國際學碩士學位論文

Legality of Selective Safeguards and the Development of FTA Safeguard System in the mega-FTAs era

선별적 세이프가드의 합법성과
거대 다자 자유무역협정 시대 세이프가드 체제의 발전방향

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崔 倫 美

Legality of Selective Safeguards and the Development of FTA Safeguard System in the mega-FTAs era

A thesis presented

by

Yoon Mi Choi

A dissertation submitted in partial fulfillment
of the requirements for the degree of Master
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國際學碩士學位論文

ABSTRACT

Legality of Selective Safeguards and the Development of FTA Safeguard System in the mega-FTAs era

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With an exponential increase of FTAs since 1990s, the rule diversification problem is becoming a controversial issue. Selective safeguard measures that allow the exclusion of RTA partners from applying safeguard actions are one of those controversial issues, because they violate Article 2.2 of the Agreement on Safeguards. The WTO DSB's concept of parallelism was not enough to solve the controversies. Therefore, the first part of this thesis analyzed the three types of selective safeguard rules based on five kinds of global safeguard rules, and argued that GATT Article XXIV can justify selective safeguard measures but not all of them are legal in practice.

The second part of the thesis focused on the new trend of mega-FTAs such as TPP or RCEP, where multiple countries agree to conclude a single FTA. This would lead to

several systemic changes regarding selective safeguards in the FTA safeguard system. First, there will be a growing need for the sophisticated provisions for selective safeguards due to the increase in the violation of WTO rules by selective safeguards and mounting conflicts surrounding selective safeguards. Based on the analysis, the thesis suggested a desirable type of global safeguard rules in the multilateral FTAs. Second, bilateral and special safeguard measures will be increasingly important in the mega-FTAs era.

Key words: FTAs, Selective safeguards, GATT XXIV, mega-FTAs, TPP, RCEP

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CHAPTER 1. Introduction

I. Backgrounds and Motivation

The world trading order after the Cold War can be characterized as a two track system: multilateralism of World Trade Organization (WTO) and regionalism of Free Trade Agreements (FTAs). There has been an exponential increase in the number of FTAs worldwide since the 1990s. However, the rule diversification caused by various FTAs and no relationship settled to resolve the problem made the global trading system more complicated and controversial. One of the controversial issues regarding the rule diversification is the selective safeguard issue. Previous rulings on this issue by the WTO DSB have been unsatisfactory and it needs to be discussed to clarify and develop the FTA safeguard system.

So far, debate about the FTA system has focused on whether it is a 'building block' that promotes trade liberalization, and supports the multilateral trade system, or a 'stumbling block' that distorts free trade and competition to undermine multilateralism. While this debate still continuing, there is a new trend arising in the FTA system. It is called mega-FTAs, since a large number of countries are participating at the same time in a cross-regional trade bloc. The Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP) are the major mega-FTAs now proposed. These mega-FTAs are a form of "regionalism", but at the same time

"multilateralising regionalism"[1] that replaces or harmonizes the existing bilateral FTAs among TPP parties. In this regard, they are even called as a "mini-WTO". Now this trend sheds light on whether this movement will become the chance to solve the rule diversification problem by producing a comprehensive, high quality arrangement that could be a potential stepping stone to the final goal of trade liberalization. Against this backdrop, the current controversial issue of selective safeguard is expected to be continued and may be extended to the mini-WTO system.

II. Purpose and Structure of the Study

Firstly, this study is to analyze whether GATT Article XXIV can justify selective safeguard measures. GATT Article XXIV is not yet clear enough to solve the issue. So, it needs to be interpreted to find a desirable approach. In doing so, this thesis will look into not only the previous legal interpretations by the WTO DSB but also the arguments of prominent scholars in this field. Moreover, it will analyze the actual selective safeguard practices to see whether Article XXIV can be the justification of them in practice and discuss how can selective safeguard measures be *de facto* legalized.

Secondly, this study is to see what would happen regarding selective safeguard measures in the FTA safeguard system with the rise of mega-FTAs era. Access to the

[1] Ann Capling & John Ravenhill (2011) Multilateralising regionalism: what role for the Trans-Pacific Partnership Agreement?, The Pacific Review, 24:5, p.555.

negotiations and texts of TPP is currently impossible due to the secrecy policy among negotiating partners. To overcome the limitation, this thesis will focus on the change in the meaning of selective safeguards in the mega-FTAs era and try to propose a desirable form of global safeguard rules. Moreover, it will discuss the possible systemic change in the FTA safeguard system.

This thesis is organized as follows. In Chapter 1, the backgrounds and motivation of the thesis are suggested. Chapter 2 briefly outlines the WTO Safeguard system. Section 3 suggests three types of selective safeguards based on various global safeguard provisions in the FTAs and the problem of selective safeguard measures. Section 4 underscores that selective safeguard measures can be justified with GATT Article XXIV, but not all types of them are legal in practice. Section 5 focuses on the new trend of mega-FTAs such as TPP and RCEP and discusses the possible shifts in the FTA Safeguards system in regard to selective safeguard measures. Chapter 5 concludes with summary of the former chapters.

CHAPTER 2. WTO Safeguard System

I. Definition and Purpose of Safeguard Measures

The ultimate purpose of the World Trade Organization (WTO) is to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, and allow for the optimal use of the world's resources

through free trade. But at the same time, member countries face internal demand that they should restrict free trade to protect domestic industry and enhance national interest. In other words, the value of 'free trade' often collides with the value of 'national regulatory autonomy' in the WTO system.[2] A Safeguard measure was designed to mediate these two conflicting values and refers to the right of a WTO member to impose temporary tariffs, quotas, tariff-rate quotas or other measures to ensure that its economy or domestic industries do not suffer serious harm from imports and trade concessions.[3]

Safeguard measures are allowed in the WTO system for the following three reasons. First, since trade may improve welfare as a whole but cannot guarantee prosperity for all, safeguards are needed to support the structural adjustment. Second, safeguards are needed as a political safety valve so that national policy makers do not hesitate to pursue a long-term political strategy.[4] Third, safeguards provide a "breathing space" to firms and policy makers so they can take the action necessary to restore competitiveness and efficiency to the industry.

In order to apply a safeguard measure in the WTO system, a Member should satisfy following three conditions. First, product is being imported in such increased quantities,

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[2] 고준성 외. 2006. 『국제 경제법』, 서울: 박영사

[3] Mitsuo Matsushita, Thomas J. Shoenbaum and Petros C. Mavroidis, The World Trade Organization, Oxford University Press, 2006. P.438.

