



RESTRUCTURING THE WTO SAFEGUARD SYSTEM

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I. Introduction

A safeguard mechanism for an international trade agreement is the core element to secure market access commitments in trade negotiations and effectively sustain trade liberalization despite domestic resistance from comparatively disadvantaged economic sectors.¹ A safeguard system is not only essential to provide safety nets for overly excessive importation within such a short period of time, but also critical to facilitate structural adjustment induced by import competition.

A formal safeguard provision for an international trade agreement was first introduced in the US-Mexico Trade Agreement in 1942.² Pursuant to the Executive Order by President Truman that mandated safeguard systems for international trade agreements,³ a similar safeguard provision was later adopted in the GATT as Article XIX.

The first attempt by the GATT contracting parties to establish a separate agreement on safeguard along with the Anti-dumping Code and the Subsidy Code failed during the Tokyo Round negotiation. The WTO Agreement on Safeguard (hereinafter “Safeguard Agreement”) was later concluded during the Uruguay Round negotiation and entered into force in 1995 with the inception of the WTO. In 2004, 133 out of 148 WTO Members notified their safeguard laws and regulations.⁴

Although there were only two dispute settlement cases relating to Article XIX of the GATT during the GATT system,⁵ as of July 2005, 33 complaints

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¹ For general discussion on the rationales of a safeguard system, see John H. Jackson, *World Trade and the Law of GATT*, 553-573 (1969); Jackson et al, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 604-675 (4th ed, 2002); Dukgeun Ahn, *Treatise on the WTO Safeguard System* (2005, in Korean); Bhala and Kennedy, *World Trade Law* (1998).

² John H. Jackson, *World Trade and the Law of GATT*, 554 (1969).

³ See Executive Order No 9832 of February 25, 1947, 3 CFR 624 (1947).

⁴ In 1995, only 52 Members made such notification on safeguard related laws and regulations.

⁵ They are *United States – Withdrawal of a tariff concession under Art. XIX* (adopted on October 22, 1951; CP/106) and *Norway – Restrictions on imports of certain textile products* (adopted on June 18, 1980; BISD 27S/119).

concerning safeguard measures were brought to the WTO dispute settlement procedure. Among them, 16 cases ended up with 8 panel and 7 Appellate Body reports that contributed substantially to building WTO jurisprudence for implementation of the safeguard mechanism.⁶ In particular, the Appellate Body rulings on various legal elements of the Safeguard Agreement elucidated important criteria for interpreting and applying the newly established WTO disciplines.

Unfortunately, however, the current structure of the WTO safeguard system has not been sufficiently articulated to prevent abusive safeguard protection by many Members.⁷ Moreover, the WTO jurisprudence concerning the Safeguard Agreement has raised several controversial issues that have not been welcomed by WTO constituents, neither as complainants nor as defendants. When 7 out of 8 panel reports were reviewed by the Appellate Body, some of the legal rulings and interpretations by the Appellate Body drew much attention and indeed criticism.⁸ Some of the more fundamental issues, procedural and substantive, will be discussed below to shed some light on the establishment of a better safeguard mechanism in the future.

II. Problems in the Structure of the WTO Safeguard System

A. Structural Deficiency in Resorting to the WTO Dispute Settlement System: Lack of Fast-track Procedures

The structural problem of the WTO safeguard system manifested by the experience up to date is the ineffectiveness of a normal WTO dispute settlement procedure to address unjustifiable safeguard measures. While a safeguard measure is by nature an emergency action with temporary duration, the current WTO Dispute Settlement Understanding (hereinafter "DSU") does not provide adequate procedures to address such an "emergency" character of measures at issue. It is contrasted to the Agreement on Subsidies and Countervailing Measures (hereinafter "SCM Agreement") for which the current DSU stipulates fast-track procedures regarding prohibited and actionable subsidies.⁹ The

⁶ *United States- Definitive Safeguard Measures on Imports of Certain Steel Products* case combined the following eight complaints: DS248, 249, 251, 252, 253, 254, 258, 259.

⁷ See, for example, Henrik Horn and Petros C. Mavroidis, "United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: what should be required of a safeguard investigation?", 2 *World Trade Review* 395 (2003).

⁸ See, for example, Alan O. Sykes, "The Safeguards Mess: A Critique of WTO Jurisprudence", 2 *World Trade Review* 261-295 (2003); and Dukgeun Ahn, *Treatise on the WTO Safeguard System*, Part. IV.3 (2006, forthcoming, in Korean).

⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Appendix 2. For example, the DSU stipulates that time- periods applicable for prohibited subsidy cases shall be, roughly speaking, half the time prescribed for normal cases.

structural problem of failure to ensure procedural expediency for safeguard cases is illustrated in Table 1 that shows the duration of safeguard measures and the timing of the WTO dispute settlement.

