKES (2003) also provided the positive economics of safeguard measure that this temporary protection imposes comparatively modest political costs on trading partners and lightens the burdens trade officials who are responsible for the unceasing obligations to trade liberalization.

2.2 Key Legal Elements

2.2.1 “Unforeseen Developments” Clause

GATT Article XIX which contain “unforeseen developments” clause was the first safeguard provision in the international trade agreement. It was first included as an escape clause in a working proposal for the Charter of the

International Trade Organization (ITO)[1] and the US – Mexico Agreement. It was later adopted in the GATT Article XIX. Article XIX provide the general conditions for the application of a safeguard measure, however, it does not provide specific and substantive guidance on procedural requirements for the application. The verbiage of the article caused confusions for both importing countries and exporters, as well as the WTO judiciary parties. The confusion regarding this provision led to the contradictory rulings of the Panel and the AB of the WTO, and GATT Article XIX has become one of the most contentious issues in the safeguard dispute cases. Still, there is no agreement on continuing applicability of "unforeseen developments" clause along with the SA under the WTO. In the dispute settlement process, Article XIX was interpreted in relation to SA Article 2.1 which both set out the general requirements for the application of a safeguard measure.

The meaning of the "unforeseen developments" was first provided in *Hatter's Fur* case during the GATT period. The Working Party in *Hatter's Fur* interpreted the term "unforeseen developments" as situation occurring after the tariff concession which would have not been expected when the concession was

[1] United States Suggested Charter, Dept. of State Pub. No. 2598, Article 29, p.22 (1946). 1934 trade act. Executive Order No. 9832, 3 C.F.R. 624, 625 (February 25, 1947). Inclusion of the escape clause was the US priority.

negotiated.[1] In the WTO dispute settlement rulings, the AB ruled "unforeseen developments" as a prerequisite for applying a safeguard measure even though SA Article 2.1 which provide the general requirements for the application do not contain "unforeseen developments" clause. The AB in *Korea – Dairy Safeguards*, interpreted the term "unforeseen developments" under Article XIX indicates that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected."[2]

While trade experts generally agree that the omission of Article XIX in the SA was intended to follow prevalent practices of the contracting parties back then,[3] and they did not consider "unforeseen developments" clause as a legal requirement.[4] The Preamble of the SA and Article 8.3 also affirm that the SA includes all legal requirements, therefore no external obligations are needed. Additionally, the provision is too ambiguous to be an objective legal requirement[5], and the requirements demonstrated under Article XIX do not

[1] Hatter's Fur, GATT doc. GATT/CP/106, Para. 9 (adopted by the Contracting Parties on October 22, 1951)
[2] The Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Para. 86
[3] Cliff Stevenson, "Are World Trade Organization Members Correctly Applying World Trade Organization Rules in Safeguard Determination?", Journal of World Trade 324-327
[4] M. Trebilcock and R. Howse, The regulation of International Trade, 2nd ed. Routledge, 1999, P.228
[5] Lee,Y.S, Critical Issues in the Application of the WTO Rules on Safeguards, Journal of World Trade (2000), 131-147

seem of practical use.[1] Despite disagreements and objections of academia and experts, the ruling of the AB has not been changed and seem to be applied in the future cases, giving the WTO members the obligation to demonstrate the existence of unforeseen developments prior to applying a measure.

2.2.2 Increased Imports

Safeguard measures can be applied only when the existence of unexpected increased imports is found. According to SA Article 2.1, those unforeseen increases of imports must cause serious injury or threat thereof to domestic industries that produce like or directly competitive products in order for measure application. These requirements had been adopted from GATT Article XIX.[2] According to Article 2.1, an increase could be either absolute or relative, however, the level of an increase in imports must be severe enough to justify an emergency remedy action. The definition of 'increase' in imports has caused controversial discussions. In the WTO dispute settlement cases, the AB concluded that the increase in imports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and

[1] Lee,Y.S, Destabilization of the Discipline on Safeguards? – Inherent Problems with the Continuing Applicability of Article XIX after the Settlement of the Agreement on Safeguards (2001) 35 Journal of World Trade 1235-1246
[2] See Paragraph 1(a) of the GATT Article XIX.

qualitatively, to cause or threaten to cause serious injury."[1] This textual and qualitative ruling made it difficult for the WTO members to apply a valid safeguard measure.[2] This ruling lacked the guidelines for specific time frame and the amount of increase required for applying the measure. Through the discussions in several dispute cases so far, it has been concluded as follows. First, the time frame of increased imports must reflect the overall investigation period rather than isolated periods. Second, the fluctuations of increase and decrease must be minor enough not to influence the overall increasing trend. Also, there could be more focus on an increase in the recent period if necessary.

2.2.3 Parallelism

The term "parallelism" has been frequently discussed in safeguards jurisprudence. However, under the Safeguards Agreement, there is no direct expression of this term. Rather, it is implied from the text of Article 2.2. According to Article 2.2, all safeguard measures must be applied non-discriminatorily, following the MFN rule of the WTO. The conflicts occurred when imports from the members of free trade areas or customs unions had been exempted from safeguards application. The question is whether it is a valid

[1] The Appellate Body Report, Argentina – Footwear Safeguards, Para. 8.31
[2] Jones (2004)

measure to exclude imports from member States of free trade areas or customs unions. For example, under the NAFTA (North America Free Trade Agreement) Implementation Act, a NAFTA country is not allowed to apply a safeguard measure against the imports from the NAFTA member countries unless certain requirements are met.[1] A safeguard measure must be based on the serious injury investigation, and the scope of imports for injury investigation and the scope of imports for safeguard application must be consistent. In the WTO safeguards dispute cases, the Panel and the AB ruled that this consistency called "parallelism" is required regardless of the existence of free trade areas or customs unions. On the contrary to the SA, GATT Article XXIV provides that a member of a customs union is authorized to exempt imports from other members from applying a safeguard measure if injury investigation is based on imports from non-member countries only. GATT Article XXIV is used to support the claims of the United States in the *United States - Line Pipe Safeguards* case, and the Panel also agreed that Article XXIV provides a legal defense for the exclusion among member countries of a customs union.[2]

[1] Section 311(a) of the NAFTA Implementation Act requires the Commission to find whether imports of the article a NAFTA country, considered individually, account for a substantial share of total imports and imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports. A NAFTA country can apply a safeguard measure to other NAFTA member countries only when conditions stipulated above are met.

[2] Panel Report, United States – Line Pipe Safeguards, Paras.7.135 – 7.163

So far, it is not clear whether the elimination of duties and regulations under Article XXIV extends to other special circumstances such as safeguards application. Regarding Article XXIV issue, the AB has not ruled any definitive conclusion, however, it stated that the discrepancy between the scope of serious injury investigation and the scope of safeguard application could only be justified only if the measure satisfies the conditions set out in Article 2.1. Despite the requirements of GATT Article XXIV, safeguard application must prioritize the MFN rule of the SA. Undermining the agreement which completed after taking years of debates would cause more confusion regarding constituting a valid safeguard measure in accordance with the SA.

2.2.4 Serious Injury and Causation

Serious injury constitutes a major investigation and implementation process in the SA. Safeguard measure is applied in emergency situation to prevent and remedy serious injury or threat of serious injury.[1] The subjective definitions of serious injury and threat of serious injury stipulated under the SA have caused major controversies in the WTO safeguard disputes. Although the SA tried to improve the objectiveness of safeguard application process by

[1] SA Article 4.1(a) defines "serious injury" as "a significant overall impairment in the position of a domestic industry." Article 4.1(b) defines "threat of serious injury" as "serious injury that is clearly imminent, in accordance with the provisions of paragraph 2."

listing out particular injury factors under Article 4.2(a) to base the injury investigation, it is not plausible to completely remove the arbitrariness of the agreement. The issues regarding serious injury and causation will be discussed precisely in the next chapter. In several cases including *Argentina – Footwear and United States – Line pipe*, issues such as injury factor determination, adequate explanation for injury determination, methodology for injury assessment, and test for causation have been discussed. The causation has been one of the most controversial issues, particularly due to the contribution of multiple causal factors to the serious injury. The applying member has a responsibility to conduct a separate examination of causal factors other than increased imports. This separate identification of different causal factors is such a burden which significantly difficult even if it is not impossible at all.[1] Also, according to the AB's decision in Argentina – Footwear Safeguards, it is required to demonstrate how "unforeseen developments" have caused the injurious effect on domestic industry. So far, the analytical test for this demonstration has not been provided, therefore, members are not eligible to conduct any evaluation regarding unforeseen developments and serious injury

[1] Henry K Horn and Petros C. Mavroidis (2003) emphasizes the importance of adopting quantitative tests for the causation determination.

causation. When it comes to serious injury and causation in the SA, there are many issue left to be discussed further in the future for more clarifications.

