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On the Comparison of Safeguard Mechanisms of Free Trade Agreements

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On the Comparison of Safeguard Mechanisms of Free Trade Agreements

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Abstract

Bilateral and regional safeguard mechanisms in free trade agreements (FTAs) address only the effects of trade liberalization initiatives under FTAs, and thus, in contrast with other trade remedies such as antidumping, they enable the examination of their nature and preferability to free trade independently of the global. We investigated selected bilateral and regional safeguard mechanisms according to nine different indicators, which represent the "conditions for invocation," "conditions of application," and "procedural conditions" for the safeguard measures. While the safeguard mechanisms reveal specific characteristics according to their political and economic backgrounds, their nature is approximately summarized in the following order of preferability: (1) No Safeguard Type, (2) WTO Type, (3) NAFTA Type, (4) GATT Type, and (5) European Type. Importantly, however, in the overall understanding of the significance of each safeguard mechanism, one needs to be reminded of their trade liberalization ("safety valve") functions. In that sense, any final remarks on the subject can come only after assessing the level of trade liberalization facilitated by the existence of the mechanisms.

Introduction

This paper aims to investigate the treatment of bilateral and regional safeguard mechanisms in selected free trade agreements[1], and to some extent evaluate and rank them according to their preferability for the achievement of freer international trade. The primary safeguard mechanism in the international trading system is, of course, the global safeguard mechanism, which was originally introduced under GATT 19 and later succeeded by the package of GATT 19 and the WTO Safeguard Agreement[2].

On the other hand, most free trade agreements concluded in recent years provide special and different safeguard mechanisms which share the same or similar grounds for the invocation of trade-restrictive measures as the global safeguard mechanism, but only address the effects of certain bilateral or regional free trade agreements, and are thus only applicable between the contracting parties or among the member countries of such bilateral or regional agreements. These mechanisms, generally referred to as bilateral or regional safeguard mechanisms, exhibit considerable and interesting differences in their respective regulations, and are therefore a favorable research subject for elucidating and comparing the nature and background of bilateral and regional free trade agreements.

This paper first touches on the basic idea and structure of safeguard mechanisms with reference to the provisions of the global safeguard mechanism under the GATT and the WTO, and then attempts to clarify the different characteristics of the global and bilateral or regional safeguard mechanisms, as well as the subsequent embodiments of such differences in some of their specific provisions. In the following

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[1] Investigated FTAs include, EFTA, AFTA, NAFTA, Australia- New Zealand, EC-Mexico, Japan-Singapore, China-ASEAN, US-Singapore, Korea-Chile, US-Australia, Japan-Mexico, and Korea-Singapore FTAs.

[2] The Safeguard Agreement was, among its negotiators, clearly projected to be the sole set of regulations concerning the application of global safeguard measures. However, since the former GATT 19 remained effective as part of the General Agreement on Tariffs and Trade 1994 after the coming into effect of the WTO, the application of global safeguard measures are now subjected to the provisions of both GATT 19 and the Safeguard Agreement.

section, which will constitute the body of our analysis, we will first provide nine different indicators with which to look into the selected bilateral and regional safeguard mechanisms, and explain briefly what they are and how they are important for the purpose of our analysis. We will then provide detailed case-by-case analysis of the safeguard mechanisms based on the indicators, and also present some speculative remarks on their specific characteristics. Subsequently, we shall attempt to categorize the investigated mechanisms into five groups according to their overall features, and then evaluate which groups of mechanism and which mechanisms among them are comparatively more preferable, basing such evaluations on their trade-restrictive qualities. Finally, we point to the possibility that safeguard mechanisms may, in fact, serve some positive functions rather than simply restricting trade. Consequently, we conclude that the evaluation based on the trade-restrictive nature of the mechanisms is essential, but comprises only half the overall analysis necessary for a complete and comprehensive understanding, by suggesting that any final remarks on the subject come only after assessing the level of trade liberalization facilitated by the existence of the respective mechanisms.

1. What Are Bilateral and Regional Safeguard Mechanisms?

(1) The Basic Idea and Structure of Safeguard Mechanisms

The purpose of the GATT and free trade agreements, whether bilateral or regional, is to liberalize trade by reducing tariffs and non-tariff barriers for freer movement of goods across borders. Safeguard mechanisms provided therein, on the contrary, authorize the contracting parties to take trade-restrictive measures with no unfair trade practices on the part of the exporting countries[3], and thus, in principle, stand as obstacles to the effective execution of the agreements. Such an apparent contradiction in the existence of safeguard mechanisms is supposedly justified as

[3] Antidumping measures and countervailing measures are, on the contrary, characterized as the remedies to unfair trade practices on the part of the exporting countries, and are thus applicable only against the products of countries responsible for such practices.

emergency measures for the purpose of remedying the negative impacts on domestic industries incurred by surges in imports[4]. For example, the initial global safeguard mechanism articulated in GATT 19, which to some extent provided the prototype for subsequent safeguard mechanisms, prescribed the grounds and framework of the measures by ambiguously stating:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession[5].

Thus, typically, a safeguard mechanism presupposes serious injury or threat thereof to the domestic industry of an importing country, which is, in turn, deemed to be brought about by a sudden increase in imports. Then, only when such an"exceptional situation" is considered to be existent, the importing country is allowed to invoke trade-restrictive measures that are otherwise prohibited under the free trade agreement. However, as one can easily imagine from the intensity of domestic trade politics, such trade-restrictive measures are, in practice, always subject to the risk of being abused by an importing country, thus considerably undermining the trade

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[4] However, such negative impacts on inefficient domestic industries are the natural consequences of trade liberalization, and the sources of efficiency gains that trade liberalization is aimed at. Thus, theoretically, the existence of safeguard mechanisms requires more elaborate academic rationales, which, in fact, have been the subject of longstanding controversy in the study of the global safeguard mechanism. For the overall descriptions of various doctrines presented in this context, see, for example, Raj Bhala and Kevin Kennedy, *World Trade Law: The GATT-WTO System, Regional Agreements, and U.S. Law*, Lexis Law Publishing, 1998; John H. Jackson, *The World Trading System*, 2nd ed., Cambridge: MIT Press, 1997; M. J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd ed., New York: Routledge, 1999.