[4] See, the "Political Rationale" for safeguards in Sykes, Alan O. (2003). "The Safeguards Mess: A Critique of Appellate Body Jurisprudence," *World Trade Review* 2, p. 285.

absolute or relative to domestic production[5] due to unforeseen development.[6] Second, such import cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[7] Third, there should be a causal link between the increase in imports and serious injury or threat thereof.[8]

II. Non-selectivity of WTO Safeguard Measures

The Non-discrimination rule is a well-established basic principle of the WTO system. This rule is incorporated as a Most-favored Nations (MFN) Treatment Principle, being a basic principle over the international trade of products and services. GATT Article I stipulates as follows:

> GATT Article I: With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity* granted by any contracting party to *any product originating in or destined for any other country* shall be accorded *immediately and unconditionally* to the like product originating in or destined for the territories of all other contracting parties. (Highlight added)

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[5] Agreement on Safeguards, Article 2.1

[6] General Agreement on Tariffs and Trade 1994 Article XIX

[7] Agreement on Safeguards, Article 4.1 (a), (b)

[8] Agreement on Safeguards, Article 4.2 (b)

MFN Treatment principle aims at preventing the distortion of the competitive opportunities. Politically, it serves to prevent trade disputes among nations. Economically, it serves to promote free trade by enhancing the effective use of the world resources and protecting the value of tariff concession. Safeguards measures are designed to promote free trade by temporarily allowing higher trade barriers but they should also be applied in a non-discriminatory manner in order to minimize the distortion of competition. In this regard, during the GATT period, where no non-discrimination principle existed for safeguard measures, the panel applied GATT Article XIII, which stipulated non-discrimination principle of quantitative restriction, to safeguard measures.[9] Afterwards, Article 2.2 of the Agreement on Safeguards introduced MFN Treatment principle when applying the safeguard measure. Article 2.2 of the Agreement on Safeguards stipulates as follows:

> Safeguard measures shall be applied to a product being imported *irrespective of its source*. (Highlight added)

According to the Article 2.2, safeguard measures shall be imposed in a non-discriminatory manner.

[9] Panel Report, *Norway-Restriction on Imports of Certain Textile Products*, L/4959-27S/119, 1980, para.14.

CHAPTER 3. FTA Safeguard System and the Issue of Selective Safeguards

I. Bilateral and Global Safeguard Measures

FTA safeguard rules do not have a uniform style, but two kinds of safeguard rules are found in common in FTAs. First one is 'bilateral safeguards or intra-regional safeguards' that only constituent territories can invoke each other when the industry of one party is injured by the increased imports from other constituent territories. Second one is 'multilateral safeguards or global safeguards' that a constituent territory can take against all other WTO Members according to the WTO safeguard rules. So, in practice, an FTA member State suffering seriously from increased imports can take either a bilateral safeguard measure or a global safeguard measure. The issue of selective safeguard measures arises because FTA member States impose global safeguard measures according to various kinds of their own FTA global safeguard rules while there is no established principle on the relationship between the WTO and FTA safeguard system.

II. Various Types of Global Safeguard Rules in RTAs

WTO Working paper classifies five types of global safeguard rules found in 232 RTAs notified to the GATT/WTO up to 31 December 2012: 1) No reference to global safeguards in the RTA legal text 2) Retention of rights under GATT Article XIX and the Agreement on Safeguards 3) Exclusion of imports from the RTA partner without

conditions 4) Exclusion of imports from the RTA partner with conditions 5) Possible exclusion of imports from the RTA partner.[10]

[TABLE 1] Types of global safeguard rules in 232 RTAs

Treatment applied to the RTA partner in a global safeguard action	**Number of RTAs**
No Reference to global safeguards in the RTA legal text	117
Retention of rights under GATT Art. XIX and the Agreement on Safeguards	53
Exclusion of imports from the RTA partner without conditions	2
Exclusion of imports from the RTA partner with conditions	34
Possible exclusion of imports from the RTA partner	26
Total	232

1. No reference to global safeguards[11]

About half of the 232 FTAs make no specific reference to global safeguards in their legal texts. RTAs of Armenia, Georgia, the Kyrgyz Republic, the Russian Federation and Ukraine, roughly half of EU's RTAs including those with Israel, Jordan, Morocco, Tunisia and Croatia etc.; most of Turkey's pre-2006 RTAs (exceptions are those with

[10] Jo-Ann Crawford, Jo Mckeagg and Julia Tolstova, Mapping of Safeguard Provisions in Regional Trade Agreements, October 14, 2013, WTO Working paper, p.4.

[11] Jo-Ann Crawford, Jo Mckeagg, and Julia Tolstova, *op.cit.*, p.6

Canada, Chile, and SACU); and intra-Africa RTAs (COMESA, EAC, CEMAC, ECOWAS, SADC etc.) are the examples of this type.

2. Retention of rights under GATT Article XIX and Agreement on Safeguards[12]

53 RTAs, about fifth of the total RTAs stipulate that the rights of the GATT Article XIX and the Agreement on Safeguards are retained by the parties. RTAs of Japan, ASEAN, Australia, New Zealand, Chile, China, India, the United States and Turkey are in this type.

3. Exclusion of imports from an RTA partner without conditions[13]

Two RTAs, Singapore-New Zealand and Singapore-Australia FTAs stipulate that RTA parties shall be excluded from applying a global safeguard measure, without being subject to any condition.

4. Exclusion of imports from the RTA partner with conditions[14]

Thirty four RTAs provide that imports from the RTA partner shall be excluded from a global safeguard action, if certain criteria are met. The conditions vary; one of the representative conditions is "unless such imports account for a 'substantial share' of total imports and such imports 'contribute importantly to the serious injury or threat

[12] *Ibid*.

[13] *Ibid.*, p.7.

[14] *Ibid.*, pp.7-8.

thereof" The definition of 'substantial share' also varies from "the top five suppliers of the good in terms of import share in the most recent three year period" to "the top three suppliers in the most recent period" in some other RTAs with wider range of exclusion. Some RTAs define 'substantial share' with specific numbers. For instance, Korea-ASEAN FTA stipulates that a safeguard measure shall not be applied against a good, so long as its share of imports of the good concerned does not exceed 3% of the total imports from the parties. Some other FTAs such as EFTA's RTAs with Albania; Columbia; Hong Kong; China; Montenegro; Peru and Serbia and Hong Kong, China-New Zealand RTA provide that imports from the RTA partner shall be excluded from a global safeguard, if such imports "do not in and of themselves cause or threaten to cause serious injury". In EFTA-Ukraine FTA, imports from the RTA partner are excluded "if such imports are not a substantial cause of serious injury or threat thereof".

5. Possible exclusion of imports from the RTA partner with conditions[15]

26 RTAs set out that the imports from the RTA partner "may be excluded" from a safeguard action, subject to certain conditions. 20[16] out them, stipulates that they can be excluded "if such imports are not a substantial cause of serious injury or threat thereof." In New Zealand-Malaysia and Thailand-New Zealand, the condition for

[15] *Ibid*., p.7

[16] Canada's RTAs with Columbia and Peru; Colombia-Northern Triangle (Honduras, El Salvador and Guatemala); Singapore's RTAs with India, Jordan, Panama and Peru: India-Korea; Peru with Panama and Korea; Thailand-Australia; and US RTAs with Australia, Colombia, Israel, Jordan, Korea; Panama, Peru, Singapore and CAFTA-DR.

exclusion is “if such imports are not a cause of serious injury or threat thereof” which can be understood as alleviated conditions. Moreover, there is a RTA that stipulates certain rate of total imports as a condition. Nicaragua-Chinese Taipei FTA stipulates that imports from parties may be excluded if the party accounts for not more than 7% of total imports of the good concerned.