2.2.5 Investigation and Notification

In this chapter, two procedural requirements of the SA, investigation and notification for a safeguard measure will be discussed. The requirements of investigation are explained under Article 3. According to Article 3.1, a safeguard measure could only be applied following the precedent investigation by the competent authorities of the applying member country. The results of investigation must be open to public and all related parties and all these interested parties could submit their views and evidences on whether the safeguard application could be justified and would meet the public interest. During the investigation, the national authorities are obligated to examine all pertinent facts and information. Also, a report that includes the findings and reasoned conclusions of the investigation shall be published. Article 3.2 supports the protection of confidential information. This provision protects the sensitive business-related information of the domestic industries that injuries might be caused by disclosing such information. Unless considered parties authorized the disclosure in a summarized form, the competent authorities redact such information from the investigation reports. This protection of key

business information is necessary, however, unavailability of certain information created conflicts between parties as undisclosed data could not be reviewed or verified. Also, this confidentiality could undermine the transparency and fairness of the investigation process. In some cases, for example, in *United States – Line Pipe Safeguards*, the review of certain confidential information was required for more objective assessment of related facts. Article 3.2 poses restraints in requesting further information which prohibits efficient evaluation and verification of the dispute. Regarding the investigation period, this provision does not specify the amount of the period the investigation should cover or how long should be the investigation itself. The investigating body is responsible for deciding the duration. There is an agreement that the investigation period should be long enough to precisely examine the changing conditions of domestic industries, which is normally three years or more. Article 3 which stipulates the rules of investigation needs more detailed procedural requirements to reduce confusions and provide clearer guidance for the application.

The procedural requirements regarding a safeguard measure notification is stipulated under Article 12. This provision defines the timing and contents of notification and it also requires the applying countries to provide notifications to the Committee on Safeguards before the actual application of a safeguard

measure. Notification is the crucial procedural element of a safeguard application. All interest parties needs to be notified of planned safeguard measure in a timely manner in order to understand the on-going application process and to prepare for the possible consequences. Also, the timely notification will secure the transparency of the investigation and application procedures. According to Article 12, notifications must be made immediately in three stages when; 1) initiating serious injury investigation; 2) finding serious injury caused by increased imports; 3) deciding to apply or extend a safeguard measure. However, the stipulated timing guidance, "immediately", has been causing certain issues due to inevitable delays such as administrative works. So far, the legal bodies of the WTO have not provided any specific guidance regarding the immediacy standard of notifications even though it considered the immediacy as the rights of the other WTO members since a safeguard measure is applied toward all exporting members irrespective of its source. Therefore, all members have the rights to be informed of the progress of each stage. Also, to minimize the existing controversies regarding the timing issue, the specification of a time limit for notifications will be necessary.

Article 12.2 explains the required contents of notifications. Regarding the contents, there have been conflicts between imposing members and exporting members. Exporting countries would prefer to gather as much

information as possible in order to prepare the potential counterplans. On the other hand, imposing members will try not to disclose all related information before deciding the final measure. Also, requiring an overwhelming amount of information would cause an extra burden which eventually leads to the delay of notifications. The definitions of the contents listed under Article 12.2 are not clear as well. For example, the range of "all pertinent information" is not provided. Regarding the evidence of serious injury, the Panel and the AB disagreed on whether it must be included in the minimum contents for notifications. The Panel ruled that it would be desirable to contain sufficient information that is useful to interested parties.[1] On the contrary, the AB believed that the injury factors should be examined in accordance to Article 4.2(a).[2] It is still not clear how much information should be included in the notification.

2.2.6 Application of Safeguard Measure

The SA, unlike GATT Article XIX, specifies the detailed procedural requirements for a safeguard measure application. Article 7 stipulates the general guidelines such as durational limit, extension, re-application and mid-

[1] The Panel Report, *Korea – Dairy Safeguards*, Para. 7.127
[2] The Appellate Body Report, *Korea – Dairy Safeguards*, Para. 108

term review. Article 7.1 provides that the maximum period for a safeguard measure application must not be longer than four years. Article 7.2 provides that the extension of a safeguard measure is allowed once for up to four years only if the continuation of a measure is deemed necessary to remedy or prevent serious injury when the domestic industry is actually adjusting from the measure. When extending an existing safeguard measure, the additional investigation must be done. Including preceding provisional measure and once-allowed extension, the total period of a safeguard measure should not exceed eight years according to Article 7.3. However, developing countries are eligible to utilize safeguards up to ten years. When extended, a measure cannot be more restrictive than the existing protection level, and it should be liberalized continuously at regular intervals. Once a safeguard measure is applied, at least two years of non-application period should be provided before the re-introduction of a measure with regard to the identical product. The midterm review is required to evaluate the situation for a safeguard measure that lasts longer than three years. Based on these procedural guidelines, a valid safeguard measure must be proportionate to prevent or remedy serious injury of domestic industry. The appropriate protection level should be considered as well as injury adjustment plan and liberalization schedule. However, the guidance for the determination of an appropriate and valid safeguard measure is not provided in

the SA, except the minimum quota level stipulated under Article 5.1. Therefore, the applying members are responsible for making a decision regarding the form and extent of the measure. Considering import restriction measures including safeguards sacrifice the domestic economic welfare[1], it is desirable to take a minimalist approach when applying a safeguard measure.

[1] Dominick Salvatore (2004) *International Economics*, 8th ed. John Wiley and Sons, Inc., pp.235-242, 273-276

Chapter III.

Legal Conflicts of WTO Safeguard Jurisprudence

The primary purpose of safeguards system is to achieve market integration by protecting domestic industry from a surging importation. Safeguards is crucial and integral element to eventual market liberalization. In order to utilize this system effectively, WTO members, as well as WTO ruling bodies should have clear understandings of what SA conveys and how to operate this system thoroughly. However, there are conflicts between the panel and the appellate body on the understandings of safeguards working mechanism. A number of literatures suggested that the panel has more practical and better interpretations of the agreement and decisions on how safeguards system should work. This might be one of the reasons why AB reforms should be considered. Since the AB has a higher authority and importance on their rulings, the expertise and professionalism of the AB rules should be improved. It is critical issue the rulings for this trade remedy issues are separated significantly.

In this chapter, the contradictory decisions between the Panel and the AB will be examined. Such different interpretations and rulings have caused critical controversies among WTO members which has led major countries to

abandon the measure for decades. It is not an ideal situation that two WTO ruling bodies have different legal interpretations of the agreement. By studying past WTO safeguards dispute settlement cases and their reversed rulings, I expect to learn major safeguards provisions on issue and possible rectifications on the quarrels raised.

3.1 GATT Article XIX:1(a) – Unforeseen Developments

The "Unforeseen development" clause is one of the most contentious constituents in safeguards disputes. During the GATT period, this legal predicate in Article XIX:1(a) had been regarded unpragmatic and had become nullified. Such inutility of this conceptual wording, therefore, was excluded during the Uruguay Round when the final WTO Safeguards Agreement was completed. In its first WTO dispute settlement, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98 (1999), the Panel concluded that "unforeseen developments" requirement contained in GATT Article XIX has no additional legal obligations, and it rather simply explains why such measure may be needed.[1] The Panel believed WTO members have no obligation to demonstrate "unforeseen developments" to legitimatize their application of safeguards measure. It examined the relationship between the

[1] Panel Report, *Korea – Dairy Safeguards*, Para. 7.42

GATT Article XIX and the SA Article 2.1[1] and argued that the omission of the "unforeseen developments" clause from Article 2.1 was intended to nullify the independent legal effect of the provision.[2]

However, the AB developed a different perspective. It reversed the Panel's understanding that GATT Article XIX:1(a) does not have a formal congruence with WTO Safeguards Agreement. The AB quarreled with the reasoning of the Panel and contended that SA Articles 1 and 11.1(a) require any safeguards measure imposition under the WTO system must be compatible with all WTO Agreements. It emphasized a "single undertaking" rule of the WTO Agreement that the member should comply with both the GATT and the SA concurrently such that all obligations are cumulative.[3] The AB extended its reasoning further to the working party report in Hatter's Fur case during the GATT period[4]. In this line of reasoning, the AB concluded that safeguards measures should be applied consistently with the SA and the provisions of Article XIX of the GATT 1994, therefore the competent authorities should

[1] Ibid. Para. 7.40
[2] Ibid. Para. 7.47
[3] Appellate Body Report, *Korea – Dairy Safeguards*, Paras. 74-77
[4] The working party report of Hatter's Fur case stated that '"unforeseen developments" should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated' (Ibid. Para. 89). However, this case also supported the Panel's reasoning in *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R (1999), which confirms the non-enforcement of the "unforeseen development" clause.

demonstrate the compliance with both of them. It elaborated that the clause does not require additional conditions to apply a safeguard measure, but it rather describes "certain circumstances" must be demonstrated as a matter of fact for a valid application.[1] However, this standard of the AB that a "factual circumstance which has to be demonstrated as a matter of fact" did not elucidate the difference between an "independent condition" and a "factual circumstance." In its first important ruling for a safeguards dispute, the AB fully revived the dormant "unforeseen developments" clause of GATT Article XIX:1(a), however, it failed to provide a coherent explanation of the specific requirements of this provision.[2] Also, it lacked a clear guidance regarding the compatibility of GATT Article XIX with the SA.