As shown in Table 1, the ineffectiveness of the current WTO dispute settlement system is apparently serious. All of the listed WTO cases in Table 1 found the safeguard measures at issue to be inconsistent with the WTO obligation. Yet, in many cases, unjustifiable safeguard measures were maintained for a substantial period of time, which renders the resolution through the WTO dispute settlement system practically meaningless.¹⁰ For example, in two cases – *Argentina – Footwear* case and *US – Wheat Gluten* case, the expiration dates for the original safeguard measures coincided with the due dates for the implementation periods determined by the WTO dispute settlement procedure. In the *Argentina – Peach* case, the implementation due date determined by the WTO dispute settlement procedure lapsed merely about two weeks before the original due date of the safeguard measure at issue. In the *Korea – Dairy Product* case, the WTO inconsistent safeguard measure could be maintained for more than three years despite the WTO dispute settlement resolution. In that regard, the repeal of the safeguard measures within less than two years in the *US – Steel* case was actually a rare exception.

Table 1: Timing for Safeguard Measures and Relevant WTO Dispute Settlement

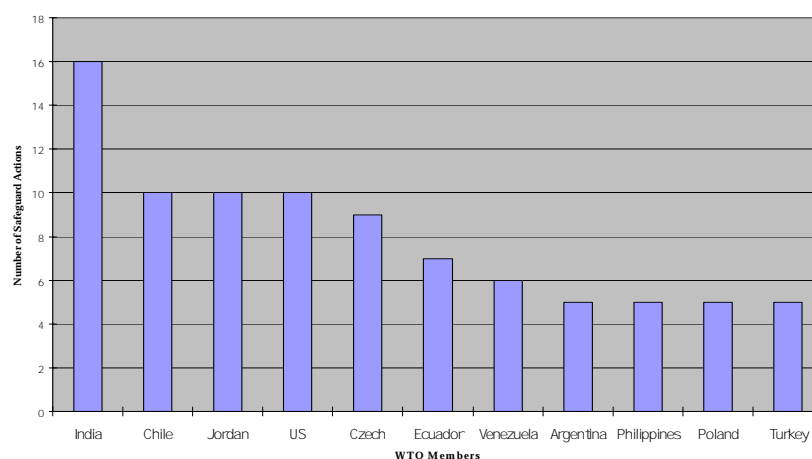
	Length of Safeguard Measure	Period for Dispute Settlement ¹⁾	The End of Implementation Period
<i>Argentina – Footwear</i>	3 years (97.2.25 – 00.2.25)	98.6.10 – 00.1.12	00.2.25
<i>Argentina – Peach</i>	3 years (01.1.19 – 04.1.18)	01.12.06 – 03.4.15	03.12.31
<i>Chile – Price Band</i>	1 year + 1 year extension (99.11.26 – 01.11.26)	01.1.19 – 02.10.23	03.12.23
<i>Korea – Dairy Product</i>	4 years (97.3.1 – 01.2.28)	98.6.10 – 00.1.12	00.5.20
<i>US – Lamb Meat</i>	3 years (99.7.22 – 02.7.22)	99.10.14 – 01.5.16	01.11.15
<i>US – Line Pipe</i>	3 years (00.2.23 – 03.2.24)	00.9.14 – 02.3.8	02.7.24 (Mutual Agreement)
<i>US – Wheat Gluten</i>	3 years (98.6.1 – 01.6.1)	99.6.3 – 01.1.19	01.6.2
<i>US – Steel</i>	4 years (02.3.20 – 06.3.20)	02.5.7 – 03.12.10	Withdrawal on 03.12.4

1) The “period for dispute settlement” in the above table is the period from the panel request to the adoption of panel/Appellate Body reports.

¹⁰ Of course, the WTO dispute settlement resolution can prevent unnecessary and unjustifiable extension of a safeguard measure. But, the current WTO dispute settlement resolution whose procedures have been routinely delayed has not properly addressed “temporary” safeguard actions.

Unfortunately, this problem of ineffective dispute resolution is systemic. Based on statistics of the WTO dispute settlement proceedings up to June 2005, it takes, on average, about 545 days to complete a dispute settlement proceeding from panel establishment to the adoption of the Appellate Body reports.¹¹ If a consultation period of the minimum 60 days and an implementation period – maximum 15 months – are added to a normal dispute settlement proceeding, it can easily be extended to two and a half years or more.¹² It implies that unjustifiable safeguard actions with a duration of two or even three years may not be properly disciplined by the current WTO dispute settlement procedure.

Figure 1: Safeguard Actions notified to the WTO as of July 2005



This systemic problem may partly explain why, in the WTO system, safeguard actions have been primarily abused by developing Members that have little experience in implementing safeguard systems. It is starkly contrasted to the GATT situation. During 1950 to 1995, 150 safeguard measures in total were notified to GATT. Those measures were adopted mostly by EC (43), Australia (38), US (27), Canada (23), accounting for about 87 per cent of all measures.¹³ However, about 85 per cent of all safeguard actions notified to the WTO were imposed by developing country members.