[5] GATT Article 19.1(a).

liberalization efforts conducted under the agreement. In fact, GATT 19 does not elaborate any further than the above provision on how the grounds for the invocation of such restrictive measures are determined to be existent, nor the types of measures and how long such measures are allowed to be applied. These eventually gave rise to the situation where importing countries were virtually free to invoke and maintain the measures to their liking[6]. On the other hand, due to the obligation of nondiscrimination upon the application of measures[7], as well as the right of the affected exporting countries to suspend the application of substantially equivalent concessions or other obligations[8], importing countries were, in fact, subject to substantial economic as well as political costs. The costs invoking safeguard measures, combined with the lack of dispute settlement practices to judge an often-obvious GATT inconsistency[9], contributed to the proliferation of infamous "grey-area measures," as well as the severe marginalization of GATT 19[10].

The Safeguard Agreement of the WTO, which came into effect after more than

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[6] In fact, as early as 1963, it was already suggested by the GATT Secretariat that the regulations of GATT 19 were too lax to secure the achievement of trade concessions, and are thus in need of critical review. See, GATT, L/2002, 1963, p.13.

[7] Though it was generally considered that the safeguard measures had to be applied non-discriminatorily, GATT 19, in fact, put forth no provisions concerning such an obligation and eventually gave rise to a counter-argument (see, for example, MC. E. J. Bronckers, Selective Safeguard Measures in Multilateral Trade Relations, Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1995). The Safeguard Agreement of the WTO, on the other hand, clearly articulated that the measures be, in principle, applied non-discriminatorily against different sources of imports (Safeguard Agreement, Article 5).

[8] GATT Article 19.3(a).

[9] The so-called Panel proceeding was, of course, available as long as the parties agreed on its establishment. However, since grey-area measures were taken "voluntarily" by the exporting countries upon request, whether formal or informal, by the importing countries, there usually were no contracting parties in hope of such a proceeding.

For the legal status of grey-area measures, see, for example, John H. Jackson, "The GATT Consistency of Export Restraint Arrangements," *World Economy*, 11-2 (1988), pp.187-202; E-U. Petersman, "Gray Area Measures and the Rule of Law," *Journal of World Trade*, 22-2 (1988), pp.23-44.

[10] It was estimated that by the year 1990, a total of 284 grey-area measures were confirmed to have existed (Terence P. Stewart, *The GATT Uruguay Round: a negotiating history (1986-1992)*, Boston: Kluwer Law and Taxation, 1993, p.1729), whereas the number of the safeguard measures invoked between 1970 and 1994 remained less than 100 (Industrial Structure Council, *2005 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners*, Ministry of Economy, Trade and Industry, 2005, p.239, table 7-2).

20 years of scattered negotiations[11], widely responded to these structural and practical problems of GATT 19, and provided a highly elaborate set of regulations covering a variety of aspects of law regarding its implementation[12]. The overall structure and the improvements of the Agreement are summarized as follows:

First, grounds for the invocation of measures and the framework for their applications are provided and better elaborated than the ambiguous regulations of GATT 19. For example, Article 4 of the Agreement specifically defines some of the conditions required for the invocation of measures, also clearly prescribing the ways of determining such prerequisite conditions. Furthermore, Article 11 explicitly prohibits the invocation of grey-area measures, preceded by Article 5 and Article 7 which illustrates what types of measures, what level of restrictions, and how long and how such measures are allowed to be applied.

Secondly, the Safeguard Agreement prescribes in detail the proceedings for the implementation of the mechanism, whether they are domestic or international proceedings. Article 3, for example, provides various instructions on the processes that domestic authorities need to follow upon determining the prerequisite conditions of the safeguard measures, while Article 12 elaborates the notification and consultation obligations required on importing countries at the various stages of investigation and application. Furthermore, Article 13 of the Agreement describes the surveillance task imposed on the Committee on Safeguards[13]. Article 14 clarifies that the neutral dispute settlement procedures of the WTO are applicable to the disputes arising from the Agreement.

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[11] For the details of such negotiations, see, especially, Stewart, ibid, pp.1745-1752 and pp.1761-1800; John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd and revised ed., The Hague: Kluwer Law International, 1999, pp.53-57, 168-171, 260-261.

[12] For the achievements and failures in the Safeguard Agreement, see, for example, John H. Jackson, *The World Trading System*, 2nd ed., Cambridge: MIT Press, 1997, pp.210-211; Thiebaut Flory, "The Agreement on Safeguards," in Jacques H. J. Bourgeois, Frederique Berrod, and Eric G. Fournier, *The Uruguay Round Results*, Brussels: European Interuniversity Press, 1995, pp.265-273.

[13] The Committee on Safeguards was the committee established in the same Article under the authority of the Council for Trade in Goods, which is open to the participation of any Member indicating its wish to serve on it. See, Safeguard Agreement Article 13.1.

Finally, in Article 8, the Agreement clarifies the effort obligation of importing countries to provide an equivalent level of compensation to the affected exporting countries[14], whereas it reserves the right of exporting countries to suspend the application of concessions or other obligations for three years, when the measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the agreement.

(2) The Intrinsic Nature of Bilateral and Regional Safeguard Mechanisms

Bilateral and regional safeguard mechanisms have been an integral part of most free trade agreements. In fact, the history goes back to the United States reciprocal trade agreements in 1940s, which subsequently provided a model for the safeguard mechanism under GATT 19. Under those earlier examples of bilateral safeguard mechanisms, contracting parties were authorized to restrict imports from the other parties, be it through a tariff increase or quantitative restriction, where they simply found that their domestic industries were being seriously damaged by such imports from the other parties.

Since the conclusion of the GATT, however, bilateral and regional safeguard mechanisms in FTAs have, in theory and to a somewhat lesser extent in practice, become a remedy of special and limited nature. Under an international trading system based on the nondiscrimination principle, importing countries are primarily allowed to resort to the global safeguard measures in order to deal with the negative impacts incurred by imports on their domestic industries. Only when such negative impacts by imports are the specific results of additional trade liberalization initiatives under FTAs can importing countries be allowed to invoke bilateral or regional safeguard measures as are regulated under such FTAs. Therefore, in a case where a certain import product is an object of additional liberalization initiatives under bilateral or regional agreements, as long as the damages incurred by such an import product are not the

14 The former GATT 19 contained no provisions regarding compensation. What was deemed to be as such an obligation was, in fact, developed through practices of the contracting parties.

specific result of such additional liberalization, it is not the purpose of bilateral or regional safeguard measures to deal with such damages.

In short, the global safeguard mechanism, and bilateral or regional safeguard mechanisms are two different institutions dealing with problems arising from two different free trade initiatives. This is exactly why bilateral and regional safeguard mechanisms have their own particular foundations despite the existence of the nondiscriminatory global safeguard mechanism. On the contrary, the concept of "bilateral or regional antidumping mechanisms" makes no sense because dumping is, after all, a single inseparable action of an importing country[15].