In the next safeguards dispute, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121 (1999), despite the earlier contradictory rulings of the AB, the Panel retained its reasoning from *Korea – Dairy safeguards* case. In this case, it added a precondition that if a safeguard measure conforms to all requirements of the SA, it is also consistent with the GATT Article XIX:1(a), and the Article does not impose independent legal

[1] Ibid. 83-85
[2] See SYKES (2003) for examples of detailed requirements

obligations.[1] The AB again reversed the Panel's conclusion and reiterated its earlier findings of *Korea – Dairy Safeguards*. In this case, the AB interpreted GATT Article XIX:1(a) and SA Article 2.1 to refute the Panel's reasoning regarding "express omission" of "unforeseen development" clause, on which the Panel relied in reaching the conclusion.[2] The AB opined that if this clause had been excluded deliberately from the SA, it must have been explained in the agreement. Since the reason why this clause was not incorporated to the SA have not been elaborated, the AB reasoned that all the relevant provisions should be considered harmoniously when applying a safeguard measure.[3]

In the subsequent safeguards dispute cases, the Panel adopted the precedent rulings of the AB regarding "unforeseen developments" clause and elaborated the reasonings for their decisions. The Panel of *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177,178 (2001), concluded that the U.S. violated the GATT Article XIX as it failed to demonstrate the existence of unforeseen developments in the factual circumstances.[4] The Panel articulated that in the context with SA Article 3.1, the competent authority, in this case the

[1] Panel Report, *Argentina – Footwear Safeguards*, Paras. 8.49, 8.69
[2] Ibid. Para. 8.59
[3] Appellate Body Report, *Argentina – Footwear Safeguards*, Paras. 85-89, 97
[4] Panel Report, *United States – Lamb Safeguards*, Para. 7.18

ITC, must contain in its report a *reasoned conclusion* or a *description or demonstration* of the existence of unforeseen developments during dispute settlement proceedings.[1] The Panel concluded that the ITC failed to fulfill demonstrate unforeseen developments as a matter of fact as required by GATT Article XIX.[2]

The AB agreed to the Panel's final conclusion, but in different articulation. Since Article XIX puts forth no guidance on when, where or how the demonstration of unforeseen developments should be done, the AB put more focus on the "logical connection" between the requirements in Article XIX and the factual circumstances, such as unforeseen developments.[3] In this regard, the AB opined that the ITC report must contain the existence of unforeseen developments, and as ITC report lacked the related explanation, the safeguard measure has not been applied in consistence within the meaning of GATT Article XIX:1(a).[4] The AB requires the WTO members to demonstrate unforeseen developments and their conformity to the Article XIX:1(a) prior to the application the safeguard measures.

[1] Ibid. Paras. 7.25-29
[2] Ibid. Paras. 7.32-45
[3] Appellate Body Report, *United States – Lamb Safeguards*, Para. 72
[4] Ibid. Para. 73

Issues regarding the "unforeseen development" clause had been more elaborated in *United States – Definitive Safeguards Measures on Imports of Certain Steel Products,* WT/DS248,249,251,252,253,254,258,259 (2003). In this case, the competent investigating authority officially identified unforeseen developments in its report for the first time. Nonetheless, the Panel found that there is insufficient evidence to link stated "not foreseen developments" to the particular increased imports into the U.S.[1] The Panel extended a violation of GATT Article XIX:1(a) to SA Article 3.1, and the AB extended the violation further to SA Article 4.2(c). The Panel interpreted GATT Article XIX:1(a) and SA Article 3.1 correlatively and put emphasis on the "reasoned and adequate" explanation of the relationship between the unforeseen developments and increased imports causing serious injury to the relevant domestic producers for "each safeguard measure at issue".[2] The Panel found that the ITC failed to provide reasoned and adequate explanation and to demonstrate as a matter of fact that the unforeseen developments resulted in increased imports, which violated both GATT Article XIX and SA Article 3.1.[3]

[1] Panel Report, *United States – Steel Safeguards*, Para. 10.135
[2] Ibid. Paras. 10.121-134, 10.44
[3] Ibid. Paras. 10.145-150

The U.S. argued that the "reasoned and adequate" explanation required by the Panel is not an explicitly requisite finding from the SA and the authorities should pay more attention to the "logical basis" for the conclusion.[1] The AB disagreed with this argument and observed that SA Article 4.2(c) requires a prompt publication of information from the investigation illustrated in Article 3. The AB reasoned that Article 4.2(c) elaborates the conditions of Article 3 and the term "pertinent issues of fact and law" in Article 3.1 refers to unforeseen developments in Article XIX. In this regard, Article 3.1 requires the ITC's demonstration of unforeseen developments in connection with Article 4.2(c).[2] Therefore, the AB rejected the U.S. claim to disregard explanation requirement is not consistent with SA Article 3.1.[3]

The U.S. also appealed the Panel's finding that the separate analysis of unforeseen developments should be done for each product subject to a safeguard measure. The Panel reasoned that unforeseen developments must result in increased imports of the product at issue, not a broad category of products.[4] The U.S. argued that Article XIX neither defines the particular analysis method nor necessitates respective unforeseen developments on each

[1] Appellate Body Report, *United States – Steel Safeguards*, Para. 282
[2] Ibid. Paras. 289-290
[3] Ibid. Para. 291
[4] Ibid. Para. 306

product.[1] The AB objected to the U.S.' appeal and upheld the Panel's decision[2], however questioned the characterization of the Panel's conclusion that the "complexity" of the unforeseen developments cited to by the ITC "called for a more elaborate demonstration and supporting data that that provided by the USITC."[3]

3.2 Safeguards Agreement Article 2.1 – Increased Imports

In Argentina – Safeguard Measures on Imports of Footwear, WT/DS121 (2000), the Panel found the EC argued that Argentina violated SA Articles 2.1 and 4.2(a) by failing to demonstrate either an absolute or a relative increase in imports.[4] The EC criticized Argentina's "end-point-to-end-point" analysis which ignored the overall trends throughout five-year investigating period.

The Panel of *United States – Definitive Safeguards Measures on Imports of Certain Steel Products*, WT/DS248,249,251,252,253,254,258,259 (2003) found a lack of a reasoned and adequate explanation on the ITC's determination regarding the existence of increased imports, within the meaning of Article 2.1, of five specific steel products. Regarding three of these products

[1] Ibid. Para. 312
[2] Ibid. Para. 323
[3] Ibid. Paras. 320-322
[4] Panel Report, *Argentina – Footwear Safeguards*, Para. 5.145

(CCFRS, hot-rolled bar, and stainless-steel rod), the Panel opined that the ITC's explanation of its conclusion on the importation in increased quantities despite the decreased imports of three specific products at the end of the investigating period, is not sufficient. Furthermore, the ITC failed to demonstrate factual basis for supporting the relative increase in imports of the products at issue in terms of domestic production. In this respect, the Panel concluded that the U.S. violated SA Article 2.1 and 3.1. In reaching its conclusion, the Panel considered the magnitude of the decrease in the latest period, and the sharpness and the extent of the increase in the early investigation period. In the appeal, the U.S. complained that the Panel focused more on the decreases in the recent period, not giving the same weight of consideration to the increases existed beforehand.

The AB rejected the U.S. challenge and stated that the Panel reached the proper conclusion. In the context of examining the absolute increase in imports of three products, the AB reasoned that data represents the latest period of investigation is of higher importance[1] and *trends* in imports[2] over the investigation period are required to be demonstrated in order to justify the general increase in imports even after integrated with the decrease in the later

[1] Appellate Body Report, *US – Lamb Safeguards*, para. 138.
[2] Appellate Body Report, *Argentina – Footwear Safeguards*, para. 129 requires competent authorities to examine trends in imports.

period. In the analysis of the relative increase in imports, the hot-rolled bar was examined separately, with the distinguished reasoning from the Panel. After analyzing the data contained in the ITC report, the AB concluded that the report, in fact, provided the relevant support for the determination of increased imports, while it failed to provide an explicit explanation on the relative increase of imports proportionate to domestic production. The AB agree with the Panel's final conclusion, although with dissimilar reasoning.

The imposition of each safeguard measure on the tin mill products and stainless-steel wire had been determined based on the affirmative findings of three Commissioners who had applied different like product definitions. For tin mill products, the affirmative findings by three out of six ITC Commissioners were based on different product categories.[1] The Panel stated that these three alternative analysis cannot be reconciled due to their different findings on like product categorization, and pointed out that the ITC failed to provide a reasoned and adequate explanation regarding this inconsistency in its conclusion, which led to violations of SA Article 2.1 and 3.1. The U.S. argued that the three

[1] Four of the six ITC Commissioners defined tin mill products as a separate and distinct product category, while the other two as part of the larger CCFRS category. One out of four who treated tin mill products as a separate product category reached an affirmative finding, and three reached a negative finding. Two Commissioners who considered tin mill products as part of the CCFRS category reached an affirmative conclusion (Appellate Body Report, U.S. – Steel Safeguards para.407-408)

Commissioners' findings were reconcilable without breaking the SA provisions, and the determination of increased imports is valid so long as at least one analysis complies with the SA.

The AB agreed to the U.S. claim, considering that different grouping definitions does not necessarily indicate mutual exclusiveness. The AB believed, a determination supported by various explanations could be justifiable under Articles 2.1 and 4. The issue at hand is whether a reasoned and adequate explanation for the ITC's determination is contained in the report, not the reconciliation. The AB noted the views of three Commissioners had been examined separately and each Commissioner's finding could be the ITC's 'single institutional determination.' The AB argued that the Panel erred in reviewing the multiple findings separately in the context of parallelism. However, the AB did not explore in any detail the nature of separate opinions in judicial proceedings. In respect to stainless steel wire products, the identical reasoning and decision had been applied.