III. Selective Safeguards in the FTA Safeguard Mechanism

1. Definition of Selective Safeguard Measure

Selective safeguard measures refer to measures that a WTO Member excludes RTA members from applying global safeguard measures. In other words, when a WTO Member does not impose safeguard measures according to WTO rules to its RTA member countries based on a preferential trade arrangement, it is called a selective safeguard measure or a discriminatory safeguard action. Selective safeguards can promote political and economic friendship among RTA member States by providing an exception for emergency action against import surges and it serves as an incentive for signing RTAs. If RTAs can serve as facilitators of the trade liberalization, which is the ultimate goal of the WTO, allowing the selective safeguard actions will enhance such role of RTAs.

2. Types of Global Safeguards Provisions Allowing Selective Safeguards

Based on the five kinds of global safeguard rules presented by the WTO staff working paper, this paper suggests three types of provisions found in RTAs that allow selective safeguard actions: Type1 (obligatory selective safeguards), Type 2 (Obligatory Selective Safeguards under conditions), Type 3 (selective safeguards at discretion)

[TABLE 2] Types of provisions allowing selective safeguards

Types of provisions allowing selective safeguards	**Treatment applied to the RTA partner in a global safeguard action**	**Number of RTAs**
Type1. Obligatory Selective Safeguards	Exclusion of imported products from the RTA partners without conditions (shall exclude)	2
Type2. Obligatory Selective Safeguards under conditions	Exclusion of imports from the RTA partners with conditions (shall exclude)	34
Type3. Selective Safeguards at discretion	Possible exclusion of imported products from the RTA partner (may exclude)	26
	No Reference to global safeguards in the RTA legal text	117
	Retention of rights under Art. XXIV and the Agreement on Safeguards	53
	Total	232

Type 1 is RTAs that stipulate a contracting party shall exclude RTA members without any conditions attached. Type 2 is RTAs with the obligation of excluding RTA member States when applying global safeguard measures but with certain conditions.

Type 3 is named “selective safeguards at discretion” because in these RTAs countries can either take selective safeguard measures or not. In type 3, there are three kinds of global safeguard rules. First kind is RTAs with global safeguard rules that stipulate member States “may exclude” RTA parties from taking safeguard actions. In this case, countries can exclude their RTA partners at their own free will. Second kind is RTAs with no reference to global safeguards. Since they do not regulate how to impose global safeguard actions, it can be interpreted that countries can exclude RTA member States when imposing global safeguard actions. Third kind is RTAs that stipulate “each party retains its rights and obligations under Article XIX of GATT 1994 and the Agreement on Safeguards”. In this case, whether a country should exclude RTA member States or not is not mentioned, thereby allow their discretion.

IV. Problems of Selective Safeguard Measures

A selective safeguard measure has a limitation in itself because it is against the non-discrimination principle, which is a basis for achieving free trade, the ultimate objective of the World Trade Organization (WTO). Selective safeguard measures are to exclude some RTA members from the scope of application of the safeguard measures, so, it violates Article 2.2 of the Agreement on Safeguards that incorporate MFN treatment principle. This problem arises from the conflict between the MFN treatment principle and the discriminatory nature of the RTA. RTA is aiming at providing benefits for the parties and it would naturally create discrimination against non-parties

to the RTA. In regard to RTAs, GATT Article XXIV: 5(b) solves this problem by stipulating as follows:

> GATT Article XXIV: 5(b): The provisions of this Agreement *shall not prevent*, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary from the formation of a customs union or of a free-trade area.

In other words, RTAs are in violation of GATT Article I and can be justified with GATT Article XXIV. However, for selective safeguard measures imposed according to RTAs, there is no such provision that justifies the violation of Article 2.2 of the Agreement on Safeguards and it is unclear whether GATT Article XXIV: 5 can be applied to safeguard measures. So, the problem remains unresolved, while some countries like the United States and Canada continue to have global safeguard provisions that allow selective safeguards when signing the RTAs, thereby cause controversy. The United States and Canada still maintain their positions that selective safeguard measures can be justified with the GATT Article XXIV.

CHAPTER 4. Legality of Selective Safeguards

I. Positions of WTO DSB on Selective Safeguards Issue: Parallelism

1. Logics of Parallelism

Due to the discriminating character of the selective safeguard measures, this issue has been raised in number of cases in the WTO.[17] However, the panel and Appellate Body have consistently sealed the problem with the concept of parallelism. Parallelism is a requirement that all imported products investigated to determine the serious injury and threat thereof should be in the scope of application when taking global safeguard measure. In other words, if products imported from RTA members were included to determine the serious injury, then the products should not be excluded from the global safeguard measure.

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[17] 1) Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear* (EC), WT/DS121/AB/R, 2000, 2) Appellate Body Report, *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 2000, 3) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2001, 4) Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R. WT/DS178/AB/R, 2001, 5) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 2002, 6) Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS 248, 249, 251, 252, 253, 254, 258, 259/AB/R, 2003.

The concept of parallelism was first introduced in *Argentina-Footwear (EC)* case. In this case, Argentina imposed a selective safeguard measure on imported footwear but excluded products of MERCOSUR member States from taking global safeguard measure. The European Communities (EC) argued that Argentine authorities conducted an analysis of imports, injury and causation on the basis of statistics for "all imports", i.e., from MERCOSUR countries as well as from third countries, and then applied the safeguard measure "only against imports from non-MERCOSUR third countries". The EC contends that Argentina cannot, consistently with the Safeguards Agreement, include MERCOSUR imports in the injury and causation analyses and then exclude these imports from application of the resulting safeguard measures.[18] The Panel named this argument "Parallelism" in the sense that the scope of a safeguard investigation and the scope of the application of safeguard measures should be 'parallel'.[19] The Appellate Body also confirmed the logics of "parallelism" on the basis of the reasoning that the "product … being imported" included in the investigations made under Article 2.1 should correspond to the "product being imported" included in the application of the measure, under Article 2.2. The same logic was later upheld by the Appellate Body of *US-Wheat Gluten, US-Line Pipe case* regarding the issue of selective safeguard measure according to RTA.[20] It is

[18] Panel Report, *Argentina-Safeguard Measures on Imports of Footwear* (EC), WT/DS121/R, 1999, para. 8.72

[19] *Ibid,*. para. 8.80.

[20] The same phrase "product…being imported" appears in both...paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary

noteworthy that the Appellate Body provided flexibility to parallelism condition in *US-Wheat Gluten and US-Line Pipe* case by allowing the gap between imports covered under the investigation and imports falling within the scope of the measure. This can be justified only if the competent authorities "establish explicitly" that imports from sources covered by the measure "satisfy the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards."[21]And, in the context of a claim under Article 4.2(a)[22] of the Agreement on Safeguards, "establishing explicitly" implies that the competent authorities must provide a "reasoned and adequate explanation of how the facts support their determination".

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indication in the context, we believe that it is appropriate to ascribe the same meaning to this phase in both Articles 2.1 and 2.2. (Appellate Body Report, *US-Definitive safeguard measures on imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, paras. 96; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO/DS202/AB/R, 2002, para. 181.)

[21] Appellate Body Report, *US-Definitive safeguard measures on imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 2000, para. 98; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WTO/DS202/AB/R, 2002, para. 181.

[22] Non-Distribution requirement: The Determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

2. Criticism against Parallelism

According to the above WTO cases, it can be interpreted that if the requirements of parallelism are satisfied, RTA members can be excluded from the global safeguard measures. However, the key problem with the logic of parallelism is that the parallelism principle does not cover all the cases of the selective safeguards. Selective Safeguards can be taken following the options in the table.