As of July 2005, the major safeguard users included India (16), Chile (10), Jordan (10), Czech Republic (9), Ecuador (7) and Venezuela (6), in

¹¹ <http://www.worldtradelaw.net/dsc/stats.htm> (visited on June 26, 2005).

¹² In fact, the average implementation periods are about 12 months for arbitration cases under DSU Article 21.3(c) and nine months for settlement cases under DSU Article 21.3(b). <http://www.worldtradelaw.net/dsc/database/implementaverage.asp> (visited on June 26, 2005).

¹³ WTO, Analytical Index: Guide to GATT Law, Vol I, (1996).



addition to the US (10). Other traditional main users – EC (4), Australia (1) and Canada (2) – have been relatively reluctant to use safeguard measures in the WTO system. Whereas many developing countries do not hesitate to employ questionable safeguard actions, most of those actions were simply disregarded or not bothered by other Members partly because the current WTO dispute settlement system would not effectively discipline them.

Therefore, this systemic problem should be addressed by establishing a more expeditious dispute settlement procedure, preferably in line with those already enunciated for subsidy disputes.

B. Lack of a Legal Standing for Safeguard Investigation

Unlike the WTO Anti-dumping Agreement and SCM Agreement that provide specific legal standing requirements, the Safeguard Agreement remains silent concerning this issue.¹⁴ Considering the fact that safeguard actions are to be based on serious injury that is a higher level of injury than material injury demanded for anti-dumping and countervailing actions, the standing requirement to ensure legitimate representativeness for a relevant domestic industry should also be mandated for a safeguard investigation at a higher level than anti-dumping and countervailing investigation.

A proper level of a standing requirement does not seem to be a matter of analytical calculation rather than political negotiation. In that regard, it is noteworthy that a draft text of Free Trade Area of the Americas (FTAA) contains “50 per cent of the total production of the like or directly competitive good” as a standing requirement for the FTAA safeguard system.¹⁵

¹⁴ Article 5.4 of Anti-dumping Agreement and Article 11.4 of SCM Agreement provide that:

An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

¹⁵ Article 6.4 of Chapter XIV, FTAA.TNC/W/133/Rev.3 (dated November 21, 2003).

III. Problems in Implementing the WTO Safeguard Agreement

A. Applying “Unforeseen Development” Requirement

Article XIX:1(a) of the GATT stipulates “unforeseen development” as a precondition for invoking emergency action against imports by providing that: “[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.”¹⁶ After the GATT Contracting Parties in *Hatter’s Fur* ruled very broadly to embrace virtually almost every circumstance for the legal requirement of unforeseen development,¹⁷ this legal element was considered to have no practical legal meaning.¹⁸ It was also dropped out of the textual languages of the WTO Safeguard Agreement during the Uruguay Round negotiation.

It explains primarily why even conventionally active user countries such as the United States, the European Community, Canada and Australia, do not include the “unforeseen development” provision in their most recently amended safeguard laws and regulations.¹⁹ Therefore, many WTO Members still use *ad hoc* procedures or simply rely on practical guidelines to accommodate this element in their investigations. For example, as shown in *US – Steel*, the USTR had to request additional findings on “unforeseen development” to the USITC after the USITC issued its original final report without examining that element.²⁰

¹⁶ For the discussion on the conflict between economic rationale and legal principles concerning the application of “unforeseen development”, see Henrik Horn and Petros C. Mavroidis, “United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: what should be required of a safeguard investigation?”, 2 *World Trade Review* 395, 406-408 (2003).

¹⁷ *United States – Withdrawal of a tariff concession under Art. XIX* (adopted on October 22, 1951; CP/106).

¹⁸ John H. Jackson, *World Trade and the Law of GATT* (1969), 553-574.

¹⁹ These laws typically mandate the finding of serious injury and threat thereof, but do not mention “unforeseen development”.

²⁰ Panel Report on *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* (WT/DS248, 249, 251, 252, 253, 254, 258, 259/R; adopted on December 10, 2003), paras 1.222-1.26. The panel found no violation for the timing of the USITC’s “subsequent” finding of unforeseen development since it was made before the safeguard measure was applied. But, substantively, the USITC finding of unforeseen development was found to be inconsistent with the WTO obligation.

On the other hand, the Appellate Body substantially elaborated – or complicated – the rules for applying “unforeseen development” provisions in *US – Steel*. It ruled that, in addition to confirming standard of review that requires a reasoned and adequate explanation, unforeseen development resulting in increased imports must be demonstrated for each safeguard measure at issue, rather than for overall economic circumstances. Although this interpretation may fortify the rigor of legal jurisprudence, the vast discrepancy between practices of administering authorities and unbearable legal requirements of the WTO disciplines would strengthen the need for clarifying and augmenting the current system.