3.3 Safeguards Agreement Article 2.2 – Parallelism

Argentina – Safeguard Measures on Imports of Footwear, WT/DS121 (1999) had first crucial rulings regarding customs union and "parallelism". The Panel observed that according to Article 2, there should be no discrepancy

between the scope of imports subject to safeguard investigation and the scope of imports subject to the application of a safeguard measure.[1] It concluded that Argentina violated the MFN and parallelism requirements incorporated in SA Article 2.2 by including imports from its customs union, MERCOSUR, during the investigation of serious injury, while excluding safeguard application to the imports of MERCOSUR.[2] In the examination, the Panel considered Argentina imposed a safeguard measure as a customs union "on behalf of a member State" in accordance to SA Article 2, footnote 1.[3] Argentina challenged the Panel's finding with the reasoning under GATT Article XXIV:8, in which elimination of duties among the members of custom union is demonstrated.[4] The Panel disregarded Argentina's claim by analyzing numerous aspects[5], for example, the empirical evidences that show the imposition of safeguard measures in between member States of intra-regional trade agreements.[6]

The AB agreed to the Panel but discorded with the legal reasonings on which it reached the conclusion. The AB opposed the Panel's reasoning

[1] Reasonings provided in Panel Report, *Argentina – Footwear Safeguards*, Paras. 8.84-87
[2] Ibid. Para. 8.102
[3] Ibid. Paras. 8.77-83
[4] Ibid. Para. 8.93
[5] Ibid. Paras. 8.96-100
[6] Ibid. Para. 8.101. On the contrary to this ruling, the Panel in *United States – Line Pipe Safeguards*, gave permission to U.S. to account on GATT Article XXIV as a defensive argumentation against Safeguards Agreement Article 2.2. However, the Appellate Body found this issue of little practical relevance and negated its legal effect.

regarding Article 2.1, footnote 1 and stated that the safeguard measure imposed had nothing to do with the customs union or MERCOSUR. It observed that the Argentine government implemented the measures as an individual WTO member State, based on their investigation of injurious effects from imports on domestic producers. [1] Next, the AB identified that Argentina had not formally raised its argument under GATT Article XXIV for their defense, and the Panel's analysis had also not been conducted comprehensively.[2] In these aspects, the AB reversed the Panel's legal logic for the conclusion.

Selective application for FTA partners is one of the most discussed issues when applying safeguards measure. GATT Article XXIV applicability was one of the major causes for the failure of safeguards negotiation during the Tokyo Round. U.S. also has been changing their position regarding GATT Article XXIV, selective applicability of safeguard measures in different international trade agreements. In NAFTA and USMCA, U.S. allowed the exclusion of FTA contracting parties from the application of safeguard measures. On the other hand, in TPP, U.S. removed the exclusion clause which will cause the surges of import injury. It is contradictory logic of import

[1] Appellate Body Report, *Argentina – Footwear Safeguards*, Paras. 106-108
[2] Ibid. Paras. 109-110

restriction, and raising MFN tariff would be more logical. However, so far, there is no validated and final rulings for parallelism issue.

3.4 Safeguards Agreement Article 4.1 – Definition of Domestic Industry and Serious Injury or Threat Thereof

In the case, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from the New Zealand and Australia*, WT/DS177,178 (2001), the Panel found the ITC's broad definition and grouping of domestic producers in the serious injury examination violated SA Article 4.1(c) and 2.1.[1] The ITC included both lamb *meat* processors and *live lamb* growers in its domestic industry investigation, considering lamb meat and live lambs as like products.[2] The Panel observed that within the meaning of Article 4.1(c), domestic industry only encompasses a producer who actually makes the product at issue. With this interpretation, growers and feeders of live lambs are out of span of domestic industry.[3] The U.S. argued that the term "producers as a whole" in Article 4.1(c) indicates that a producer of raw material or inputs could be part of the industry of directly competitive

[1] Panel Report, United States – Lamb Safeguards, Para. 7.118
[2] Ibid. Paras. 7.46-47
[3] Ibid. Paras. 7.66-71

products.[1] On the other hand, the Panel interpreted this phrase as a specification of quantitative proportion of producers subject to a serious injury investigation.[2] The U.S. also justified the inclusion of live lambs in such aspects that live lambs constitute 88 per cent of the end-product's value, and also live lambs are technically the only input for the end-product, which together show the vertically integrated industry.[3] To refute this argument, the Panel reasoned that such a producer only constitutes a domestic industry when any serious injury or threat of serious injury is transmissible from a final product to a raw material or input. In other words, domestic industry definition is justified only if those industries could be protected under a single safeguard measure. Also, the Panel found the support for its reasoning in the precedent GATT the WTO cases.[4] The previous rulings prohibited vertical integration of industries as well as common ownership.[5] Also, safeguards negotiating parties[6] during Uruguay

[1] Ibid. Para. 7.72
[2] Ibid. Paras.7.73-74
[3] Ibid. Paras. 7.105-108
[4] The Panel in GATT case, *The United States – Definition of Industry Concerning Wine and Grape Products* (adopted by the SCM Committee on 28 April 1992, SCM/71, BISD 39S/436) ruled that grape growers and winery owners constitute mutually exclusive industries. In *Canada – Imposition of Countervailing Duties on Imports of Manufacturing Beef from EEC* (not adopted, SCM/85, dated 13 October 1987), the Panel concluded that manufacturing beef and live cattle are not like products.
[5] Ibid. Paras. 7.101-104
[6] *The Panel Report (WT/DS177,178/R)* – in accordance with Article 32 of the Vienna Convention on the Law of Treaties, the Panel interpreted the records of the Uruguay Round negotiations that extensively discuss the issue on broadening the industry definition. The negotiation groups disagreed to accept any broadening of the industry definitions in the texts of

Round disagreed to approve of broadening the concept of domestic industry. With these reasonings, rejected the U.S. articulation concerning the definition of domestic industry does not align with the Safeguards Agreement.

The AB upheld the Panel's final conclusion with modified reasoning in reaching its conclusion. It examined the meaning of domestic industry within Article 4.1(c) and found that the term "domestic industry" is only valid to the scope of "producers of the like or directly competitive products."[1] In addition, the AB observed SA Article 2.1 explains that a safeguard measure is consistently applied under the circumstances only when an importation of a product causes serious injury to relevant domestic industry that produces like or directly competitive products. This provision, in conjunction with Article 4.1(c), supported the AB to reject the U.S. appeal.[2] The U.S. argued that live lamb should be regarded as a like product of lamb meat based on the facts that show the existence of "continuous line of production" and the inability to segregate the respective sectors considering their vertical integration, along with significant economic interests shared by both industries.[3] The AB observed that this two-pronged analysis of the U.S. has no consistency with

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the Anti-dumping, SCM and Safeguards Agreements, and the relevant provisions remained unchanged from the predecessor provisions in the Tokyo Round Codes

[1] Appellate Body Report, *United States – Lamb Safeguards*, Paras. 83-84

[2] Ibid. Paras. 85-86

[3] Ibid. Para. 89

Article 4.1(c) that since live lambs are not the like products of lamb meat, the U.S. reasonings are all irrelevant to the issue.[1] Regarding the incorporation of the past three GATT panel reports[2], the AB agreed to all of the Panel's reasoning but one aspect of its view regarding *Canada – Beef* case. The Panel referred to the reasoning of *Canada – Beef* case that focused on separability and integration of the production process and based its analysis of whether separate products were included in the production process of lamb meat on it. The AB questioned the Panel's consideration on the segregation and integration issues in production process. The AB believed that when defining a domestic industry, the emphasis of primary reasoning should be placed on the identification of a product itself, not on a stage of production.[3] By regarding live lamb as a like product of lamb meat, the AB concluded that the U.S. failed to conduct a thorough serious injury determination to an appropriate domestic industry, which nullifies the conformity of the safeguard measure to the SA. In this respect, the AB confirmed the Panel's final conclusion.[4]

3.5 Safeguards Agreement Article 4.2 – Serious Injury and Causation

[1] Ibid. Para. 90
[2] *United States – Wine and Grapes*, *Canada – Beef* and *New Zealand – Transformers*
[3] Ibid. Paras. 92-94
[4] Ibid. Paras. 95-96

In the case, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166 (2001), the EC brought up the claim before the Panel that the ITC failed to consider all the relevant injury factors raised by the EC companies in the domestic industry investigation.[1] SA Article 4.2(a) states that all the relevant factors should be investigated by the competent authorities then specifies the examples of the relevant factors. Article 4.2(a) implies that the relevant factors elaborated in this provision, as well as unspecified other relevant factors should all be evaluated.[2] The Panel understood that those unlisted other relevant factors could only be examined when particularly raised by the interested parties.[3] In this case, the Panel found that the ITC evaluated all the listed Article 4.2(a) factors, and in respect to unlisted relevant factors, the interested parties failed to raise the issue clearly before the ITC. Therefore, the Panel concluded that the ITC evaluated both listed and other relevant factors, therefore acted in conformity to SA Article 4.2(a).[4]

[1] Panel Report, United States – Wheat Gluten Safeguards, Para. 8.36. The EC companies argued specifically regarding new entrants, co-products development and imports as 'positive business strategy of certain US producers' The EC also argued that the ITC failed to investigate the relationship between the protein content of wheat and the price of wheat gluten.
[2] Ibid. Paras. 8.38-39
[3] Ibid. Para. 8.69
[4] Ibid. Paras. 8.45, 8.66, 8.77