[TABLE 3] Safeguards options in injury determination and application

	Injury Determination	Application of Safeguard Measure	Parallelism Requirement	Selective Safeguards
Opion1.	BASED ON ALL IMPORTS	APPLIED TO ALL IMPORTS	Satisfied	-
Option2.		REGIONAL IMPORTS EXCLUDED	Not Satisfied	Selective Safeguards
Option3.	REGIONAL IMPORTS EXCLUDED	APPLIED TO ALL IMPORTS	Not satisfied	-
Option4.		REGIONAL IMPORTS EXCLUDED	Satisfied (but remains the problem of the violation of the Article 2.2 of the SA)	Selective Safeguards

The parallelism principle can cover the violation of Article 2.2 of the Agreement on Safeguards by the option 2 where countries take selective safeguard measures based on injury determination on all imports. However, it cannot cover the violation by the

option 4 where countries impose selective safeguard measures based on injury determination in which regional imports were excluded. Therefore, it should have been better for Panels and Appellate Bodies to rule that selective safeguards measure violate the Agreement on Safeguards Article 2.2 and discuss whether it can be justified with Article XXIV, than to introduce a new concept of parallelism in order to escape from dealing with the tricky question.[23] Grossman and Sykes (2005) also argue that until a safeguard measure is justified with a logically sound approach to the question of causation, the requirement of parallelism is just a sideshow.[24] Yong Shik Lee (2007) raised doubts whether safeguard measures can be applied even to small amount of imported products from non-member states when the parallelism requirement is satisfied. If it is possible, selective safeguard measures will harm the MFN Treatment principle in the WTO system and they are nothing more than grey area measures.[25] Joost Pauwelyn also criticizes that the Panels and Appellate Bodies adopted parallelism in order to put off the decision on whether GATT XXIV can justify the selective

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[23] In particular, the AB has exercised judicial economy to avoid reaching the issues raised: see, Appellate Body Report, *Argentina-safeguard Measures on Imports of Footwear* (EC), WT/DS121/AB/R 114.

[24] Grossman, Gene M. and Alan O. Sykes, "United States-Definitive Safeguard Measures on Imports of Certain Steel Products", The American Law Institute Reporters' Studies on WTO Case Law-Legal and Economic Analysis, American Law Institute, 2005, P.193.

[25] Yong-Shik Lee, Safeguard Measures in World Trade The Legal Analysis (Kluwer Law International BV. The Netherlands, 2007, Second Edition, p.66; 성재호, 채은선, "자유무역협정에 따른 세이프가드 조치의 차별적 적용과 최혜국대우", 2010. 2. 통상법서, 재인용.

safeguards.[26] To sum up, it is desirable for the Appellate Bodies to resolve the issue of selective safeguards by providing a clear answer to the violation of non-discrimination principle and justification by RTA exception.

II. Legality of Selective Safeguards

Now to set aside the parallelism principle of the WTO DSB, which is criticized for various reasons, we need to directly discuss the key issue in the controversy of the legality of selective safeguards. That is: whether excluding RTA members from imposing global safeguard measures can be justified with GATT Article XXIV as an exception for the violation of the Article 2.2 of the Agreement on Safeguards. So, this section first discusses whether selective safeguard measures can be justified in the light of the concerning WTO rules and then argues that it can be justified on a legal text but not all of them are legal in practice.

1. De jure Legality of Selective Safeguards

In order to discuss whether selective safeguards can be justified, it should be discussed first, whether safeguard measure is allowed in the FTA system; second, whether selective safeguard measures are justified by GATT Article XXIV exception; third, whether selective safeguard measures can satisfy GATT Article XXIV requirement.

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[26] Joost Pauwelyn, The Puzzle of WTO Safeguards and Regional Trade Agreements, Journal of International Economic Law, 7, 2004. pp. 112-116.

1.1 Permissibility of Safeguards in the FTA System

Safeguard measures are usually applied in a form of increase in tariff, tariff quota or quota.[27] These measures are understood to mean "the duties and other regulations of commerce" in GATT Article XXIV: 8 (b). GATT Article XXIV: 8 (b) stipulates as follows:

> GATT Article XXIV: 8 (b)
>
> A free-trade area shall be understood to mean a group of two or more customs territories *in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIV, XV and XX)* are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Articles XI, XII, XIV, XV and XX are listed as exceptional cases for maintaining the duties and other restrictive regulations. However, Article XIX (safeguard measure) is not enlisted even though it falls under the scope of the duties and other restrictive regulations of commerce. So, it aroused controversy whether safeguard measures are allowed in the FTA system or not. If this exception list is an illustrative clause, safeguard measures will not be allowed within the FTA system. On the other hand, if

[27] The Agreement on Safeguards Article 5.1 stipulates that Members should choose measure most suitable for the achievement of these objectives to prevent or remedy serious injury and to facilitate adjustment. So, countries have flexible options in applying safeguard measures.

this exception list is an exhaustive clause, safeguard measures may be allowed by interpretation. So far, there has been no interpretative note or legal finding on whether this exception clause is illustrative or exhaustive. Then, it should be resolved by interpretation of the legal text. The WTO DSB have consistently applied the rule of interpretation in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). According to Article 31:1, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context here to be interpreted is not enough, because the text of the GATT Article XXIV is ambiguous and there is no Preamble or instrument related to the issue. Then we can think of the purpose and object of the treaty. The WTO system incorporates RTAs because they contribute to liberalize markets despite its discriminatory nature. If RTAs are spread worldwide, they can serve as a building block for the multilateral trade liberalization, which is the ultimate goal of WTO.[28] Safeguard measures also aim at promoting trade liberalization by giving chance to recover competitiveness of an injured industry. Since the level of trade liberalization of RTAs is higher than that of the WTO system, the role of safeguards that provides a driving force to trade liberalization would be greater in RTAs. Therefore, it is appropriate to interpret that Article XXIV: 8 (b) exception clause is illustrative and safeguard measure is allowed in RTA system. In addition, Article 31.3 of the VCLT stipulates that together with the context, subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding

[28] Mitsuo Matsushita, Thomas J. Schoenbaum and Petros C. Mavroidis, *op.cit*. p.913.

its interpretation, 'shall' be taken into account. Considering that most RTAs contain bilateral safeguard or special safeguard rules in their text, it is clear that the subsequent practice of the countries participating in RTAs are allowing safeguard measure in the RTA system.

Moreover, Joost Pauwelyn (2004) appropriately pointed out that since the list excludes not only Article XIX on safeguards, but also Article XXI on security exceptions and Article XVIII: B on trade restrictions for balance of payments reasons that can be imposed by certain developing countries, the list should not be an exhaustive one.[29]

1.2 Justification of the Violation of the Agreement on Safeguards by GATT Article XXIV

Even if safeguard measures are allowed within the RTA system, there still remains the issue of the violation of Article 2.2 of the Agreement on Safeguards by selective safeguard measures. Therefore, whether this violation can be justified with GATT Article XXIV exception should be discussed. Joost Pauwelyn (2004) discussed this issue in a thorough way and argued that there is no conflict between Article XXIV and the Agreement on Safeguards, and GATT Article XXIV can be a defense for violation of the Agreement of Safeguards.