Considering such a difference in characteristics between the global safeguard mechanism and bilateral or regional safeguard mechanisms, a proliferation of bilateral and regional safeguard mechanisms, *per se*, by no means affect the integrity of the global safeguard mechanism, because those two types of mechanisms are not in the relationship where the legal principle of *lex specialis derogate generali* potentially applies[16]. Nor, on the contrary, does it necessarily contribute to better institutional design of a future global safeguard mechanism, because, in principle, there is no such relationship between the global safeguard mechanism and bilateral or regional

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[15] In some FTAs application of the antidumping mechanism is explicitly prohibited or additional requirements are attached to it between the contracting parties of such agreements (see, for example, Canada Chile FTA Article M-01 and Korea-Singapore FTA Article 6.2). However, these, of course, are not the examples of bilateral antidumping mechanisms existing together with the global antidumping mechanism. Rather they exemplify the case where global regulations are replaced by bilateral regulations between the contracting parties which so agreed.

[16] On the contrary, non-application of the global safeguard mechanism, or non-application or additional requirements for the application of the antidumping mechanism observed in some FTAs (the former include, for example, the Australia-Singapore and New Zealand-Singapore FTAs, for the latter, see the footnote above) replace the worldwide regulations on such trade instruments between their contracting parties and, to that extent, affect the integrity of those regulations. These practices not only raise the question of whether they are preferable economically, but also the question of whether they are permitted legally. In fact, as some scholars argue (see, for example, Akira Kotera, *WTO Taisei no Hou Kouzou* [On the Structure of the WTO System], University of Tokyo Press, 2000) if the WTO constitutes a "self-contained regime" in the sense that its law excludes some types of general international law, it is possible that the principle of *lex specialis derogate generali* does not apply in its relationship, and such bilateral and regional practices are legally unfounded.

safeguard mechanisms as to justify judgment on their institutional preferabilities[17]. These, of course, do not mean that, in practice, domestic officials and interested parties of an importing country suffer greater complications and thus greater implementation costs due to the proliferation of different safeguard mechanisms. In fact, as the number of bilateral and regional safeguard mechanisms increases, it will be more and more difficult to identify the cause of injury or threat thereof to be responded to by the respective mechanisms, and thus the burden on domestic officials and interested parties of an importing country multiplies[18].

Given such a nature of bilateral and regional safeguard mechanisms, it is only natural that their regulations exhibit some systemic differences from those of the global safeguard mechanism. For example, under most bilateral and regional safeguard mechanisms concluded in recent years, tariff increases or suspension of further tariff reduction are the only applicable measures[19], whereas under the global safeguard mechanism importing countries are explicitly allowed to invoke other types of trade-restrictive measures such as quantitative restrictions[20]. Where damages on

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17 Many scholars argue that FTAs negotiations enable their parties to agree on more extensive and more profound international trade rules than in global negotiations, and through the pervasion of such rules among different sets of countries, they eventually facilitate the achievement of more preferable trade rules at the level of the global trading system (see, for example, Hiroshi Mukunoki, "Chiiki boueki kyoutei to takaku-teki boueki jiyuu-ka no hokan kanousei [Complementarity of Regional Trade Agreeements in Multilateral Trade Liberalization]," *RIETI Discussion Paper Series*, 06-J-006, p.19). However, since bilateral and regional safeguard mechanisms are the institutions that are inherent to bilateral and regional free trade agreements, no matter how a certain type of such mechanisms prevails among different sets of countries it does not have any foundation in the global trading system.

18 These costs associated with the proliferation of bilateral and regional safeguard mechanisms are, in essence, of the same nature as what is commonly called "the spaghetti bowl problem," in the context of the proliferation of different sets of rules of origin and the subsequent increases in the transaction costs associated with their implementations. For the original terminology of the "spaghetti bowl phenomenon," however, see, Akira Kotera, "What is the 'spaghetti bowl phenomena'?" on the RIETI website at http://www.rieti.go.jp/en/columns/a01_0193.html (as of March 31, 2007).

19 See, for example, Japan-Singapore FTA Article 18.1.

20 GATT 19 provides that the contracting party shall be free to suspend the obligation incurred by a contracting party under the GATT in whole or in part or to withdraw or modify the concession (GATT Article 19.1[a]). Although tariff increases and quantitative restrictions were the most popular measures applied under the mechanism, GATT 19 did not specify what types of measures fell within the scope of such suspendable "obligations." During the negotiations for the GATT 19 amendment

domestic industries could be the result of both global and bilateral or regional free trade initiatives, suspending the further tariff reduction under FTAs or increasing the tariff rate to a level not exceeding the level of the most-favored-nation (MFN) is virtually the only possible way to exclusively address the effects of liberalization under FTAs.

Furthermore, under most bilateral and regional safeguard mechanisms it is explicitly articulated that bilateral and regional safeguard measures are, in principle, only applicable during the transition period[21], while the global safeguard mechanism does not provide a specific time limit for the invocation of a safeguard. This difference might be due to the requirement of Article 24, para. 8 (b) of the GATT, which states that restrictive regulations on commerce shall be eliminated on most all trade[22].

2. Analysis and Evaluation of the Selected Safeguard Mechanisms

(1) Indicators for Analysis and their Descriptions

In order to analyze the respective bilateral and regional safeguard mechanisms, we came up with nine different indicators as listed in Table 1 of the Appendix. In the followings segments we will provide descriptions and explanations on what they are and how they are important for the purpose of our analysis.

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contracting parties attempted to clarify the scope of the applicable measures. However, the Safeguard Agreement concluded as the result of such negotiations essentially eluded the issue by simply stating, "This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article 19 of GATT 1994 (Safeguard Agreement Article 1)."

[21] For example, the Japan-Singapore FTA articulates that the bilateral safeguard measures provided therein are applicable only during the transition period (Japan-Singapore FTA Article 18.1), which, in turn, is defined as the 10 years immediately following the agreement's entry into force (Japan-Singapore FTA Article 11[d]). Interestingly, however, FTAs that were subsequently concluded by Japan (Japan-Mexico, Japan-Malaysia, and Japan-Philippines FTAs) do not include the concept of a transition period, and thus no predetermined period for the invocation of safeguard measures.