B. Causality Requirement

For invoking a safeguard measure, it should be proven that “any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products”. In other words, there must be a causality relationship between increased imports and domestic injury. The analysis of a causality relationship, however, illuminates a vast and fundamental difference between an economic theory and a legal application. While the economic theory requires increased imports to be not merely a proximate but an ultimate cause of injury as a reasonable basis for invoking safeguard actions, the legal interpretation of causality does not fully reflect such an economic distinction.²¹

Although Article XIX of the GATT and the Safeguard Agreement do not specifically provide what kind of causality relationship should be construed, the panel in *US – Wheat Gluten* ruled that the increased imports, under the conditions extant in the market place, *in and of themselves*, caused *serious* injury.²² Likewise, the panel in *US – Lamb Meat* determined that “increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is ‘*serious*’ enough to constitute a significant overall impairment in the situation of the domestic industry”.²³ In other words, the panels’ views are basically primary causality between increased imports and serious injury in that import alone should be able to cause serious injury.

²¹ See generally Douglas A. Irwin, “Causing problems? The WO Review of Causation and Injury Attribution in US Section 201 cases”, 2 *World Trade Review* 297 (2003); and Henrik Horn and Petros C. Mavroidis, “United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: what should be required of a safeguard investigation?”, 2 *World Trade Review* 395 (2003).

²² Panel Report on *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (adopted on January 19, 2001; WT/DS166/R), para 8.139.

²³ Panel Report on *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (adopted on May 16, 2001; WT/DS177, 178/R), para 7.238.

These interpretations and rulings were reversed by the Appellate Body. The Appellate Body ruled that “the competent authorities determine [...] whether ‘the causal link’ exists between increased imports and serious injury, and whether this causal link involves a *genuine and substantial relationship* of cause and effect between these two elements”.²⁴ This ruling seems to overturn completely the economic justification of safeguard measures. It has been the conventional understanding that a safeguard measure may be invoked as a safety net when import surges induced by trade liberalization cause serious domestic injury. Indeed, for example, Section 202 of the Trade Act of 1974 in the United States enunciates “substantial cause of serious injury” where substantial cause means “a cause which is important and not less than any other cause”.²⁵ In Canada, the causality relationship between increased imports and serious injury is given as “principal cause” that is defined to be “an important cause that is no less important than any other cause of the serious injury or threat”.²⁶ It is also noted that many recent FTAs adopt explicit provisions requiring “substantial cause” for bilateral safeguard mechanisms.

But, according to the rulings by the Appellate Body, serious injury to a domestic industry, however it happened, may be safeguarded as opposed to imports insofar as increased import has “genuine and substantial relationship” with serious domestic injury. For a rough numerical example, suppose that import accounts merely for 5 per cent of injury and that over-investment and earthquakes cause 40 per cent of injury, respectively. Pursuant to the Appellate Body interpretation, it would still be possible to invoke safeguard action if the nature of the causal relationship is genuine and substantial, whereas a safeguard action is not permitted under a panel interpretation or under the US law. If the numbers in the above example are changed to 40 per cent for import, 5 per cent for over-investment and 40 per cent for earthquake, the United States and Canada would allow a safeguard action, whereas panels in *US – Wheat* or *US – Lamb Meat* would not. A very strict standard presented by panels in *US – Wheat* or *US – Lamb Meat* would be satisfied only if import can account at least for 50 per cent or more of injury. The economic justification to permit safeguard measures for limiting importation becomes weaker in a reverse order at the above example.

²⁴ Appellate Body Report on *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (adopted on January 19, 2001; WT/DS166/AB/R), para. 69.

²⁵ US Government Printing Office, *Overview and Compilation of US Trade Statutes: 2001 edition* (June 2001), 664.

²⁶ Article 27, Canadian International Trade Tribunal Act. See WTO, *G/SG/N/1/CAN/3* (dated August 10, 2004).



This unreasonable outcome is generated by the confusion of “nature” of causality and “degree” of causality. In terms of nature of causality, a genuine and substantial relationship between cause and effect seems to make a good legal sense. It is also true that, in that regard, causation and correlation share many common economic phenomena and normally go hand in hand. But, how much causal effects should be required is a question to be clarified by policy consideration for safeguard mechanisms since the textual languages do not provide any clear guidance. Unless judicial activism exercised by the Appellate Body clarifies this problem, the practical difficulty to adopt econometric analyses in legal deliberation and rulings for determining causality relationship would typically lead the Appellate Body to set forth a legal conclusion on causality that is fatally confused with “correlation”.²⁷