The notion of 'conflict' has two meanings in the WTO rules. First, it means clashes between obligation contained in GATT1994 and obligations contained in agreements

[29] Joost Pauwelyn, *op. cit*,. P.127.

listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time. Second, it means the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[30] Since Selective Safeguard measure is not an obligation of GATT Article XXIV, the conflict of first meaning does not fit in this case. But according to the aforementioned interpretation that GATT Article XXIV allows safeguard measures, it is the situation where the Agreement on Safeguards prohibits a measure that GATT allows. So, it can be seen as a conflict situation of the second meaning. However, as the panel on *US-Line Pipe* stated safeguard measures subject to the provisions of the Agreement on Safeguards are understood to be GATT Article XIX measures. Thus, if an Article XXIV defense is available for Article XIX measures, by definition it must also be available for measures covered by the disciplines of the Agreement on Safeguards.[31] Joost Pauwelyn (2004) refers this relationship as "general rule versus exception" relations and points out that GATT Article XXIV does not make any conflict but restrict the scope of application of the Article 2.2 of the Agreement on Safeguards as an exception.[32]

The last sentence in footnote 1 to the Agreement on Safeguards also supports the

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[30] Panel Report, *EC-Regime for the Importation, Sale and Distribution of Banana* (EC-Bananas III), WT/DS27/R/GTM, WT/DS27/R/HND, 1997, para. 7.159. 고준성 외. 2006.『국제경제법』, 서울: 박영사, p. 23. 재인용.

[31] Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*,

[32] Joost Pouwelyn, *op.cit*., p.129.

idea that GATT Article XXIV can be applied to justify the violation of the Agreement on Safeguards. It says: nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.[33]

To sum up, the violation of the Agreement on Safeguards can be justified with GATT Article XXIV.

1.3 Justification of Selective Safeguards with GATT Article XXIV

1.3.1 Requirements of GATT Article XXIV: critique of the Turkey-Textiles requirement

The Appellate Body of the *Turkey-Textiles* case provided two requirements needed to satisfy the Article XXIV. First one is timing requirement that a measure should be introduced upon the formation of a customs union or of a free-trade area. Second one is necessity requirement that the formation of the regional arrangement would be prevented if the introduction of the measure were not allowed.[34] But these requirements have limitations for the following reasons.

First, as to timing requirement, it is criticized that the Appellate Body has simply added the timing conditions while GATT Article XXIV does not rule timing of the introduction of a measure. Article XXIV: 5 stipulates that the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the

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[33] *Ibid.*

[34] Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R, 1999, para. 58.

formation of a customs union or a free trade area. However, the Appellate Body added the "measures introduced upon" between the word "prevent" and "the formation"[35] In practice, it would be also impossible to impose safeguard measures when introducing a free-trade area, because safeguard measures can only be applied in case of serious injury by increased imports after the formation of a free-trade area.

Second, as to the necessity requirement, the Appellate Body added again 'measures necessary for' between the 'prevent' and 'formation', which is not in the legal text. Also, it would be difficult for a WTO Member to convince a panel that without excluding regional imports, the legal conditions for a valid customs union or free-trade area under Article XXIV: 8 cannot be met.[36]

1.3.2 Requirements of GATT Article XXIV

Considering the above critiques, it would be more desirable to see whether each selective safeguard provision can satisfy the substantive requirements laid down by GATT Article XXIV. According to GATT Article XXIV, internal and external requirements should be met for the duties or restriction on commerce to be justified.

First, internal requirement is stipulated in GATT Article XXIV: 8(b)[37] and it obliges contracting parties to eliminate the duties and other regulation of commerce for "the

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[35] Joost Pauwelyn, *op cit.*, P.132

[36] *Ibid.*

[37] GATT Article XXIV: 8 (b)

A free-trade area shall be understood to mean a group of two or more customs territories in *which the duties and other restrictive regulations of commerce (except, where necessary, those*

substantially all the trade.' A selective safeguard application is to eliminate the duties and other regulation of commerce within the FTA except for the case of agreements that stipulate conditions for selective safeguards (but still in this case, it can be interpreted to fall into the scope of exception as discussed above). So, selective safeguard rules satisfy the internal requirement.

Second, externally, GATT Article XXIV: 5 (b)[38] requires the duties and other regulations of commerce not to be higher or more restrictive than the corresponding duties and other regulations of commerce prior to the formation of the free-trade area. This external requirement can also be satisfied because selective safeguard provisions do not usually increase duties or other regulations of commerce to non-parties.

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permitted under Articles XI, XII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[38] GATT Article XXIV: 5 (b)

With respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement *shall not be higher or more restrictive than* the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be.

For procedural requirement, Committee on Regional Trade Agreements (CRTA) will have to assess whether the structure of the selective safeguard provisions (*ex ante*) satisfy the internal and external requirements.[39]

2. De facto legality of each type of Selective Safeguard Measures in Practice

GATT Article XXIV can justify the violation of the Agreement on Safeguards by a selective safeguard rule but in practice a safeguard measure can only be legalized when the measure at issue meets the requirement of GATT Article XXIV. Such *de facto* legality should be evaluated *ex post*. Internally, it would be evaluated whether a country eliminated the duties or quotas and it is highly likely to be met if the country did follow the RTA rules. The key issue here would be the external requirement on whether the measure at issue caused trade diversion effect. GATT Article XXIV embraces an "economic concern" that an RTA should not entail trade diversion effect.[40] The trade diversion effect might be determined not only be *ex ante* evaluation of structures of regulations but also by *ex post* assessment of trade effects.[41] And it can be assessed better by *ex post* because only after the measure at issue was taken can one

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[39] See, WTO, Committee on Regional Trade Agreements–Decision of 8 February 1996, WT/L/127, 7 February. on the CRTA's role to examine Article XXIV RTAs, though it turned out to be not efficient

[40] Dukgeun Ahn, Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules, Journal of International Economic Law, February, 2008, p. 122

[41] *Ibid*., p.123

see the trade effects. Paragraph 2 of the Understanding on the Interpretation of Article XXIV of the GATT 1994 also explains as follows:

> It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, *the examination of individual measures, regulations, products covered and trade flows affected may be required.*

So, this paper will see each type of selective safeguard provision to discuss a desirable type of selective safeguard provision.

2.1 Selective Safeguards type 1 : Obligatory Selective Safeguards

Selective safeguard type 1 prohibits member States from imposing safeguard measures. This type mainly focuses on providing preferential treatment to member States but does not consider the effect of the Safeguard actions and the trade diversion effect. If a country only restricts imports from the non-parties, it is highly likely that the like products imported from member States that are produced less efficiently will increase substantially to make up for the vacuum and this will harm not only the free competition and its efficiency but also the objective of safeguard measures to support domestic industry's restructuring and facilitate free trade in the long term. So, this type is highly likely to be not justified by Article XXIV.

2.2 Selective Safeguards type 2: Obligatory Selective Safeguards under conditions

Selective safeguard type 2 prohibits safeguard actions to member States but with conditions. Conditions vary as elaborated above but representative one stipulates "shall exclude unless such imports account for a 'substantial share' of total imports and such imports contribute importantly to the serious injury or threat thereof" In this case, if imports from member States is the cause of serious injury or threat thereof, they should be included in the safeguard actions. But if they are not the cause, then safeguard actions can be taken to member States. So, it is deemed to be reasonable for the preferential treatment as well as for the effect of safeguard measures. However, there still remains trade diversion effect problem because the imports from members can increase to make up for the vacuum. If trade diversion is found in the *ex post* economic test, it cannot be justified by Article XXIV.