[22] See James H. Mathis, "Regional Trade Agreements and Domestic Regulation: What Reach for 'Other Restrictive Regulations of Commerce'?" in Lorand Bartels and Federico Ortino eds., *Regional Trade Agreements and the WTO Legal System*, Oxford University Press, 2006, pp. 89-91.

(a) Conditions for Invocation

The first three indicators are the conditions for invocation of the safeguard measures, that is, the conditions that must be met for the invocation of safeguard measures. In any safeguard mechanism, whether global, bilateral, or regional, the requirements for the invocation of safeguard measures are basically threefold[23]. Firstly, injury to domestic industries must be apparent. Secondly, increase in imports of a certain product also must be shown. Thirdly, a causal relationship between injury and increase in imports must be established.

The regulatory details concerning these requirements, however, differ from one safeguard mechanism to another. For example, a degree of variety is observed in the required level of injury or causation, or how such injury, causation, and increase in imports are to be determined. These varieties in the regulation of invocation, of course, significantly affect the trade-restrictive nature of the respective safeguard mechanisms. For example, if the standard of injury to domestic industries is set so high as to put the requirement of injury at an almost insurmountable level, importing countries cannot effectively invoke safeguard measures, therefore rendering such a mechanism virtually unrestrictive. The impact of the mode of regulations on these requirements is considered even more significant when one takes into account the recent interpretive practices of the global safeguard mechanism in the WTO dispute settlement procedures[24]. None of the cases brought to the WTO dispute settlement

[23] In fact, since the former GATT 19 remained effective as part of the General Agreement on Tariffs and Trade 1994 after the coming into effect of the WTO, the "unforeseen developments" requirement therein provided was judged to also remain effective as one of the conditions for the invocation of global safeguard measures (see, Korea-Definitive Safeguard Measures on Imports of Certain Dairy Products: Report of the Appellate Body, WT/DS98/AB/R, paragraph 74-77; Argentina-Safeguard Measures on Imports of Footwear, Report of the Appellate Body, WT/DS121/AB/R, paragraph 79-84). Such a requirement, however, is not articulated in recent bilateral and regional safeguard mechanisms, since their provisions are normally drawn from those of the Safeguard Agreement and not from those of the former GATT 19.

[24] For the descriptions and evaluations on the interpretive practices of the global safeguard mechanism including those on the conditions for invocation, see, generally, Ichirou Araki and Tsuyoshi Kawase, *WTO taisei-ka no se-fuga-do* [The Safeguard under the WTO System], Toyo Keizai Inc, 2004; Yong-Shik Lee, *Safeguard Measures in*

mechanism so far have been judged to meet the requirements of these conditions, thus failing to establish the grounds for the invocation of measures in the first place[25].

The regulations of the global safeguard mechanism concerning these conditions are provided in the same table for further descriptions of the respective indicators and also as a point of reference in order to inquire and evaluate the respective bilateral and regional safeguard mechanisms. Under the global safeguard mechanism, the level of injury required on domestic industries, for example, is "serious injury[26]" which, in turn, is defined as "significant overall impairment in the position of a domestic industry[27]." Furthermore, regarding the matter of determining cause of injury, it imposes the so-called non-attribution rule, which is articulated as "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[28]." Each of the bilateral and regional safeguard mechanisms will be inquired about according to these indicators and in comparison to these regulations of the global safeguard mechanism.

(b) Conditions of Application

The next three indicators concern the conditions of application of the safeguard measures. These conditions essentially regulate how such measures as are allowed under the respective safeguard mechanisms are to be applied, once the abovementioned conditions for invocation are deemed to have been satisfied. Such conditions include, for example, what period of time measures are allowed to be maintained, what period of time and on what conditions measures are allowed to be extended, whether or not progressive liberalization is required during the initial application, and, given that such a thing is allowed, what period of time is required in order to again invoke measures on the same products. Furthermore, some safeguard

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World Trade, Hague: Kluwer Law International, 2003.

[25] Such cases include Korea-Dairy (DS98), Argentina-Footwear (DS121), US-Wheat Gluten (DS166), US-Lamb (DS177/178), US-Line Pipe (DS202), Chile-Price Band (DS207), Argentina-Preserved Peaches (DS238), US-Steel (DS248/249/251/252/253/254/258/259).

[26] Safeguard Agreement Article 2.1.

[27] Ibid, Article 4.1(a).

[28] Ibid, Article 4.2(b).

mechanisms explicitly refer to the concept of adjustment in relation to, for example, the determination of the period of initial application, the allowability of the extension of the initial measures, and the purpose of the progressive liberalization of the initial measures. These referrals to the concept of adjustment are also considered important, because in some cases they are actually expected to significantly constrain the application of measures, as has been indicated in the interpretive practice of the WTO dispute settlement mechanism[29].

The impact of these conditions of application on the assessment of the trade-restrictive nature of the safeguard mechanisms is also straightforward. For example, the longer the maximum period of application and the looser the conditions for such determinations, the longer the measures can be maintained, and thus such a mechanism is generally considered more trade-restrictive. In fact, as we have stated earlier in this paper, in GATT 19 it was only articulated that countries could resort to safeguard measures "to the extent and for such time as may be necessary to prevent or remedy such injury[30]." The ambiguous wording of the former global safeguard regulations virtually left unregulated the question of an applicable time period, thereby allowing the measures to be maintained indefinitely. This raised a cry for greater specificity regarding the application of safeguard measures, thus leading to the formulation of the highly detailed regulations of the Safeguard Agreement. For example, in the new agreement on global safeguard measures, the maximum period of initial application and the total maximum period after extension are specified to be four and eight years respectively[31]. In the case that the expected duration of such measures is more than one year, countries are required to liberalize the measure progressively at regular intervals[32].

The conditions of application of bilateral and regional safeguard mechanisms are generally more rigid than those of the global safeguard mechanism. However,

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[29] See, for example, Korea-Definitive Safeguard Measures on Imports of Certain Dairy Products: Report of the Appellate Body, WT/DS98/AB/R, paragraph 96.
[30] GATT Article 19.1(a).
[31] Safeguard Agreement Article 7.1 and 7.3 respectively.
[32] Ibid, Article 7.4.

certain variations exist in the regulations of conditions among different bilateral and regional safeguard mechanisms, and therefore detailed inquiries and comparative analysis according to such conditions are considered meaningful.

(c) Procedural Conditions

Finally, the last three indicators are the procedural conditions that the parties must or are allowed to follow domestically or internationally in order for the implementation of the safeguard mechanism.