On the other hand, the Appellate Body tried to link causality requirements to a degree of safeguard measures. In *US – Line Pipe* case, the Appellate Body concluded that it would be illogical to require authorities to ensure that the “causal link” not be based on the share of injury attributed to factors other than increased imports, while at the same time permitting a Member to apply a safeguard measure addressing injury caused by all factors.²⁸ Therefore, the Appellate Body concluded that safeguard measures might be applied only to the extent that they address serious injury “attributed to increased imports”.²⁹

Even if this ruling seems very plausible in a legal sense, the application of this legal interpretation with respect to safeguard measures appears patently difficult to render it almost useless. Suppose that increased imports cause 10 per cent of serious injury for the domestic industry. The Appellate Body ruling suggests that safeguard measures in this case can only be applied to that 10 per cent injury. Contrary to its seemingly simple and clear criteria, it is not obvious how only 10 per cent of injury should be safeguarded. For example, it is not clear at all whether this 10 per cent injury justifies a safeguard action on the entire imports, or the entire increased volumes of import, or simply 10 per cent of increased volumes of imports. Let alone tremendous difficulty to quantify injury and thereby determine a proper level of a safeguard action, the conceptual ambiguity of safeguarding “injury attributed to increase imports” must be promptly resolved to prevent practical demise of legitimate safeguard measures.

²⁷ See also Alan O. Sykes, “The ‘Safeguards Mess’ Revisited – A Reply to Professor Jones”, 3 *World Trade Review* 93 (2004), 96.

²⁸ Appellate Body Report on *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (adopted on March 8, 2002; WT/DS202/AB/R), paras. 250-252.

²⁹ Appellate Body Report on *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (adopted on March 8, 2002; WT/DS202/AB/R), paras. 260.

C. Parallelism Doctrine

Following the NAFTA model³⁰, more and more FTAs including Canada-Chile FTA³¹ and US-Singapore FTA³² adopt provisions to exempt FTA parties from WTO safeguard measures. In fact, the exemption of FTA parties from the WTO safeguard actions has been persistent issues for WTO dispute settlement cases.³³

The selective application of a safeguard measure was indeed one of the most controversial issues during the Uruguay Round negotiation.³⁴ But, there was no specific agreement or decision on whether Article XXIV of the GATT permits exempting FTA partners from the scope of the MFN application of safeguard measures. To address this issue, the WTO dispute settlement body has relied on invented concept of “parallelism” that requires the imports included in the injury determination to correspond to those covered by the safeguard measure. The parallelism doctrine has worked as one of the most stringent disciplines by striking down all measures reviewed so far.³⁵

This parallelism doctrine, however, may create a serious loophole for the MFN application of a safeguard measure. Suppose that the country A is importing from five other countries whose exportation has individually genuine and substantial relationship with serious injury of the country A. Then, pursuant to the parallelism doctrine, the country A can exempt any – or any group – of the five trading partners from its safeguard action by matching products under the investigation and under safeguard measures. In practice, panels and the Appellate Body have adopted the most serious strict scrutiny with regard to parallelism doctrine to prevent abusive selective safeguard actions. But, meticulous preparation of Members’ authorities will soon overcome the legal hurdle of parallelism doctrine.

³⁰ Article 802:1 of the NAFTA provides, in a relevant part, that:

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.

³¹ Article F-02.

³² Article 7.5.

³³ Four panel/Appellate Body reports, one regarding Argentine safeguard action and three US safeguard actions, addressed the “parallelism” issue.

³⁴ Terence P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1992)*, vol. II, 1711 – 1800 (1993).

³⁵ For example, in *US –Steel* safeguard case, the panel and the Appellate Body found the violation of parallelism doctrine for all ten safeguard measures.

The Appellate Body in *US – Line Pipe* case opined that:

The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *Agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2.³⁶

Considering the Uruguay Round negotiating history, it is not clear whether the Appellate Body is a proper forum to decide the above question. Before the proliferating FTAs cause serious discriminatory safeguard problems, this fundamental issue must be addressed somehow in the WTO.

D. Legal Requirement of Structural Adjustment

The crucial element of a safeguard system that has been neglected collectively by all the WTO Members is the legal requirement for implementing structural adjustment measures. The Safeguard Agreement clarifies that any safeguard action shall be applied to the extent necessary to facilitate adjustment, not merely to remedy serious injury. Article 5 of the Safeguard Agreement provides that “[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury *and to facilitate adjustment.*” This principle is reiterated in Article 7 as follows: “A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury *and to facilitate adjustment.*” Moreover, an extension of a safeguard measure must be based on the evidence that the industry is actually adjusting. In other words, the legal element of facilitation of structural adjustment is one of the core parts of the WTO safeguard system.

³⁶ Appellate Body Report on *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (adopted on March 8, 2002; WT/DS202/AB/R), para. 198.