The EC appealed the Panel's finding, insisting that the relevant factors under Article 4.2(a) extend to all available relevant factors and are not only limited to those listed in the provision.[1] The AB reiterated the previous findings of *Argentina – Footwear Safeguards* that a competent authority is responsible for the evaluation of not only all of the listed 4.2(a) factors, but also of all other factors relevant to the investigation.[2] The AB also considered the duty of evaluation lies on an authority, not on the interested parties even though it believed an unlimited obligation is not applicable in this case.[3] Referring to the terms that indicate "a proper degree of activity" in SA Article 3.1, the AB stated that it is an authority's role to put an effort to actively seek out pertinent information when there is insufficient evidence to justify their claims.[4] In this reasoning, the AB reversed the Panel's interpretation regarding the examination of the relevant factors.[5] However, the AB found that in its report, the ITC clearly provided the facts that demonstrated the relationship between the protein portion of wheat and the price of wheat gluten. Therefore, the AB agreed to the Panel's final conclusion that the ITC acted consistently with Article 4.2(a).[6]

[1] Appellate Body Report, *United States – Wheat Gluten Safeguards*, Para. 48
[2] Ibid. Paras. 50-51
[3] Ibid. Para. 52
[4] Ibid. Para. 53
[5] Ibid. Para. 56
[6] Ibid. Para. 59

In regard to the causation requirement stipulated under Article 4.2(b), the EC argued before the Panel that the ITC's inclusion of factors other than the importation in serious injury analysis violated SA Article 4.2(b).[1] The Panel agreed to the EC's claim and stipulated that other factors that cause serious injury should be thoroughly investigated and properly attributed and should not be considered cumulatively along with increased imports that cause serious injury.[2] In this respect, the Panel concluded that the ITC's investigation methodology failed to evaluate imports exclusively from other factors, especially "over-capacity."[3] By failing to separate the increased imports from other factors, and to demonstrate serious injury attributed by other factors, the Panel found a violation of SA Article 4.2(b).[4]

On appeal, the AB upheld the Panel's conclusion with reversed interpretation. The U.S. argued that the word "cause" in Article 4.2(b) does not require imports in isolation should be sufficient to cause serious injury, and last sentence indicates that other factors simply do not nullify the existing causality between increased imports and serious injury. In its analysis, the AB explained that this provision describes a cause and effect relationship in which increased

[1] Panel Report, *United Sates – Wheat Gluten Safeguards*, Para. 8.119
[2] Ibid. Paras. 8.139, 8.142
[3] Ibid. Para. 8.151
[4] Ibid. Para. 8.153

imports bring about serious injury and does not necessarily implies that increased imports must be the only cause of the serious injury as the Panel determined. Rather, the AB understood Article 4.2(b) signifies other factors could also induce serious injury. The important part is the proper investigation by authorities to separate and discern the injurious effects caused by the different factors. Also, when the different factors together are causing serious injury at the same time, authorities should not attribute injury caused by other factors to injury caused by imports. The AB emphasized that a genuine and substantial causal link between increased imports and serious injury is essential to comply with this provision. The AB found support for its reasoning in Article 4.2(a) which states the evaluation of all relevant factors. It understood those 4.2(a) factors as general economic indicators, not only limited to imports. In the definition of serious injury in Article 4.2(a)[1], the word "overall" implies all relevant factors that should be included in serious injury investigation process. The AB extended its reasoning further to Article 2.1 in which it found two basic elements for causation analysis: import specific factors and general conditions of circumstances related to imports. In other words, both import specific factors listed in Article 4.2(a) and other relevant factors related to "conditions" in the

[1] In SA Article 4.2(a), "serious injury" is defined as "a significant overall impairment in the position of a domestic industry"

domestic industry could be included as long as with proper attribution method is incorporated. The AB disagreed to the Panel's interpretation, however, in regard to the ITC's capacity utilization investigation, it still found a violation of Article 4.2(b) because the ITC failed to properly evaluate and attribute the effects of increased capacity and increased imports. Therefore, it held the Panel's final conclusion.

In *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177,178/AB/R, the identical issue regarding Article 4.2(b) causation requirement from *United States – Wheat Gluten Safeguards* was raised. The Panel upheld the indistinguishable findings from that the importation alone should be the sufficient causation of serious injury. The AB reversed the Panel's conclusion in the same reasoning that what Article 4.2(a) requires is non-attribution not imports as a sole causation of serious injury.

In regard to the ITC's serious injury investigation in the same case, the complainants challenged the ITC's determination without an explicit explanation regarding declines in particular injury indicators. They argued in respect of projections, the time period used, and the evaluation of the data in the process of ITC's investigation. In regard to the time period used, the ITC

gathered data for a five-year period, but in its analysis only evaluated the last one year and nine months for the investigation. The Panel found no error in time period used by the ITC, arguing that by focusing on the recent period, the ITC could base their determination on more quantifiably object facts. With respect to the complainants' argument that data covered by the ITC were not representative of the domestic industry according to Article 4.1(c) and 4.2(a). The Panel observed that the collected data had deficiency and even the U.S. noticed it. Therefore, the Panel found a violation of Article 4.1(c) in that the ITC's data failed to represent a major proportion of the domestic industry which is required by the provision. As a result, the violation extended to SA Article 2.1.

In regard to time period of the data, the AB agreed with the Panel that the most recent data has the highest possibility to indicate the probable situation of the domestic industry in the near future. However, the AB argued that the Panel focused too much on the most recent data in isolation and failed to consider the data for the entire period. The AB believed that the trend in short term period could not reflected the trend in the entire period of investigation. With this reasoning, the AB reversed the Panel's conclusion regarding the selective time period usage by the ITC. With respect to the data's non-representativeness of the domestic industry, the AB observed that no SA

provision specifies any requirement regarding data collection for injury investigation. Rather, it found support from the phrase "evaluate all relevant factors having a bearing on the situation of industry" contained in Article 4.2(a). Applying this standard, the AB stated that the data, along with the relevant factors, must represent domestic industry. In this respect, the AB agreed the Panel's conclusion that the data collected for serious injury investigation failed to represent the domestic industry. However, the AB disagreed with the Panel regarding the violation of Article 4.1(c). The AB argued that Article 4.1(c) simply reads the definition of domestic industry and does not impose no further obligation on the parties. Instead, the AB concluded the ITC acted inconsistently with Article 4.2(a) where it found the support for its reasoning. In this regard, the AB reversed the Panel's final conclusion on the non-representativeness argument.

Korea argued in *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (WT/DS202/AB/R) that when publishing an investigation report, serious injury and threat of serious injury must be evaluated respectively. The Panel agreed to Korea's claim and stated that serious injury and threat of serious injury are

exclusive to each other in that they cannot co-exist at the same time.[1] Article 3.1 requires competent authorities to include reasoned findings on "all pertinent issues" in an investigation report, and Article 4.2(c) necessitates a publication of a detailed analysis. With these reasonings, the Panel found that the U.S. violated Article 3.1 and 4.2(c) by failing to provide separate findings of serious and threat of serious injury in the ITC report.

On appeal, the AB questioned whether this issue establishes the prerequisite for competent authorities in order to apply a safeguard measure. It examined the phrase "cause or threaten to cause" contained in SA Article 2.1. The AB noted the U.S. read this phrase as "either one or the other, or both in combination", while the Panel interpreted as "one or the other", but not "both". The AB thought both could be possible according to the dictionary definition. Regarding definitions of serious injury and threat of serious injury in Article 4.1, the AB proactively interpret the provision. The AB found that requiring to demonstrate these two concepts discretely would lower a threshold for manifesting the precondition to start a safeguard measure. It would facilitate an imposing Member to take this preventive measure only with the proof of a threat of serious injury but have not yet caused actual serious injury. In the

[1] The Panel defined serious injury as "present" and threat of serious injury as "clearly imminent"

AB's perspective, it is not pertinent to assess whether there is serious injury or only threat of serious injury so long as there is at least a threat. Based on this analysis, the AB reversed the Panel's interpretation. It concluded that competent authorities may find serious injury, threat of serious injury, or serious injury or threat of serious injury in combination.

3.6 Safeguard Agreement Article 5.1 – The Application

The EC, the appellant of *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (2000) argued that Korea's application of the safeguard measure violated the first and second sentence of Article 5.1. The EC claimed that Korea failed to consider alternative options in order to prove the best adequacy of the selected measure to fulfill the purpose of the measure stipulated in the provision. Also, the EC found that Korea failed to substantiate the suitability and necessity of the implemented quota according to the requirements of Article 5.1. Korea also failed to collect data for the proper "last three representative years" stated in the provision. In considering a conformity to Article 5.1, the Panel emphasized the totality and restrictiveness of the measure imposed should meet the necessity standard. Additionally, it considered that the applying member is responsible for providing an explicit explanation regarding the conformity of the measure to

the provision. Regarding the requirements of the first sentence of the provision, the Panel found Korea merely describing the measure and listing the relevant factors without discernibly explaining why they select this certain measure to achieve the goals of remedying the serious injury and facilitating adjustment. Based on this reasoning, the Panel confirmed the violation of Article 5.1, first sentence. Regarding the EC's claim that the quota Korea implemented was lower than the average import level of three-year period stipulated in Article 5.1, second sentence, the Panel decided not to examine whether Korea applied the measure based on precise quantitative calculation.