The first indicator, the "domestic investigation," is a set of regulations that importing countries are obliged to follow when they investigate whether the invocation of safeguard measures is justified. Recent safeguard mechanisms have generally provided rigid and detailed regulations regarding the conditions for their invocations. However, if the determination of the conditions were to be made arbitrarily by the domestic authority of an importing country, the value of such regulations and thus the rights of the affected exporting countries would be severely undermined. This remains true even where a neutral dispute settlement is available internationally and therefore such determinations by the domestic authority are to be overturned afterwards. Procedures usually require a considerable amount of time, as well as being economically very costly. In the global safeguard mechanism of the WTO, detailed regulations are provided regarding the obligations of public notice, public hearing, and publication of a report[33], with the purpose of ensuring that views of all the interested parties are sufficiently reflected.

The second of this group of indicators is the notification and consultation requirements imposed on the importing countries. In order for the implementation of the safeguard mechanism to be legally sound, there needs to be a procedural guarantee which provides sufficient information and time so that the affected exporting countries can fully express their own views. For this purpose, the global safeguard mechanism specifies when and with whom such notifications and consultations are required, as

[33] Ibid, Article 3.1.

well as their contents and procedures[34]. Bilateral and regional safeguard mechanisms also impose such obligations at varying degrees, thus justifying their in-depth assessment of how the fair and effective implementation of these potentially destructive mechanisms is to be secured among different mechanisms.

The last indicator is the applicability of a "neutral dispute settlement," indicating a type of international procedure subject to an impartial third party judgment comparable to an international adjudication. The importance of this indicator for the purpose of our analysis is indisputable. Without a neutral dispute settlement procedure applied on a compulsory basis, all regulations regarding the implementation of the safeguard mechanism are basically entrusted to auto-interpretation by the respective parties. This virtually allows the importing countries under the GATT to exercise a high level of discretion concerning when and how the measures are to be applied. The WTO, on the other hand, enjoys a highly judicialized dispute settlement system[35], wherein all interpretative issues concerning the implementation of the safeguard mechanism are subjected to and determined in a neutral manner. Here, we examine what types of dispute settlement procedures are applicable in the respective safeguard mechanisms in order to assess how effectively the implementation of the mechanism is secured among different agreements.

(d) Other Possible Indicators

In addition to the nine indicators detailed above, safeguard mechanisms include other regulations that could potentially influence their trade-restrictive nature, the most important of which being, arguably, the effort obligation of compensation on the part of importing countries and the right of rebalancing on the part of the affected exporting countries. However, these provisions remain essentially the same among

[34] Ibid, Article 12.

[35] In this context, developments such as the introduction of the negative consensus rule at the establishment of the procedures and at the adoption of their reports, the establishment of the Appellate Body, and the provision of a specific time schedule for the procedures merit special attention. For the details and nature of the dispute settlement procedures of the WTO, see, especially, Kotera, supra note 16, ch.2, 4, and 5.

different bilateral and regional safeguard mechanisms. For example, the mechanisms generally authorize the immediate execution of rebalancing measures by the affected exporting countries without the provision of a moratorium period stipulated under the Safeguard Agreement[36]. Therefore these regulations are excluded from the scope of our analysis despite their general importance in the overall scheme of these mechanisms.

(2) The Analysis of the Selected Bilateral and Regional Safeguard Mechanisms

The actual regulations of the respective bilateral and regional safeguard mechanisms on the above-mentioned nine indicators are summarized in Tables 2 and 3 of the Appendix. Here we analyze the respective bilateral and regional safeguard mechanisms and speculate on the backgrounds of their respective characteristics.

(a) NAFTA

The regional safeguard mechanism in the North American Free Trade Agreement (NAFTA)[37] shares a great similarity with the global safeguard mechanism of the WTO. Although this mechanism was adopted one year earlier than that of the WTO, the similarity comes as no surprise considering that both safeguard mechanisms refer extensively to the same domestic safeguard provisions of the United States, the dominant country of NAFTA[38]. Looking closely at the provisions, it seems that the regional safeguard mechanism in NAFTA provides more detailed and rigid regulations on its conditions for invocation than its elaborate counterparts in the global safeguard mechanism. For example, in NAFTA the increase in imports needs to be "in absolute terms[39]," whereas the global safeguard mechanism makes no such distinction between

[36] See, for example, Japan-Singapore FTA Article 18.4.
[37] NAFTA Article 801-805. The safeguard mechanism provided in this agreement, however, only applies to the bilateral relationships between Mexico on the one hand and the United States and Canada on the other. Bilateral safeguard measures between the United States and Canada are subjected to the provisions of Article 1101 of the Canada-US FTA, which is incorporated into and made a part of NAFTA for such purpose. See, NAFTA Annex 801.
[38] The Trade Act of 1974 § 201-204.
[39] NAFTA Article 801.1.

absolute and relative increases[40]. Furthermore, concerning the standard of causation requirement, the former requires that imports alone constitute a substantial cause of serious injury[41], whereas the global safeguard mechanism remains silent on such a standard.

The most prominent feature of this regional safeguard mechanism, however, is that it explicitly articulates that no party may request the establishment of an arbitral panel regarding any proposed safeguard measures[42]. At first glance, such a provision seems incongruous for a safeguard mechanism with such detailed and rigid conditions. However, once one becomes aware of the extensive and thorough nature of its regulations on domestic investigation[43], the inapplicability of the international neutral dispute settlement procedure can arguably be seen as not so much a lack of procedural guarantee[44]. That is, the effective implementation of the safeguard mechanism is designed to be secured not so much through the interactions of the member countries representing their interested parties, but rather by guaranteeing sufficient due process rights at the level of domestic investigation to the affected interested parties regardless of their nationalities.

(b) EFTA

The Convention Establishing the European Free Trade Association (EFTA), which was concluded in 1960 and later amended in 2001, possesses truly unique

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40 However, as previously stated in this paper, the Safeguard Agreement, interestingly, distinguishes absolute and relative increases in imports in the context of the rebalancing measures. See, Safeguard Agreement Article 8.3.
41 NAFTA Article 801.1.
42 Ibid, Article 804.
43 Not only are the regulations concerning the notice requirement and the public hearing better elaborated than in the Safeguard Agreement, it particularly puts forth detailed provisions on issues such as the institution of a proceeding and the contents of a petition or complaint. Ibid, Article 803 and Annex 803.
44 However, it needs to be remembered that such regulations on the domestic investigations concern only the determination of conditions for invocation. The determination of conditions of application, on the contrary, are not subjected to such domestic proceedings, and thus without the application of a neutral international dispute settlement procedure, the affected exporting countries and their interested parties are basically devoid of the opportunities to secure their implementation.

regional safeguard mechanisms[45].