Despite such a clear textual requirement, that part of legal requirement has not been seriously addressed by most of WTO Members. Administering authorities of WTO Members have rarely paid their attention to whether and how safeguard measures do facilitate structural adjustment of pertinent domestic industries.³⁷ In fact, this legal element – along with obvious wrongful practices of WTO Members – has never been formally raised at the WTO dispute settlement system and thereby not been elaborated by subsequent jurisprudence. Therefore, this clear legal element still remains practically dead languages. It is particularly unusual when we consider a highly strict literal approach by the Appellate Body that resuscitated even the “unforeseen development” provision.

This legal requirement indeed raises a fundamental issue regarding the safeguard system. The intrinsic character of a safeguard measure is to secure certain period of time in which temporarily protected industries can expedite structural adjustment to trade liberalization. Therefore, a more effective enforcement of the legal requirement concerning facilitation of structural adjustment would substantially contribute to refinement of the WTO safeguard system.

IV. China Specific Safeguard Action: Transitional Product-Specific Safeguard Mechanism

The accession by China to the WTO added a peculiar element to the safeguard system: Transitional Product-Specific Safeguard Mechanism (hereinafter “TPSSM”). Whereas TPSSM shares some commonality with a safeguard system, it differs fundamentally from normal safeguard mechanisms in several important aspects.

Firstly, TPSSM is invoked exclusively against China. In other words, the MFN application of safeguard measures are not required when a WTO Member invokes TPSSM against China.³⁸ Under the current WTO

³⁷ In most WTO Members, final rulings or recommendations by administering authorities do not even mention this legal requirement. Currently, the United States seems the only country that at least tries to enforce this legal element. For example, the USITC addressed the issue whether pertinent firms undertook structural adjustment measures in the extension case regarding wheat gluten. Although the USITC mentioned several economic facts, even the mere promises or vague future plans were accepted as sufficient evidence to demonstrate sufficiency of implementing adjustment measures. USITC, *Wheat Gluten: Extension of Action* (Investigation No. TA-204-4), Publication No. 3407 (April 2001).

³⁸ In fact, a country specific safeguard system is not unprecedented in the GATT/WO system. Similar provisions were adopted when Eastern European countries such as Hungary, Poland, and Romania joined the GATT in the 1960s and 1970s. GATT, *Basic Instruments and Selected Documents*, 15th Supplement (1968), 46-52; 18th Supplement (1972), 3-10; 20th Supplement (1974), 3-8. See also Fabio Spadi, “Discriminatory Safeguards in the Light of the Admission of the People’s Republic of China to the world Trade Organization”, 5 *Journal of International Economic Law* 421 (2002), 426-428.



system, it is the only formal mechanism to permit discriminatory safeguard actions.

Secondly, instead of “serious injury” requirement, TPSSM is invoked on the basis of “market disruption or threat thereof”. Market disruption deems to exist “whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be *a significant cause of material injury, or threat of material injury* to the domestic industry”. Compared to other trade remedy cases, the threshold of “significant cause of material injury” for invoking import restriction is very lenient, particularly for safeguard actions.

Thirdly, TPSSM permits even more lenient safeguard actions to third countries for preventing “significant diversions of trade” into their markets. Unlike a direct safeguard measure by an importing country to remedy market disruption that still mandates injury determination – albeit at a much lower level, an indirect safeguard measure to remedy trade diversion by third countries does not require any injury determination. Accordingly, this aspect of TPSSM may raise much more serious chain reaction in terms of trade restriction against products from China.

Lastly, unlike normal safeguard measures, TPSSM does not have a specific time limit for measures. So, practically, it seems possible to maintain, extend or re-invoke anytime TPSSM until 2013 when this special arrangement will terminate.

This special arrangement to discriminate China in the WTO system was rapidly incorporated into many WTO Members’ trade remedy systems, although there is considerable variance in technical aspects of implementing TPSSM.³⁹ Considering its porous structure potentially vulnerable to abusive utilization, the record up to date demonstrates remarkably prudent use – or no use – by WTO Members. In the United States, the USITC conducted four investigations, issuing three affirmative determinations⁴⁰ and one negative determination⁴¹. But, in all three affirmative cases, the US President declined to take actual safeguard measures since he considered that the overall social cost of imposing

³⁹ For the excellent comparison between the US and EC systems, see Marco Bronckers, “The Special Safeguards Clause in WTO Trade Relations with China: (How) Will It Work?”, in *WTO and East Asia: New Perspectives* (eds. Mitsuo Matsushita and Dukgeun Ahn, 2004) 39-50.

⁴⁰ Pedestal Actuators from China (Investigations No. TA-421-1); Certain Steel Wire Garment Hangers from China (Investigations No. TA-421-2.1); and Certain Ductile Iron Waterworks Fittings from China (Investigations No. TA-421-4).