On appeal, the AB considered that a Member imposing a safeguard measure are obligated to demonstrate whether the measure is consistent with the provision. The AB found that the obligations under the first sentence applies to all safeguard measures whether quantitative or other types of measures. In this respect, the AB upheld the Panel's interpretation of the first sentence. However, the AB objected to the Panel's broad finding that Article 5.1 requires reasoned explanation on how the chosen measure is most suitable for achieving the objectives of this provision. The AB believed that only quantitative measure has the obligation to satisfy the "clear justification" requirement in the second sentence. Even though the AB disagreed to the Panel's reasoning of the second sentence, it upheld the Panel's final conclusion regarding the first sentence.

3.7 Safeguards Agreement Article 9 – Developing Countries

In *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,* WT/DS202/AB/R (2002), Korea argued that the U.S. violated SA Article 9.1 by failing to exclude developing countries from the application of the measure. The U.S. claimed that the quantitative quota of 9,000 short tons constitutes 3 percent share of total imports, therefore developing countries should be exempted from the duty accordingly when their imports exceed the stated amount. The Panel rejected the U.S. claim considering the possibility that the stated quota constitutes less than 3 per cent if total imports increase. The Panel focused on express exclusion of developing countries, however, it could not find express exclusion other than Canada and Mexico which are NAFTA member countries. On the basis of this reasoning, the Panel found the U.S. failed to comply with Article 9.1.

The U.S. appealed the Panel's conclusion and argued that based on the expected amount of total imports, the duty exemption of 9,000 ton automatically account for 3 percent threshold stated in Article 9.1. In its examination, the AB found that Article 9.1 does not explicitly require express exclusion of developing countries. However, the AB noticed that as of 1998, the 9,000 tons limit only accounted for 2.7 percent of total imports. Under this circumstance, without specifically expressing the exclusion, developing

countries could be entitled for the duty even when their imports account for less than 3 percent. With its findings, the AB stated that the U.S. did not take the thorough analysis to comply with the Article 9.1. Therefore, the AB upheld the Panel's finding.

3.8 Safeguard Agreement Article 12.1 – Notification

In *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, the U.S. President notified the Committee on Safeguards of its decision to apply the safeguard measure five days after the measure was implemented.[1] The Panel found this timeframe violated SA Article 12.1(c) which requires the immediate notification to apply the final measure. The Panel argued that according to Article 12.1, the notification should take place between the date of decision and the date of final implementation. It reiterated the interpretation of the phrase "immediately upon" by the Panel in *Korea – Dairy Safeguards* which emphasized the matter of urgency in the notification at issue. The Panel considered that the notification of the final safeguard measure must be made before the application of the measure. The Panel also found its reasoning in the

[1] The safeguard measure was applied on May 30, 1998 (effective June 1, 1999) and the Committee on Safeguards received the notification five days later on June 4, 1998

term “proposed” in Article 12.2 that this word implies suggested measure that had yet to be applied. Based on this reasoning, the Panel concluded the U.S. notification of the final measure was inconsistent with SA Article 12.1(c) because the notification was issued after the application of the measure.

On appeal, the AB reversed the Panel’s conclusion. The AB noted that the Panel erred in finding its reasoning from Article 12.2 which imposes additional obligations. For the timing issue, the AB argued that the emphasis should be on the word “immediately” in Article 12.1. The AB found that Panel also noted a five-day delay might be consistent with the urgency requisite, and the EC agreed to this consistency during oral hearing. Also, to be precise, the notification was made on the fourth day after the actual implementation. Based on these findings, the AB concluded that the notification at issue conforms to immediacy requirement contained in Article 12.1(c).

3.9 Safeguard Agreement Article 12.2 – All Pertinent Information

In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy product*, WT/DS98/AB/R (2000), the EC argued that Korea failed to present “all pertinent information” delineated in Article 12.2. The EC interpreted the phrase as a summary form that all information required under SA Article 3 and 4 to implement safeguard measure. The Panel objected to the EC’s

understanding and stated that this phrase means sufficient information that are useful to members in the process of safeguard consultations. The Panel observed that Korea provided sufficient content include relevant evidence demonstrated under Article 12.2. However, the Panel did not complete the analysis on whether Korea violated the provision regarding this issue.

The EC requested the AB to conclude the Panel's analysis to find a violation. The AB found that Article 12.2 gives the examples of "all pertinent information" that members must provide in order to comply with this provision. Also, it rejected the Panel's reasoning that the notifying member is responsible for demonstrate "evidence of serious injury." Rather, the AB found the SA Article 4.2(a) states the requirements to constitute serious injury. The AB confirmed that "all pertinent information" must contain all the required factors listed in Article 12.2 as well as Article 4.2. In this regard, Korea violated Article 12.2 by failing to make a reference to all the listed items under this provision.

Chapter IV.

Comparison of Safeguards System by the Panel and the Appellate Body

In this chapter, the comparison of different understandings of safeguards system by the Panel and the AB will be demonstrated. Technically, the Panel understands the agreement more contextually, while the AB focuses more on the active legal interpretation. WTO Safeguards jurisprudence is controversial due to such contradictory interpretations and rulings by the Panel and the AB. In the dispute cases studied in this thesis, the AB reversed most of the main findings of the Panel. This chapter examines the reasonings of the Panel and the AB respectively, and how their interpretations had been elaborated over time through different dispute settlement cases.

4.1 Safeguards understood by the Panel

"Unforeseen Developments"

Compared to the rulings of the AB in the cases studied above, the Panel has more contextual interpretations of the provisions. In the first rulings regarding "unforeseen developments" stated in GATT Article XIX:1(a), the Panel in *Korea – Dairy Products Safeguards* understood "unforeseen developments" clause does not impose any obligation on WTO members. The

Panel considered there is no conflict between GATT Article XIX:1(a) and SA Article 2.1.[1] It stated that the clause at issue does not require additional conditions for applying any measure, but simply explains why such measure may be needed.[2] The Panel reasoned that to have the explicit obligation for application, "unforeseen developments" standard should have been incorporated into the SA.[3] In the subsequent case, *Argentina – Footwear Safeguards*, the Panel sustained the same stance with the previous decision in *Korea – Dairy Products Safeguards*. In this case, the Panel considered that even though the SA does not override GATT Article XIX, GATT Article XIX must comply with the requirements of the SA provisions. The Panel referred to the similar finding in *Brazil – Coconut* where the AB examined the relationship between the SCM Agreement and the GATT, and stated the SA should be understood as definition, clarification, and modification of previous agreements regarding safeguard measures.[4] In this context, the Panel understood that "express omission" of "unforeseen developments" standard in the SA indicates no legal enforcement of GATT Article XIX:1(a). In the subsequent safeguards dispute cases, the Panel adopted the reversed rulings of the AB regarding

[1] Panel Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, para.7.39
[2] Ibid. Para.7.42
[3] Ibid. Para.7.47
[4] Panel Report, Argentina – Safeguard Measures on Imports of Footwear, Paras.8.50-57

GATT Article XIX. The Panel in *United States – Lamb Safeguards* stated that the serious injury caused by increased imports much be the result of "unforeseen developments,"[1] and the existence of this relationship must be proved to conform to Article XIX. It made "unforeseen developments" clause a prerequisite to apply a safeguard measure, and also applied the publication requirements under Article 3.1 to GATT Article XIX.[2] In *United States – Steel Safeguard*, the Panel followed the previous rulings of the AB that a valid safeguard measures must be in compliance with GATT Article XIX which required the competent authorities to provide reasoned and adequate explanation of "unforeseen developments." It stated that unforeseen developments precondition must be demonstrated separately for each safeguard measure for the specific product. The existence of unforeseen developments should cover for the specific measure at issue not for a broad category of products.[3] The Panel also required the factual demonstration of unforeseen developments in aspect of "when, where and how."[4]

[1] Panel Report, United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Para. 7.8
[2] Ibid. Paras. 7.25-29
[3] Panel Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Products
[4] Ibid. 10.48

"Increased Imports"

"Increased imports" contained under Article 2.1 and 4.2(a) is an important standard in safeguards investigation. The Panel in *Argentina – Footwear Safeguards*, understood that merely comparing the imports of two different time period is not sufficient to examine the whole importation trends during the investigation period. With this "end-point-to-end-point comparison", the Panel stated it is difficult to confirm whether any decrease or increase in imports are temporary. Additionally, the increasing trends over the investigating period must be found. Regarding the import investigation period, the Panel found no specific duration time requirements in the SA.[1] In *United States – Wheat Gluten Safeguard*s, the Panel adopted the rulings of the AB in *Argentina – Footwear Safeguards* that "the increase must be sufficiently recent, sudden, sharp and significant, both quantitatively and qualitatively, to cause or threaten to cause serious injury."[2] In *United States – Line Pipe Safeguards*, the Panel focused on three aspects in increased imports investigation; 1) appropriate methodology, 2) absolute increase in imports, 3) relative increase in imports.[3] The Panel concluded that ITC conducted the investigation with