Article 40.1 of the Convention which provides the grounds and the basic framework for the measures reads "If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist are arising, a Member State may unilaterally take appropriate measures under the conditions and procedures set out in Article 41." Immediately obvious from the text is that member countries are allowed to invoke trade restrictive measures otherwise prohibited under the convention, as long as certain types of difficulties of a "sectorial" or "regional" nature are deemed existent. Since the mechanism does not further elaborate on the nature or the extent of the difficulties except that they are "economic," "societal" or "environmental" of a "serious" degree, it can safely be said that member countries enjoy enormous discretion on the invocation of such measures. The original safeguard mechanism included in the 1960 convention[46] shared the same particularly wide range of grounds for the invocation of measures[47], but their actual application was considerably controlled due to the prior multilateral authorization procedure[48], as well as the provision of a specific time frame for the measures[49].

This unusual regression, as it were, in the rigidities of the regulations observed between the 1960 and 2001 conventions can best be understood as the consequence of change in member constitution, thus also the overall purpose of the organization. At its conclusion in 1960, the organization included seven member countries and was the largest regional free trade agreement[50], with the view to further liberalize trade among its member countries beyond the level of the worldwide trading system. Therefore, the member countries readily possessed enough incentive to control the use of trade-restrictive measures in order to secure the objectives and benefits of the newly established organization. Contrarily, due to the consecutive withdrawals of

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45 EFTA Convention (Consolidated Version: 2001) Article 40 and 41.
46 EFTA Convention (Stockholm 1960) Article 20.
47 Ibid, Article 20.1(a).
48 Ibid, Article 20.1.
49 Ibid, Article 20.2.
50 The initial member countries of the EFTA included Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom.

its member countries, as well as the foundation of the European Economic Area between the European Community (EC) and three of the remaining four member countries of the EFTA[51], the 2001 EFTA Convention, including the safeguard mechanism therein provided, effectively applies only to the relations between Switzerland and the other EFTA member countries. Consequently, the other three member countries did not readily have the incentives to negate the argument for more flexible safeguard mechanisms, thus leading to the unique and unusually lax conditions for the invocation and the application of the safeguard measures.

(c) AFTA

The safeguard mechanism included in the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (AFTA)[52] is best characterized by its great resemblance to the former global safeguard mechanism, GATT 19. In particular, it elaborates no further on the standard or the method of determination of the respective conditions for invocation, and also remains completely silent on issues such as timeframe, extension, and reapplication of the safeguard measures. The lax and nonspecific regulatory nature displayed by the safeguard mechanism, in fact, greatly conforms to the overall scheme for trade liberalization of this agreement.

As a general framework for trade liberalization among heterogeneous developing countries in the Southeast Asian region, this agreement is best understood as a collection of general principles, rather than rules of a detailed and specific nature[53]. Correspondingly, the primary dispute settlement procedure available under

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[51] The contracting parties to the 2001 Convention include Iceland, Liechtenstein, Norway and Switzerland. Among those four countries Iceland, Liechtenstein and Norway are the members of the EEA.

[52] AFTA Article 6. In a strict sense AFTA is not the agreement for establishing the free trade area under GATT 24, but is based upon the Enabling Clause of GATT of 1979.

[53] Such a general and flexible nature of the agreement is clearly in line with the political motive for its establishment. In fact, it was widely recognized that the establishment of a free trade agreement was not so feasible from an economic perspective due especially to the enormous variety in political regimes and economic conditions as well as the similar export product lines among the countries in this region (see, for example, Kouichi Satou, “AFTA wo meguru ASEAN no ikinai seiji

the agreement, including the disputes arising from the safeguard mechanism, is consultation between the parties involved in the dispute, with the minor alternative of submitting the issues to a council comprised of nominees from each member country which is, therefore, a procedure of a political nature[54].

(d) EC-Mexico

The bilateral safeguard mechanism included in the EC-Mexico FTA [55] demonstrates a remarkable yet somewhat plausible imbalance between the regulations on the conditions for invocation and those on the conditions of application. Specifically, while it provides rigid and detailed provisions on how the measures are to be applied[56], it remains considerably unspecific on what occasions such measures are initially applicable[57]. This unique structure of the mechanism can readily be explained by the EC's long-standing philosophy toward its safeguard policy.

As it was especially evident throughout the negotiating history of the GATT 19 amendment[58], EC has been the champion of more flexible safeguard mechanisms for the purpose of addressing its strong political needs. Thus, its preferred strategy has been geared toward relaxing the requirements for the invocation of measures, while attempting to minimize its negative impacts on trade through rigid and detailed regulations on how such measures are to be applied. In fact, this bilateral safeguard mechanism between the EC and Mexico goes beyond relaxing the rigid and elaborate conditions for invocation of the global safeguard mechanism by providing other grounds for the invocation of measurers apart from the usual "injury to domestic industries" requirements. Specifically, grounds include "serious disturbances in any sector of economy," and "difficulties which could bring about serious deterioration in

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[Internal Politics of the ASEAN Countries on AFTA]," in Toshio Watanabe ed., *Higashi ajia keizai tougou heno michi* [The Road to the Integration of East Asian Economy], Keisou Shobou, 2004).

54 Ibid, Article 6.3. See also, Article 7 and 8 for the provisions on institutional arrangements and consultations.

55 EC-Mexico FTA Article 15.

56 Ibid, Article 15.2 and 15.3.

57 Ibid, Article 15.1.

58 See, for example, Stewart, supra note 10.

the economic situation of a region of the importing Party[59]."

(e) Australia-New Zealand

The bilateral safeguard mechanism in the Australia New Zealand Closer Economic Relations Trade Agreement[60] takes on a characteristic middle-ground between GATT 19 and the Safeguard Agreement, which is only natural given that the agreement was concluded in 1983, right after the initial negotiations of the GATT 19 amendment conducted during the Tokyo Round.

Throughout its provisions, this bilateral safeguard mechanism abunds with the efforts of the parties to effectively address the potential negative impacts of the highly flexible GATT 19-esque regulations, though such attempts manifest themselves in ways and degrees dissimilar to those of the Safeguard Agreement. The attempts include, for example, further elaborations on the standard of injury and the threat thereof[61], provisions of somewhat detailed conditions of application including a specific timeframe for the initial application of measures[62], and most notably, an introduction of regulations concerning domestic investigations; namely a provision outlining the opportunity for evidence to be presented by the other party[63].