⁴¹ Certain Brake Drums and Rotors from China (Investigations No. TA-421-3).

trade restrictive measures for the products at issues would prevail the benefits accruing to the protected sectors. These results are noteworthy because public interest consideration has not been such a decisive factor in the US trade remedy regimes. In July 2003, the European Commission undertook one TPSSM investigation under Regulation 427/2003, interestingly along with two parallel investigations under the normal safeguard procedure (Regulation 3285/94) and the safeguard procedure for non-market economies (Regulation 519/94).⁴² Later, the European Commission withdrew the TPSSM investigation when it found that the normal safeguard procedure was sufficient to address the domestic industry injury.⁴³

Despite the remarkable track record for TPSSM so far, the recent economic situation including the termination of the textile quota regime as of the end of 2004 and a growing concern on the allegedly undue exchange rate management of China appears to intensify more political pressure from domestic industries of the WTO Members to actually utilize a special protective and yet WTO consistent devise. Moreover, the bilateral pressure by China to dismantle the non-market economy provision in its WTO Accession Protocol make other Members dependent more upon TPSSM as the last resort to address imports from China. Since one Member country's invocation of a TPSSM can provoke numerous other Members' chain reaction, the concerted efforts in the multilateral context are necessary for prudent utilization.

V. Conclusion

Despite various problems manifested in the course of implementing the current WTO safeguard mechanism, the rectification of the problems is not likely to come in the foreseeable future. Unlike other trade remedy issues, safeguard matters are not squarely addressed in the Doha Development Agenda.⁴⁴ It leaves a much more difficult task to WTO Members than amending the current text of the Safeguard Agreement. In order to sustain the whole WTO trading system with structurally deficient safeguard system, the WTO Members should exert more

⁴² Marco Bronckers, "The Special Safeguards Clause in WTO Trade Relations with China: How) Will It Work?", in *WTO and East Asia: New Perspectives* (eds. Mitsuo Matsushita and Dukgeun Ahn, published by Cameron May Ltd in 2004) 39, 48.

⁴³ Commission Decision of 9 December 2003 terminating the transitional product-specific Safeguard proceeding concerning imports of certain prepared or preserved citrus fruits namely mandarins, etc.) originating in the People's Republic of China (2003/855/EC), OJ L323/11 (Dec. 10, 2003).

⁴⁴ The only issue raised so far in the Doha Development Agenda is about *de minimis* standard for developing countries. Venezuela proposed the modification of Article 9.1 of the current safeguard Agreement by increasing the thresholds to 7% and 15% from 3% and 9%, respectively. This proposal, however, did not obtain consensus support from Members and thereby was not accepted. WTO, G/SG/59 (dated Jan. 17, 2003).

sensible efforts to confine abusive attempts and develop reasonable standards for adequate implementation. After all, solutions for these problems are at the hands of the WTO Members.

Appendix 1. WTO Disputes Relating to the Safeguard Agreement

Name of Dispute	Complainant
1997	
1. United States - Safeguard Measure Against Imports of Broom Corn Brooms	Colombia DS78
2. Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products	EC DS/98
1998	
3. Argentina - Safeguard Measures on Imports of Footwear	EC DS121
4. Argentina - Safeguard Measures on Imports of Footwear	Indonesia DS123
1999	
5. Hungary - Safeguard Measure on Imports of Steel Products from the Czech Republic	Czech Republic DS159
6. Argentina - Measures Affecting Imports of Footwear	US DS164
7. United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities	EC DS166
8. United States - Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand	New Zealand DS177
9. United States - Safeguard Measure on Imports of Lamb Meat from Australia	Australia DS178
2000	
10. United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	Korea DS202
11. Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products	Argentina DS207
12. United States- Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe	EC DS214
2001	
13. Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products	Guatemala DS220
14. European Communities- Tariff-Rate Quota on Corn Gluten Feed from the United States	United States DS223
15. Chile – Provisional Safeguard Measure on Mixtures of Edible Oils	Argentina DS226
16. Chile- Safeguards on Sugar	Colombia DS228
17. Chile - Safeguard Measures and Modification of Schedules Regarding Sugar	Colombia DS230
18. Slovakia - Safeguard Measure on Imports of Sugar	Poland DS235
19. Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches	Chile DS238
2002	
20. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	EC DS248
21. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Japan DS249
22. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Korea DS251
23. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	China DS252
24. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Switzerland DS253
25. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Norway DS254

26. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	New Zealand DS258
27. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Brazil DS259
28. European Communities – Provisional Safeguard Measures on Imports of Certain Steel Products	US DS260
29. United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Chinese Taipei DS274
30. Chile –Definitive Safeguard Measure on Imports of Fructose	Argentina DS278
2003	
31. Ecuador - Definitive Safeguard Measure on Imports of Medium Density Fibreboard	Chile DS303
2005	
32. European Communities - Definitive Safeguard Measure on Salmon	Chile DS326
33. European Communities - Definitive Safeguard Measure on Salmon	Norway DS328