2.3 Selective Safeguard type 3

Selective Safeguard type 3 provides discretion to countries whether they apply selective safeguards or not. So, this type cannot also eliminate the possibility of causing trade diversion effect and is deemed to be unstable because the countries can make different choices every time for their own interest.

2.4 Assessment

Selective safeguard measures can be justified with GATT Article XXIV exception but not all of them are legal in practice. In considering the objective of selective safeguards to provide preferential treatment and the objective of safeguard to support domestic industries restructuring, selective safeguards type 2 (obligatory selective safeguard under conditions) is desirable. But this type also cannot be justified if trade diversion effect is caused. One of possible suggestions to prevent trade diversion effect is to oblige the countries to keep the amount of imports from constituent territories to the level of average imports during the investigated period when imposing selective safeguards. So far, whether each measure taken in the FTA is in violation of WTO rules can only be dealt when it is brought to the DSB. Considering the time and cost, it would be possible to provide ability to the CRTA to monitor *ex post* legality of selective safeguard measure.

CHAPTER 5. The Future of Selective Safeguards in the mega-FTAs Era

I. The New Trend of Regionalism: Mega-FTAs

The new international economic system after the Cold War was characterized as multilateral trade liberalization buttressed by GATT, but at the same time, as regional economic integration. Until 1980s European Union (EU) was the only preferential trade bloc in the world, but soon after the United States signed North American Free Trade Agreement (NAFTA) by shifting its policy from the total commitment to free

trade to a "two-track" approach resorting to RTAs as a way to achieve trade liberalization in addition to supporting the open multilateral system.[42] This regional trade bloc mushroomed rapidly worldwide with the impasse in the Doha Round negotiation. Now the FTAs are nothing new, but the trend of FTAs are transforming as their implications for economy as well as international politics are increasing. New issues like investment, competition, environment and labor, which were not the trade issues in the WTO system, are dealt in many FTAs. Moreover, FTAs are not only intra-regional but also cross-regional.[43] In particular, the most significant shift in the FTA trend is the mega-FTAs such as TPP or RCEP that a large number of countries across the region are participating. The Trans-Pacific Partnership (TPP) is a proposed regional free trade agreement under negotiation between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. South Korea also announced interest in the TPP participation in November, 2013[44] and is expected to make an announcement for its participation after the preliminary bilateral discussions in January 2014.[45] The TPP started from the Trans-Pacific Strategic Economic Partnership Agreement signed among 4countries (Brunei,

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[42] Anne O. Krueger, Trade creation and trade diversion under NAFTA, National Bureau of Economic Research, Oct. 8. 1999, p.1.

[43] Roberto V. Tiorentino, Luis Verdeja and Christelle Toqueboeuf, The changing landscape of regional trade agreements: 2006 update, WTO Discussion Paper no. 12., 2007, p.9

[44] See, Press release by the Ministry of Trade, Investment and Energy of Korea on 2013.11.29 http://www.motie.go.kr/motie/ne/rt/press/bbs/bbsView.do?bbs_seq_n=78535&bbs_cd_n=16

[45] See, Press release by the Ministry of Trade, Investment and Energy of Korea on 2014.1.10 http://www.motie.go.kr/motie/ne/rt/press/bbs/bbsView.do?bbs_seq_n=78645&bbs_cd_n=16

Chile, New Zealand, Singapore) and it enlarged into a multilateral mega-FTAs as the United States took part in the group with a view to play a leading role in developing a broader platform for trade liberalization throughout the Asia-Pacific region and in establishing trade issues.[46] Regional Comprehensive Economic Partnership (RCEP) was agreed to launch a negotiation in November 2012. ASEAN +6 countries are participating in creating a new free trade agreement led by China.

Concerning selective safeguard issue, the mega-FTAs like TPP and RCEP mean more countries will be excluded from imposing safeguard measures. This might shift the substantial meaning and effect of selective safeguard measures. This section focuses on these shifts: First, there will be a need for the sophisticated provisions for selective safeguards due to more likelihood of violating the WTO rules and more conflicts surrounding selective safeguards; Second, global safeguards will become less efficient and bilateral and sector-specific safeguards will become more important.

II. The Future of Selective Safeguards in the Mega-FTAs Era

1. Need for the Sophisticated Provisions for Selective Safeguards

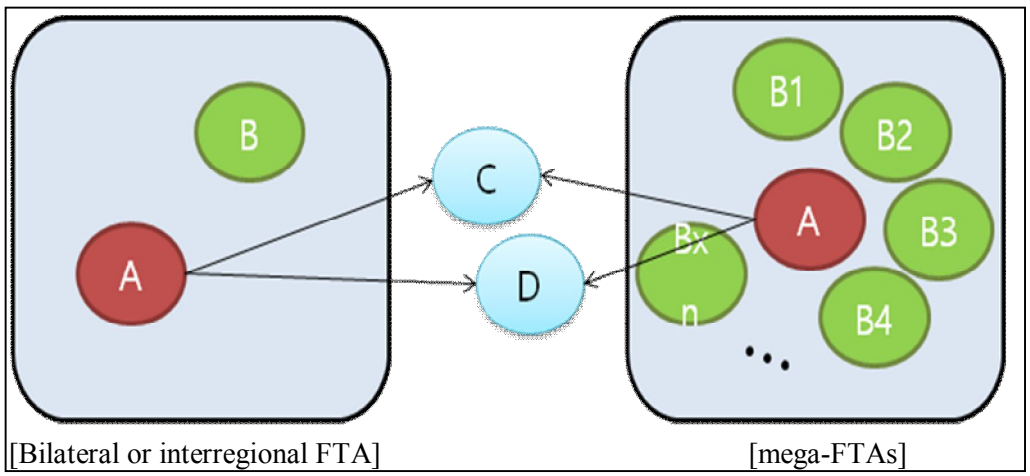
1.1 Increase in the violation of WTO rules by selective safeguards

Imposing selective safeguards in mega-FTAs will highly likely to violate the WTO safeguard rules. As discussed above selective application of safeguard measures is in

[46] Brock R. Williams, Trans-Pacific Partnership Countries: Comparative Trade and Economic Analysis, Congressional Research Service, Jan.29, 2013. p.1.

violation of Article 2.2 of the Agreement on Safeguards and it can be justified with GATT Article XXIV if external and internal conditions are met. In particular, regarding selective safeguards, the key issue is whether external conditions can be satisfied. Under mega-FTAs, since there are more constituent territories that should be excluded from the safeguard measures, it is more likely that trade diversion effect will occur. For example, country A of the figure 1 excludes only B when imposing selective safeguards in a bilateral FTA, while it should exclude B1 to Bn in mega-FTAs. Decrease in imports from country C and D can be more easily diverted to B1 to Bn in mega-FTAs because there will be more routes to diversion and less efficient imports from B1 to Bn will also increase to make up the vacuum of imports. Therefore, it would be more difficult for a measure at issue to satisfy the external requirement of GATT Article XXIV: 5(b).