However, no neutral dispute settlement procedure is provided in the agreement, and this, combined with the political nature of the consultation requirement in this mechanism, namely, the requirement of consultation prior to domestic investigation with the aim of reaching a solution[64], clearly underlines its dissimilarity to the more judicialized mechanisms of the Safeguard Agreement and their like.

(f) US-Singapore

The bilateral safeguard mechanism provided in the United States-Singapore

59 EC-Mexico FTA Article 15.1(b).
60 Australia-New Zealand FTA Article 17.
61 Ibid, Article 17.2(a).
62 Ibid, Article 17.6, 17.7(a) and 17.9(a).
63 Ibid, Article 17.4(a).
64 Ibid, Article 17.3.

Free Trade Agreement[65] draws extensively from the provisions of the Safeguard Agreement, except that the timeframe for the measures is more rigid[66] and the reapplication of the measures is not allowed[67], due to the aforementioned transitional character of bilateral and regional safeguard mechanisms.

One particularly interesting departure from the Safeguard Agreement and the mechanism in the United States' former regional trade agreement, NAFTA, is that it somewhat relaxes the requirement of causation by directly introducing the standard adopted in the United States' domestic safeguard provisions[68]. This undoubtedly deliberative modification of the key requirement for the invocation of measures is supposedly explained by the apparently strict interpretive practices of the WTO on this requirement[69], and the US's disappointment toward them[70]. Throughout the cases submitted before it, the dispute settlement body of WTO has systemically introduced an extraordinary textual approach to the interpretation of this somewhat ambiguous requirement, finding, consequently, all cases inconsistent with the provision of the Safeguard Agreement[71].

(g) US-Australia

The bilateral safeguard mechanism in the United States-Australia Free Trade Agreement[72], which was concluded a year after that of the United States-Singapore

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65 US-Singapore FTA Article 7.
66 Ibid, Article 7.2.6.
67 Ibid, Article 7.2.7.
68 Ibid, Article 7.1 and 7.6.4.
69 For descriptions and evaluations on such interpretive practices, see, for example, Yoshinori Abe, "Se-fuga-do kyoutei ni okeru inga kannkei youken [Attribution of the Safeguard]," Ichirou Araki and Tsuyoshi Kawase, ed., op. cit, 2004; Yong-Shik Lee, *Safeguard Measures in World Trade*, Hague: Kluwer Law International, 2003, pp.132-134.
70 For the general perception of the United States toward the interpretive practices on the causation requirement, see, for example, General Accountability Office, *World Trade Organization: Standard of Review and Impact of Trade Remedy Rulings*, 2003, p.22.
71 Such cases include Argentina-Footwear (DS121), US-Wheat Gluten (DS166), US-Lamb (DS177/178), US-Line Pipe (DS202), Chile-Price Band (DS207), US-Steel (DS248/249/251/252/253/254/258/259).
72 US-Australia FTA Article 9.

FTA, shares the same provisions with its predecessor, which, in turn, drew extensively from the provisions of the Safeguard Agreement.

(h) Japan-Mexico

The bilateral safeguard mechanism in the Agreement between Japan and Mexico for the Strengthening of the Economic Partnership[73] exhibits rigid and detailed regulations on the conditions of the safeguard measures, yet to a somewhat lesser extent than those of the Japan-Singapore FTA. For instance, it only provides that the standard of causation be "substantial cause[74]," while the period of initial application is considerably longer[75], and the measures can be applied more than twice on the same products[76]. This difference between the two agreements concluded by Japan is likely explained by the remarkable difference in the industrial structures of the two trading partners. Specifically, a substantial proportion of imports from Mexico consist of agricultural products[77], and this readily brought about huge concerns and fears among vulnerable yet politically strong Japanese competitors, thus leading to the advocacy of more flexible mechanisms in order to enable their remedies[78]. Furthermore this safeguard mechanism can be invoked with no time limit (even after the transition period elapses). This is one of the most remarkable differences from other safeguard

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73 Japan-Mexico FTA Article 51-56.
74 Ibid, Article 53.1.
75 Ibid, Article 53.5.
76 Ibid, Article 53.6.
77 Agricultural products, including fishery, accounted for 21.6% of the total imports from Mexico as of 2001 (Kimihiko Inaba, "Nichi-boku FTA no igi [The Significance of the Japan-Mexico FTA]" in Shujiro Urata ed., *FTA gaidobukku* [Guidebook of FTAs], JETRO, 2002), whereas agricultural products from Singapore accounted for only 1.9% of the total imports as of 1999 (Jun Shigeoka, "Nihon・Singapo-ru shinjidai keizai renkei kyoutei no igi [The Significance of the Japan-Singapore FTA]," in ibid).
78 It is not that there were no such concerns and fears concerning liberalization in agricultural products upon the negotiation of the Japan-Singapore FTA. Rather, since the agricultural imports accounted for only a marginal part of the overall imports from Singapore, sensitive agricultural products were able to be largely excluded from the scope of the bilateral liberalization. In the case of the Japan-Mexico FTA, on the contrary, agricultural products amounted to a substantial part of the total imports. Therefore they could not simply exclude all of the sensitive agricultural products since an FTA must meet the requirement to liberalize "substantially all trade," the key requirement of the WTO concerning the conformity of free trade agreements (GATT Article 24.8[b]).

mechanisms of the FTAs analyzed in this paper[79]. Additionally, this bilateral safeguard mechanism provides extraordinarily elaborate and comprehensive regulations on domestic investigations, so much that it has no equal among other bilateral and regional safeguard mechanisms[80].