Appendix 2. WTO Panel/Appellate Body Reports Relating to the Safeguard Agreement (1 January 1995 – 20 June 2005)

Dispute	Panel Established	Panel Report Circulated	Notice of Appeal	Panel Report Adopted	Appellate Body Report Circulated	Appellate Body Report Adopted
1. Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products	22.07.98 EC WT/DS98	21.06.99 WT/DS98/R	15.09.99 WT/DS98/7	12.01.00 WT/DS98/10	14.12.99 WT/DS98/AB/R	12.01.00 WT/DS98/10
2. Argentina - Safeguard Measures on Imports of Footwear	23.07.98 EC WT/DS121	25.06.99 WT/DS121/R	15.09.99 WT/DS121/6 and Corr.1	12.01.00 WT/DS121/9	14.12.99 WT/DS121/AB/R	12.01.00 WT/DS121/9
3. United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities	26.07.99 EC WT/DS166	31.07.00 WT/DS166/R	26.09.00 WT/DS166/7	19.01.01 WT/DS166/10	22.12.00 WT/DS166/AB/R	19.01.01 WT/DS166/10
4. United States - Safeguard Measures on Imports of Fresh Chilled or Frozen Lamb Meat from New Zealand and Australia	19.11.99 New Zealand WT/DS177 Australia WT/DS178	21.12.00 WT/DS177/R WT/DS178/R	31.01.01 US WT/DS177/7 WT/DS178/8	16.05.01 WT/DS177/10 WT/DS178/11	01.05.01 WT/DS177/AB/R WT/DS178/AB/R	16.05.01 WT/DS177/10 WT/DS178/11
5. United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea	23.10.00 Korea WT/DS202	29.10.01 WT/DS202/R	19.11.01 US WT/DS202/9	08.03.02 WT/DS202/13	15.02.02 WT/DS202/AB/R	08.03.02 WT/DS202/13
6. Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products	12.03.01 Argentina WT/DS207	03.05.02 WT/DS207/R	24.06.02 WT/DS207/5	23.10.02 WT/DS207/8	23.09.02 WT/DS207/AB/R	23.10.02 WT/DS207/8
7. Argentina - Definitive Safeguard Measure on Imports of Preserved Peaches	18.01.02 Chile WT/DS238	14.02.03 WT/DS238/R	N.A.	15.04.03 WT/DS238/5	N.A.	N.A.

<p>8. United States – Definitive Safeguard Measures on Imports of Certain Steel Products</p>	<p>03.06.02 EC WT/DS248 14.06.02 Japan WT/DS249 14.06.02 Korea WT/DS251 24.06.02 China WT/DS252 24.06.02 Switzerland WT/DS253 24.06.02 Norway WT/DS254 08.07.02 New Zealand WT/DS258 29.07.02 Brazil WT/DS259</p>	<p>11.07.03 WT/DS248/R and Corr.1 WT/DS249/R and Corr.1 WT/DS251 and Corr.1 WT/DS252 and Corr.1 WT/DS253 and Corr.1 WT/DS254 and Corr.1 WT/DS258 and Corr.1 WT/DS259 and Corr.1</p>	<p>11.08.03 US WT/DS248/17 WT/DS249/11 WT/DS251/12 WT/DS252/10 WT/DS253/10 WT/DS254/10 WT/DS258/14 WT/DS259/13</p>	<p>10.12.03 WT/DS248/20 WT/DS249/14 WT/DS251/15 WT/DS252/13 WT/DS253/13 WT/DS254/13 WT/DS258/17 WT/DS259/16</p>	<p>10.11.03 WT/DS248/AB/R WT/DS249/AB/R WT/DS251/AB/R WT/DS252/AB/R WT/DS253/AB/R WT/DS254/AB/R WT/DS258/AB/R WT/DS259/AB/R</p>	<p>10.12.03 WT/DS248/20 WT/DS249/14 WT/DS251/15 WT/DS252/13 WT/DS253/13 WT/DS254/13 WT/DS258/17 WT/DS259/16</p>
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**Appendix 3. “Transitional Product-Specific Safeguard Mechanism”
in the China’s WTO Accession Protocol⁴⁵**

16. Transitional Product-Specific Safeguard Mechanism

1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence

⁴⁵ WTO, WT/L/432 (dated Nov. 23, 2001).

on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.

6. A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than three years. Any such action by China shall be notified immediately to the Committee on Safeguards.

7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided for under paragraph 6.

8. If a WTO Member considers that an action taken under paragraphs 2, 3 or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be held within 30 days after the request is notified to the Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such product, to withdraw concessions accorded to or otherwise limit imports from China, to the extent necessary to prevent or remedy such diversions. Such action shall be notified immediately to the Committee on Safeguards.



Restructuring the WTO Safeguard System

9. Application of this Section shall be terminated 12 years after the date of accession.