[FIGURE 1] Selective Safeguards in bilateral FTAs vs. Mega-FTAs



1.2 Mounting conflicts surrounding selective safeguards

Countries often face stalemate at negotiation of FTAs due to conflicting interests. But in regard to selective safeguards issue, there has been not much conflict even though each has different basic policy. For example, Korea has been taken various attitude toward selective safeguards depending on the basic policy of its partner. Korea-EFTA FTA has no global safeguard rule and FTAs with ASEAN, Chile and Singapore sets out retention of rights and obligations of WT O Safeguard rules. Korea-India CEPA, Korea-US and Korea-Peru stipulate a possible (may be) exclusion of RTA parties under certain conditions. Korea's FTA with EU, which is a representative objector of selective safeguards, does not have any selective safeguard rules.[47] RTAs around the world have three different types of selective safeguard rules based on five different types of global safeguard provisions.[48] Most of them are not concrete enough to clearly regulate the selective safeguard measures. Selective safeguard type 3 provides large discretion to countries imposing the safeguard measures. Also, Type 2 does not provide enough conditions. For example, 9 out of 26 Type 2 RTAs stipulates somewhat ambiguously that member States shall be excluded if such imports do not in and of themselves cause or threaten to cause serious injury. So far, countries consistently maintain their own basic policy on selective safeguards which provides large discretion or change the position following their partners' policy.

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[47] Korea-EU FTA Article 3.7: Unless otherwise provided in the Article, this Agreement does not confer any additional rights or impose any additional obligations on the parties with regard to measures taken under Article XIX of GATT 1994 and the Agreement on Safeguards.

[48] See, Table 3

In negotiating mega-FTAs, however, countries will have more conflicts on introducing selective safeguards. As mentioned above, a large number of countries are excluded from safeguard measures if selective safeguards are imposed in mega-FTAs. For countries that already introduced selective safeguards with many partners through bilateral or regional trade agreements, providing preferential treatment of selective safeguards through mega-FTAs does not harm their trade remedy. On the other hand, for countries that did not have precedents of selective safeguards will have much burden to exempt a large number of countries from applying safeguard measures in mega-FTAs. The United States and Taiwan introduced selective safeguards in all of their FTAs. Canada also introduced them in all of its FTAs except for the FTA with Costa Rica. But Japan did not have any selective safeguard rule in any of its FTAs.

In the mega-FTAs, countries with different policy on selective safeguards are participating in negotiation. If each of them tries to set out the rules on selective safeguard as they had before, the legal texts for allowing selective safeguards would be more sophisticated. The requirements to take selective safeguards will become more concrete and clear.

1.3 Desirable provisions for selective safeguards

It is not clear whether all mega-FTAs will allow selective safeguard measures or not. But, at least, in the case of TPP led by the United States, the leading proponent of the selective safeguards, it is highly likely that the TPP have selective safeguard provisions. Moreover, if it becomes the model for mega-FTAs to be concluded in the future

selective safeguard provisions will highly likely to be included in those FTAs as well. Desirable provisions for selective safeguards in mega-FTAs would be the selective safeguard Type2 as also discussed in the previous chapter. NAFTA is the representative Type2 selective safeguards. NAFTA stipulates as follows:

> NAFTA Article 802 Global Actions: Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement *shall exclude imports of a good from each other Party* from the action *unless*:
>
> (a) imports from a Party, considered individually, *account for a substantial share of total imports*; and
>
> (b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, *contribute importantly to the serious injury, or threat thereof*, caused by imports.
>
> 2. In determining whether:
>
> (a) imports from a Party, considered individually, account for a substantial share of total imports, those imports normally shall not be considered to account for a substantial share of total imports *if that Party is not among the top five suppliers of the good subject to the proceeding, measured in terms of import share during the most recent three-year period*; and
>
> (b) imports from a Party or Parties contribute importantly to the serious injury, or threat thereof, the competent investigating authority shall consider such factors as the change in the import share of each Party, and the level and change in the level of imports of each Party. In this regard, imports from a Party normally shall not be deemed to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from a Party during the period in which the injurious surge in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.
>
> 3. A Party taking such action, from which a good from another Party or Parties is initially excluded pursuant to paragraph 1, shall have the right subsequently *to include that good* from the other Party or Parties in the action *in the event that the*

> *competent investigating authority determines that a surge in imports* of such good from the other Party or Parties *undermines the effectiveness of the action*.
> (Highlight added)

NAFTA is a desirable model because it provides preferential treatment to the parties, while keeping the effectiveness of the safeguard measure, by stipulating if such imports account for a substantial share of total imports or contribute importantly to the serious injury or the threat thereof, they can be included in the action. Article 802.2 provides the concrete meaning of substantial share and contribution to serious injury or threat thereof. In addition, Article 802.3 also provides that if the surge in imports initially excluded pursuant to paragraph 1 can be included if a surge in imports of such goods undermines the effectiveness of the action. This is a provision that took into consideration of possible trade diversion effect. But it seems to be too weak considering that the trade diversion effect might harm the justification of selective safeguard measure by GATT Article XXIV. This problem was raised by Ahn (2008).

> Suppose that the United States has three different trading partners for a steel product in addition to Canada and Mexico. In the case that the US International Trade Commission finds that six trading partners are to be subjected to safeguard measures, whereas imports from Canada and Mexico are to be excluded since they do not account for a substantial share of total imports, the underlying economic reason may well be that producers in Canada and Mexico are relatively less efficient and competitive and thereby occupy only small shares of the total imports. In this situation, the selective application of safeguard measures to exclude Canada

and Mexico from the import restriction merely *shifts import sources from more efficient non-NAFTA countries to less-efficient non-NAFTA producers*.[49]

So, in order to deal with such trade diversion effect, it would be better to restrict the imports from parties to the level of before the application of selective safeguard measures. The amount of imports from RTA partners to be kept might be the level of average imports during the investigation period as suggested in the Chapter 5.

2. Increasing Importance of Bilateral and Special Safeguards

In multilateral mega-FTAs incentives for resorting to global safeguards will decrease. Safeguard system is meaningful when an industry of the countries involved in free trade is seriously injured by a sudden surge in imports can get relief from violating GATT/WTO rules and restore driving force for the further trade liberalization. In bilateral or small-sized regional FTAs, the function of trade remedy by global safeguard measures were important in dealing with serious injury caused by the surge in imports. Selective safeguard measures exempt the other FTA parties but since the number of parties is not large enough to undermine the effect of the global safeguard measures, global safeguards were still efficient tools for trade remedy. However, in the large-sized mega FTAs, the cost of exemption from imposing global safeguards is increasing due to the high possibility of violating the WTO rules, while the benefit from global safeguard that allow selective safeguard will decrease due to the increased

[49] Dukgeun Ahn, *Op cit*,. p.129.

number of countries exempted from the measure. As a result, countries will seek another trade remedy instead of global safeguard measures.