[1] Panel Report, Argentina – Safeguard Measures on Imports of Footwear, Paras. 8.145 - 147
[2] Panel Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Countries, Para. 8.31
[3] Panel Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, Para. 7.192

appropriate methodologies by examining the overall trend over the five years and six months[1], as well as analyzing imports on a year-to-year basis, and comparing the most recent partial period with prior years.[2] Regarding the investigation period, the Panel emphasized there should be focus on the recent period of imports and the length should be long enough to support proper conclusions.[3] It considered that "recent" imports does not necessarily indicates the period immediately prior to the competent authority's measure determination or at the end of the investigation period. Also, not only recent imports but also the general trends over the entire period of investigation should be analyzed in accordance to Article 4.2(a).[4] In this respect, the Panel regarded that increased imports in the past could constitute increased imports requirement, without presently still increasing imports. In *United Stated – Steel Safeguards*, the Panel compared the duration and the degree of decrease to the sharpness and the extent of the preceding increase to interpret a decreased import in the recent period.[5] Also, the rate of the increase need not to be positive at all points during the investigating period, however, it must be sudden to comply with "unexpected" requirement of GATT Article XIX.[6] With these

[1] The SA does not have specific rules as to the length of the investigation.
[2] Ibid. Para. 7.199
[3] Ibid. Para. 7.204
[4] Ibid. Para. 7.207
[5] Ibid. Para. 10.164
[6] Ibid. Paras. 10.165 - 166

reasonings, in its analysis the Panel focused more on the imports in the preceding period than at the end of investigation period to consider the general trends of movements of imports[1]

"Parallelism"

In respect to 'implied' parallelism requirement in SA Article 2.2, the Panel in *Argentina – Footwear Safeguards* demonstrated the first important interpretation. The Panel understood safeguard measures must be applied irrespective of import sources and on a most-favoured-nation (MFN) basis. Also, the Panel considered that there should be a parallelism between the scope of serious injury investigation and the scope of actual implementation. It stated that a strict interpretation of parallelism standard in Article 2.2 is important given the fact that the SA was established to enforce multilateral control over safeguard system and the measures that escape such control. Also, the Panel noted that the SA is elaborated from GATT principles that emphasized the MFN treatment.[2] A parallelism in relation to GATT Article XXIV in which the WTO members found support to escape MFN application of safeguard

[1] Ibid. Para. 10.175
[2] Panel Report, Argentina – Safeguard Measures on Imports of Footwear, Paras. 8.88-89

measures, in this case the Panel considered GATT Article XXIV did not provide enough legal basis to justify the exclusion of MERCOSUR in safeguards implementation.[1] However, the Panel in *United States – Line Pipe Safeguards* determined that this "free-trade area" provision could be a legal justification that allow U.S. of "limited exception" to exclude NAFTA member countries, which are free-trade area members under GATT Article XXIV from safeguard measures application. In this case, the Panel understood that GATT Article XXIV could act as a defense against the non-discrimination requirement of Article 2.2[2], under certain conditions.[3] In *United States – Steel Safeguards*, U.S. excluded Canada and Mexico pursuant to NAFTA and Israel and Jordan under FTAs from the application of safeguard measures. The issue in this case is the inconsistency between the scope of the determinations where imports from all sources were included, and the scope of the application of the measures where those four countries were excluded.[4] The Panel understood that there must be no gap between the scopes of measures determination and the application. With this reasoning it found that U.S. violated the parallelism

[1] Ibid. Para. 8.101
[2] Panel Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, para. 7.158
[3] Ibid. Para. 7.141. The Conditions of Article XXIV:5(b) and (c); and (2) under Article XXIV:8(b) must be fulfilled.
[4] Panel Report, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, Para. 10.587

requirement by failing to provide the correspondent scopes of determination and application.[1]

"Serious Injury and Causation"

Regarding serious injury causation, the Panel stated that there are three elements of a causation analysis. First, all relevant injury factors must be evaluated adequately, both listed and unlisted factors under Article 4.2, with consideration of the relevance of each factor. Second, the existence of a causal link between increased imports and serious injury on domestic industry must be demonstrated. Lastly, the competent authority must examine whether factors other than increased imports contribute to cause or threaten to cause serious injury. In *Korea – Dairy Safeguards*, Korea evaluated the listed serious injury factors in Article 4.2 as well as three additional relevant factors. Korea argued that they examined all relevant factors, however, the Panel found Korea's analysis and explanation were inadequate.[2] In *Argentina – Footwear Safeguards*, the Panel explained the two requirements of Article 4.2.; an

[1] Ibid. Para. 10.609
[2] Panel Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Paras. 7.78, 7.84

assessment of the existing data and then a full examination of those data.[1] With its reasoning, Argentina violated SA Article 4.2(a) by failing to evaluate all the listed and relevant factors, and providing the data with unexplained discrepancies.[2] Also, it opined that the relevance of the injury factors must be considered. In respect to the existence of a causal link, increased imports and other injury factors, the Panel stated that "an increase in imports normally should coincide with a decline in the relevant injury factors," suggesting that when imports are declining, factors other than imports are causing serious injury on the industry.[3] It emphasized that other factors must be sufficiently examined in order to be accurately identified and properly attributed for any serious injury causation.[4] The Panel noted that actual increase in imports must be demonstrated to prove the existence of current serious injury, and threat of serious injury must be supported by explicit examination and evidence. In *United States – Wheat Gluten Safeguards*, the Panel interpreted 'relevant factors' in Article 4.2(a) as that are "clearly raised before them as relevant by the interested parties in the domestic investigation."[5] Holding this reasoning, authorities have no obligation to take initiatives to evaluate other factors other

[1] Panel Report, Argentina – Safeguard Measures on Imports of Footwear, Para. 8.205
[2] Ibid – Para. 8.277
[3] Ibid. Para. 8.237 - 239
[4] Ibid. Para. 8.267
[5] Panel Report, United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Para. 8.67

than clearly raised before them. In respect to the European Communities claims that imports must occur "under such conditions" as to cause serious injury, the Panel adopted the rulings of *Korea – Dairy Safeguards* and *Argentina – Footwear Safeguards* that the terms "under such conditions" does not mandate authorities for a further legal analysis, but simply constitute as the substance of the causation analysis.[1] Regarding attribution, the Panel noted Article 4.2(a) in relevance with 4.2(b) that increased imports must be demonstrated as to cause serious injury and imports alone must cause serious injury.[2] It emphasized the non-attribution of injury caused by other factors to imports of injury.[3]

4.2 Safeguards ruled by the Appellate Body

"Unforeseen developments"

The rulings of the AB on "unforeseen developments" clause have caused the fundamental problems of the applicability of the GATT and the SA. Regarding GATT Article XIX, the AB gave the exception to the sole authority of the SA. In the first safeguard case ruling, *Korea – Dairy Safeguards*, the AB disagreed to the Panel's finding that Article XIX has no legal obligation and rather emphasized the cumulative application of the GATT and the SA except

[1] Ibid. Para. 8.108
[2] Ibid. Para. 8.139
[3] Ibid. Para. 8.153

in the case of a conflict between the two. Examining SA Article 1 and 11.1(a), the AB argued that any safeguard measure implemented under the WTO agreement must conforms to both GATT Article XIX and the SA.[1] This ruling of the AB brought the old GATT back to life confirmed the alive applicability of GATT Article XIX along with the SA. The AB added that "unforeseen developments" standard requires the demonstration of certain circumstances as a matter of fact even though it does not establish independent preconditions for the application.[2] In the subsequent case, *Argentina – Footwear Safeguards*, the AB kept the unchanged view with its reasoning from WTO Agreement Article II which requires both the GATT and the SA apply equally and are binding on all WTO members harmoniously.[3] Regarding the express guidance of "unforeseen developments", the AB in *United States – Lamb Safeguards* stated that even though there is no explanation on "when, where or how that demonstration should occur," there must be a "logical connection" between the conditions under Article XIX and "circumstances" that must be demonstrated.[4] It also added that the existence of "unforeseen developments" is a pertinent issue of fact and law under Article 3.1, therefore "reasoned conclusion" with

[1] Appellate Body Report, *Korea –Dairy Safeguards*, Para. 77
[2] Ibid. Paras. 83-85
[3] Appellate Body Report, *Argentina – Footwear Safeguards*, Paras. 79-81
[4] Appellate Body Report, *United States –Lamb Safeguards*, Para. 68

logical basis on unforeseen developments must be included in the published report of the competent authorities according to SA Article 3.1.[1] The AB emphasized that the "reasoned conclusions" as well as "detailed analysis," and "demonstration of the relevance of the factors examined" must be included in a competent authority's report to comply with the obligations of both Agreements.[2] In *United States – Steel Safeguards*, the AB stated that GATT Article XIX and the SA must be read as an inseparable package of rights and disciplines with single-undertaking.[3] Also, it applied standard of review requirement that had been required for Article 4.2(a) in *United States – Lamb Safeguards* and *United States – Line Pipe Safeguards* to the obligations under GATT Article XIX and the SA. The AB in *United States – Steel Safeguards* reasoned that since Article 4.2(c) is an elaboration of Article 3 and Article XIX is one of the "pertinent issues of fact and law" under Article 3, Article 4.2(c) also applies to the required demonstration of unforeseen developments by the competent authorities.[4] Also, the AB required the competent authorities to

[1] Ibid. Para. 76
[2] Appellate Body Report, *United States –Steel Safeguards*, Para. 299
[3] Ibid. Para. 275
[4] Ibid. Paras. 289-290. SA Article 4.2(c): The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

demonstrate "unforeseen developments" for each safeguard measure at issue designated for different products.[1]

"Increased imports"