Accordingly, in the mega-FTAs the importance of bilateral and special safeguards is expected to increase. A bilateral safeguard measure (a FTA safeguard measure) is a safeguard measure applied among the constituent territories. There has been no case reported so far for the invocation of a bilateral safeguard measure, largely due to the structure that permits only the restoration to MFN tariff levels.[50] But in the mega-FTAs, the possibility of serious injury due to import surge from FTA countries will be higher than before. So, countries will have to resort to bilateral safeguard measures. This is a desirable development considering that an industry injury mainly incurred by FTA parties should be addressed by a FTA safeguard measure, not by a WTO safeguard measure whose MFN application requirement may restrict too much importation including economically innocuous imports from non-party Members.[51]

A special safeguard system refers to a safeguard mechanism that allows safeguards in specific sectors on alleviated requirements for application, time or the number of the measure. This mechanism was introduced in a sector where countries need a special protection such as agricultural goods[52], steel, or motor vehicle sectors. For example, Article 3.12 of Korea-Chile FTA stipulates as follows:

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[50] *Ibid.* P.130

[51] *Ibid.*

[52] The special agricultural safeguard provision is substantially different from the special safeguard mechanism under the WTO Agriculture Agreement.

Article 3.12: Emergency Clause for Agricultural Goods

1. Notwithstanding Chapter 6 of this Agreement and Article 5 of the Agreement on Agriculture, if, *given the particular sensitivity of the agricultural markets*, a product originating in a Party is being imported into the other Party *in such increased quantities and under such conditions as to cause or threaten to cause serious injury or disturbance in the markets* of like or directly competitive products of the other Party, that Party *may take appropriate measures* under the conditions and in accordance with the procedures laid down in this Article.

2. If the conditions set out in paragraph 1 are met, the importing Party may:
(a) suspend the further reduction of any customs duties on the products concerned provided for under this Chapter; or
(b) increase the customs duty on the product to a level which does not exceed the lesser of:
   (i) the most-favoured-nation customs duty; or
   (ii) the basic customs duty to which the successive reductions are to be applied, pursuant to its Tariff Elimination Schedule. (Highlight added)

With a decrease in the use of global safeguard measures in the mega-FTAs, the need for the special safeguards will increase and the contents will be also sophisticated than before. The specific conditions may be different by product and concerned parties. For example, KORUS FTA's special safeguard measure for agricultural goods is different from the one in the Korea-Chile FTA. Article 3.3 of the KORUS FTA stipulates that special safeguard actions can be taken if the aggregate volume of imports of that good in any year exceeds a trigger level as set out in its Schedule and it shall exceed the lesser of the prevailing most-favored-nation (MFN) applied rate, or the MFN applied rate of duty or the tariff rate set out in its Schedule. So, in mega-FTAs it would be a

task of special concern to select the industries to protect and the measure to be taken. This would be especially difficult with many countries involved in it.

CHAPTER 6. Conclusion

The fundamental purpose of the World Trade Organization (WTO) is to ensure 'Freer Trade' but this sometimes collides with 'regulatory autonomy' of member states. A safeguard measure is an important basis of the WTO system, designed as a safety valve to promote free trade and mediate the two conflicting values aforementioned.

With a rapid increase in the number of free trade agreements (FTAs) worldwide, individual FTAs are adopting their own safeguard rules to protect a member, which might suffer from serious injury caused by high level of trade liberalization brought about by the FTA. Among such rules selective safeguard measures caused by various global safeguard rules are controversial because they violate Article 2.2 of the Agreement on Safeguards.

The WTO DSB suggested the concept of parallelism to solve the controversy but it was not enough to prevent further disputes. Therefore, this thesis analyzed whether GATT Article XXIV can justify selective safeguard measures and argued that the selective safeguards can be justified since GATT Article XXIV can serve as an exception clause for the violation of the Agreement on safeguards and the selective

safeguard measure can satisfy the conditions of the GATT Article XXIV. However, it found that in practice not all of them are legal due to trade diversion effect.

Recent years, huge scale of multilateral regional trade agreements is becoming a new trend of RTA. Major global economies are now seeking to speed up negotiations for TPP or RCEP. This paper provided that selective safeguard can be also allowed in such large multilateral RTAs but will have different characters that require further development of rules in regard to selective safeguard measures. First, there will be a growing need for the sophisticated provisions for selective safeguards due to the increase in the violation of WTO rules by selective safeguards and mounting conflicts surrounding selective safeguards. Based on the analysis, the thesis suggested selective safeguard rules type 2 is desirable in the multilateral FTAs and it might be also possible to regulate the amount of imports from the FTA parties when imposing selective safeguards measures to prevent trade diversion effect. Second, bilateral and special safeguard measures will be increasingly important in the mega-FTAs era. Faced with these changes, it is necessary for countries participating in the multilateral trading system of WTO and the regional trade arrangements at the same time to try to develop FTA safeguard system to be consistent with the WTO and at the same time to support for the trade liberalization, which is the final goal of the WTO.

APPENDIX

TABLE OF CITED CASES

Full Case Title and Citation
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Appellate Body Report, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS34/AB/R, 1999
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선별적 세이프가드의 합법성과
거대 다자 자유무역협정 시대 세이프가드 체제의 발전방향

국문초록

1990 년대 이래로 자유무역협정(FTA)이 급증하였으며, 그 과정에서 개별 FTA 가 다양한 규범을 채택하면서, WTO 협정의 규범과의 합치성 여부가 논란이 되어왔다. 그 대표적인 사례가 선별적 세이프가드 문제이다. 선별적 세이프가드란, FTA 회원국이 글로벌 세이프가드 조치를 취하면서 FTA 협정에 근거하여 FTA 회원국을 조치의 대상에서 제외하는 것을 뜻한다. 이는 WTO 규범 하의 비차별주의와 충돌하여 세이프가드 협정 제 2 조 제 2 항의 위반을 야기하므로 논란이 되어 왔으며, 여전히 미해결의 문제로 남아있다. 따라서 이 문제가 해결될 경우 FTA 세이프가드 규범은 WTO 규범의 발전에 더욱 기여할 수 있을 것이다.

본 고에서는 선별적 세이프가드 문제와 관련하여 기존의 WTO 분쟁해결기구의 접근법인 병행주의를 비판하고, GATT 제 24 조의 지역주의 예외가 세이프가드 협정 위반을 정당화 할 수 있음을 주장하였다. 하지만 선별적 세이프가드는 국가들의 실행상 무역전환효과를 야기할 수 있으므로 항상 정당화되지는 않음을 지적하였다.

더 나아가 본고는 특히 최근 FTA 가 TPP 나 RCEP 와 같은 새로운 거대 다자 FTA 로 발전하고 있는 추세에 주목하며 이러한 새로운 FTA 체제에서는 미해결 문제인 선별적 세이프가드 문제와 관련하여 FTA 의 세이프가드 규범에 변화가 야기될 수 있음을 조명하였다. 첫째, 선별적 세이프가드 관련 규정이 정교화되고 명확화 될 것이다. 다자 FTA 체제에서 선별적 세이프가드 조치를 취할 경우 WTO 규범을 위반할 가능성이 높으므로 이를 막기 위해서는 규정의 명확화가 필요하다. 또한 세이프가드 규정을 둘러싼 국가 간 이해관계의 대립이 더욱 첨예해질 것이며 이에 따라 규정이 정교화 될 것이다. 둘째, 글로벌 세이프가드의 효용이 감소함에 따라 분야별 세이프가드와 양자간 세이프가드의 실효성을 높이는 방향으로 규범이 발전할 것이다.