In *Argentina – Footwear Safeguards*, the AB focused on the term "is being imported" contained in Article 2.1. According to this phrase, the AB suggested that "the increase in imports must have been sudden and recent," therefore, the competent authority must put more emphasis on recent period rather than putting the same weight over the whole investigating period. Additionally, the AB explained the phrase "such increased quantities" indicates that "imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury."[2] These additional obligations has no legal basis from the SA or the WTO Agreement, and in this aspect, requiring these additional demonstrations could be regarded as a legal activism conducted by the AB. The AB elaborated on these requirements in United States – Steel Safeguards that the statement "imports must have been recent enough, sudden enough, sharp

[1] Ibid. Paras. 314-319
[2] Appellate Body Report, *Argentina – Footwear Safeguards*, Paras. 130-131

enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury" is about the entire investigative obligation of the competent authority in conformity with the SA and it is a question to be answered by the competent authority along with its other analysis.[1] It also noted that there is no absolute guideline as regards how suddenness, recentness, sharpness and significance of increase could be explained to warrant an 'increase' in the context of Article 2.1, therefore the statement is not required to be evaluated with an absolute standard.[2] In regards to the phrase "in such increased quantities" it analyzed in the prior case, *Argentina – Footwear Safeguards*, the AB considered an end-point-to-end-point analysis could be manipulative. According to the AB, his term does not set the requirement that the level of imports at the end of the investigation period be higher than at some preceding point in time.[3]

"Parallelism"

Regarding the parallelism issue, the Panel and the AB shared the consistent perspective that the imports included in the injury investigation under

[1] Appellate Body Report, *United States – Steel Safeguards*, Paras. 345-346
[2] Ibid. Paras 358-360
[3] Ibid. Para. 356

Article 2.1 and 4.2 should correspond to the imports included in the actual measure implementation. In order to justify the gap between those two scopes of the imports, the AB in *United States – Line Pipe Safeguards* stated that the competent authority must provide "reasoned and adequate explanation" that explicitly establishes the facts in support of their determination.[1] Also, the AB explained the two possible circumstances where GATT Article XXIV defense is available. First is when the imports that are excluded in the serious injury investigation are exempted from the safeguard measure implementation. Second is when the imports that are included in the serious injury determination are exempted from the safeguard measure application, but competent authority proves explicitly with reasoned and adequate explanation that imports outside the free-trade area alone caused serious injury or threat thereof in accordance with Article 2.1 and 4.2.[2] This non-attribution requirement of parallelism had been more elaborated by the AB of *United States – steel safeguards*. The AB stated that imports excluded from the safeguard implementation must be considered as a factor "other than increased imports" according to SA Article 4.2(b), and the injury caused by these excluded imports must not be attributed to the scope of imports included in the safeguard measure.[3] In this respect, the

[1] Appellate Body Report, *United States – Line Pipe Safeguards*, Para. 181
[2] Ibid. Para.198
[3] Appellate Body Report, *United States – Steel Safeguards*, Para. 450

AB required the competent authority to establish explicitly whether there are injurious effects of excluded imports attributed to domestic industry.[1] Regarding the methodological issue of the injury investigation, the AB found that ITC's two separate injury determinations that exclude Canada and Mexico in the first investigation and exclude Israel and Jordan in the subsequent investigation are inconsistent to Article 2.1 and 4.2.[2] The determination must be provided as one single joint determination supported by explicit explanation which imports from sources other than Canada, Mexico, Israel and Jordan fulfilled the preconditions for the safeguard application.[3]

"Serious Injury and Causation"

In U.S. – Steel Safeguards, the AB ruled on non-attribution requirement of Article 4.2(b) that "imports excluded from the application of safeguard measure must be considered a factor 'other than increased imports' contained in Article 4.2(b)," and the possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure. In other words, the competent authority must establish

[1] Ibid. Para. 453
[2] Ibid. Para. 466-467
[3] Ibid. Para. 468

explicitly that injury caused by factors other than increased imports is not attributed to increased imports. Furthermore, the authority must explain how it did not attribute the injurious effects of factors other than included imports to the imports included in the measure.

Chapter V.

Conclusion

The inconsistency of the WTO judicial bodies has caused huge confusions and oppositions of the WTO Members. U.S. even considers the withdrawal of its WTO membership to express its resentment to the WTO jurisprudence of trade remedy cases including safeguards. U.S. ceased to apply safeguards measures after losing four cases consecutively in the early 2000s in which the AB reversed almost all crucial findings of the Panel. Of all the Appellate Body reports adopted between 1995 and 2010, 81% modified the relevant panel reports, 4% reversed them and only 15% upheld them. (update this statistic to the most current one)

Under the WTO system, the decisions of safeguards cases failed to provide satisfactory dispute resolution process. SYKES (2003) addressed that it is not even clear what modifications should be made to current safeguards rules. However, rules negotiations are required to clarify the deficiency of SA texts in order to prevent abusive applications of safeguard measures and possible reversions to extra-legal measures. Currently, members take advantage of the delays in the dispute settlement process, which takes about two years to

complete.[1] (find the average proceedings statistics worldtradelaw.net) This lengthy process is inefficient and inadequate to resolve unjustifiable safeguards cases, especially when considering safeguard is an emergency action that only be imposed temporarily.

In the absence of coherent safeguard system to comply with, members implement temporary measures and withdraw them after the rulings and a 'reasonable time' for compliance with the decision according to DSU disciplines. For example, fast-track dispute settlement process is provided for prohibited and actionable subsidies under the SCM Agreement. With fast-track process, the duration would be half the time of the normal procedure.

On-going rules negotiations contain in DOHA only cover the agreements on antidumping measures and countervailing duties. SA is not even included under renegotiation process. It is our future challenge to rectify and refine the vague verbiage of the SA provisions.

Considering the current situation of the AB, a comprehensive renegotiation of the agreement and dispute resolution process seems impossible to happen in the foreseeable future.

[1] See Dukgeun Ahn (200?), The WTO Trade Remedy System: East Asian Perspectives Restructuring the WTO Safeguard System, P? – to be modified

Adoption of radical protectionist policies by some countries has caused the increase in the imposition of trade remedies measures. Unfortunately, recent trade movements indicate that such protectionist trends is far from being diminished and will even be increasing in the near future. In addition, current situation of the WTO Dispute Settlement System (DSS), especially the Appellate Body condition is contributing to the problem. The appointment of the AB members has been delayed for years, mainly due to refusal of the United States, and now there are only three members working for the WTO disputes. If this blocking of appointing the new AB member persists, the AB will end up with only one member when the second term of two acting members expires in December 2019. Despite some deficiencies, the WTO members should put efforts to improve the conditions of the DSS than abandoning the whole system.

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- Panel Report, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (WT/DS166/R) DSR 2001:III, 779
- Panel Report, United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (WT/DS177, 178/R) /DSR 2001:IX, 4107)
- Panel Report, United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (WT/DS202/R) / DSR 2002:IV, 1473
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국문초록

트럼프 정권 이래 두드러지게 나타나고 있는 보호무역주의 움직임은 무역 자유화를 통해 경제 성장을 촉진하고자 한 세계 각국의 수십년 간의 노력과 협력을 무산시키고 있다. 현재의 혼란스러운 상황으로 인해 기존의 세계 무역 체제는 변화를 겪을 것으로 예상된다. 최근 미국이 세이프가드 제도를 20 여년 만에 다시 채택하면서 무역구제제도 중 하나인 세이프가드 조치가 주목을 받고 있다. 미국은 자국 산업을 보호하기 위한 무역 정책의 하나로 세이프가드 조치를 선택하였는데, 해당 조치는 2000 년대 초반 이후 WTO 분쟁해결제도 판결 이 후 20 여년 간 사실 상 사용이 중단 된 조치이다. 미국의 세이프가드 제도 재도입 이후 세이프가드 조치의 이행 및 시행 시도가 최근 2 년 사이 급증했다. 이러한 증가는 1990 년대 후반에 WTO 분쟁 해결 기구의 판결 논란이 있은 후선진국들이 사실 상 세이프 가드 시스템 사용을 포기 한 것을 고려하면 두드러지는 변화이다.

이 논문의 목적은 WTO 세이프가드 협정 체결 이후 세이프가드 관련 분쟁 해결 절차 상의 논쟁적인 이슈를 연구하고 선진국들이 해당 조치 사용을 중단한 이유를 알아보고자 한다. 이를 위해 1990 년대 후반부터 2000 년대 초반에 채택된 6 차례 WTO 세이프 가드 분쟁 해결 케이스에 대한 패널 및 항소 기구 보고서를 연구한다. 패널과 항소 기구의 서로 다른 법적 추론과 각기 다른 판결은 회원국에 합법적인 세이프 가드 조치를 적용하는 방법에 대한 명확한 지침을 제공하지 못함으로써 법적 장애를 수립했다. 주요 분석은 다음과 같이 진행된다. 첫째,이 논문은 세이프 조치 협정의 각 조항에 대한 패널과 항소 기구의 상반되는 판결을 연구한다. 둘째, 패널의 이해와 항소 기구의 판결에 대한 판별을 각각 설명하고, 시간이 지남에 따라 어떻게 변화해왔는지 상세히 설명한다.

결론적으로, 본고는 WTO 분쟁 해결 기구가 직면하고있는 문제와 함께 WTO 감시 하에 세이프 가드 시스템의 미래 전망을 제시한다.