(i) Japan-Singapore

The bilateral safeguard mechanism provided in the Japan-Singapore Economic Agreement for a New Age Partnership[81] exhibits one of the most extreme examples of rigidified and detailed mechanisms for safeguard measures. Specifically, the mechanism requires that the increase in imports be "in absolute terms[82]," and that such imports "alone constitute a substantial cause[83]." Furthermore, even when such particularly rigid requirements are deemed to be satisfied, the measures are initially applicable only for one year[84]. It is broadly understood that the Japanese government was especially motivated to achieve a high-level free trade agreement, in order to demonstrate that the abolition of its long-standing philosophy against bilateral and regional FTAs[85] was not a shift toward an exclusive regionalism in conflict with the idea of the nondiscriminatory world trading system. Rather, its intent was to show that this FTA was merely another product of its attempts to achieve the same goal of trade liberalization and that it complements rather than undermines the multilateral liberalization initiatives of the world trading system. This, combined with its

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79 See note 21.
80 In addition to the detailed regulations on the public notice and the public hearing, it especially elaborates on the guarantee of access to information for the interested parties of the respective contracting parties. Japan-Mexico FTA Article 55.
81 Japan-Singapore FTA Article 18.
82 Ibid, Article 18.1.
83 Ibid, Article 18.1.
84 Ibid, Article 18.3(d).
85 For example, the following statement in White Paper on International Trade 1999 clearly manifests such an opposition toward bilateral and regional free trade agreements: "As one of the few developed countries which do not participate in institutionalized regional integrations, Japan has to monitor and secure that such regional integrations will not resort to trade restrictive measures (Ministry of International Trade and Industry), *Tsuusho hakusho* [White Paper on International Trade], Ookura shou insatsukyoku, 1999, ch.5, § 3.3(2)"

traditional stance against arbitrary applications of trade remedy measures, contributed greatly to the extraordinarily rigid and detailed nature of its safeguard provisions.

(j) Korea-Chile

The free trade agreement between Korea and Chile remarkably does not put forth any provisions on general bilateral safeguard measures. This means neither country is allowed to take trade-restrictive measures in order to address negative impacts to its domestic industries specifically arising out of this bilateral agreement. However, the global safeguard measures remain applicable between the two countries[86], and therefore each country is able to restrict the imports from the other country, as long as such restrictions are applied on a nondiscriminatory basis among different countries.

Finally, but most importantly, agricultural goods are deemed an exception due to the alleged "particular sensitivity of the agricultural markets[87]," thus the agreement authorizes special emergency measures for such goods, for which regulations are characterized by its GATT 19-esque flexibility[88]. To accurately evaluate the trade-restrictive nature of this safeguard system, we need to take this structure into account.

(k) Korea-Singapore

The bilateral safeguard mechanism in the Korea-Singapore Free Trade Agreement[89] widely echoes the provisions of the agreement that Singapore concluded with the United States in the previous year. Its provisions are largely characterized by the rigidity and detailed nature observed in the Safeguard Agreement.

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86 Korea-Chile FTA Article 6.1 explicitly articulates "both parties maintain their rights and obligations under Article 19 of GATT and the Agreement on Safeguards, which is part of the WTO."
87 Ibid, Article 3.12.1
88 Ibid, Article 3.12
89 Korea-Singapore FTA Article 6.4.

(l) China-ASEAN

The safeguard mechanism included in the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the ASEAN and China[90] systemically introduces the provisions of the Safeguard Agreement with some minor exceptions arising mostly out of the structural differences between the global and regional mechanisms. In fact, the China-ASEAN FTA simply articulates that "the Parties shall adopt the rules for the application of safeguard measures as provided under the WTO Agreement on Safeguards, with the exception of the quantitative restriction measures set out in Article 5, and Article 9, 13 and 14 of the WTO Agreement on Safeguards[91]."

As a consequence of such comprehensive referral to the global safeguard provisions, this safeguard mechanism possesses one prominent feature that other bilateral and regional safeguard mechanisms lack – it reserves the right of the affected exporting countries to suspend the application of substantially equivalent concessions and other obligations for three years, a provision which marks a structural change undergone by the global safeguard mechanism from the more politically oriented GATT 19 to the legally oriented Safeguard Agreement[92].

(3) Classification of the Selected Bilateral and Regional Safeguard Mechanisms

So far, we have looked into the details of the respective bilateral and regional safeguard mechanisms and highlighted the prominent features and backgrounds of each. Here, we provide a classification of the investigated safeguard mechanisms and

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90 China-ASEAN FTA Article 9.

91 China-ASEAN FTA Article 18.6

92 Concerning the right of rebalancing conferred on the affected exporting countries, there had always been a question on why the importing countries need to suffer such a burden in taking *bona fide* temporary action (see, for example, Jan Tumlir, "A Revised Safeguard Clause for GATT?" *Journal of World Trade Law*, 7-4[1973], pp.404-420). The best answer for this was that safeguard measures were, after all, of political nature, and the political benefits arising from the invocations of measures on the part of the importing countries were intended to be balanced with those of the affected exporting countries. It was very indicative in this context that the Safeguard Agreement of the WTO reserves this right of rebalancing on condition that the safeguard measures taken by the importing countries conform to the provisions of the Agreement.

attempt to evaluate which bilateral and regional mechanisms are comparably more trade-restrictive or less trade-restrictive (the classification of types of bilateral and regional safeguard mechanisms are summarized in Table 4 of the Appendix).

(a) No General Safeguard Type

Bilateral and regional free trade agreements in this category simply provide no general mechanisms that enable their parties to take trade-restrictive measures for the purpose of addressing the negative impacts on their domestic industries incurred by such bilateral or regional trade liberalization. Therefore, this type is clearly the least trade-restrictive (or more precisely, non trade-restrictive) of all the types of general safeguard mechanisms. Among the bilateral and regional free trade agreements investigated, the Korea-Chile FTA is the only example that fits into this category.

However, the achievement of this agreement can never be overestimated because, most importantly, it provides a special type of emergency measure addressing only the injury to domestic industries incurred by agricultural imports. Given the highly flexible nature of this special safeguard mechanism, the overall safeguard scheme of this agreement could, in fact, be evaluated as one of the most trade-restrictive.

(b) Quasi-Global Safeguard Type

ⅰ. WTO Type

The second category of bilateral and regional safeguard mechanism is the type with similar characteristics to the Safeguard Agreement of the WTO. These mechanisms typically possess rigid and detailed conditions for invocation and conditions of application, and are also characterized by detailed domestic and international proceedings including neutral dispute settlement procedures. Due to its exhaustive regulations on when and how the measures are to be applied, as well as sufficient procedural guarantees to secure fair and effective implementation of the regulations, the trade-restrictive nature of this type of safeguard mechanism is

considered significantly limited. The apparently exacting interpretive practices of the WTO in recent years further fortify such a conviction.

Among the bilateral and regional safeguard mechanisms investigated, the ones under the US-Australia, US-Singapore, Japan-Mexico, Japan-Singapore, Korea-Singapore, and China-ASEAN FTAs are classified into this category. The virtual impossibility of weighing the importance of the respective indicators utilized in this analysis (an evaluation of the relative importance between a rigid standard of injury and a rigid timeframe for the initial application, for example,) makes further evaluation or ranking, as it were, among the six listed mechanisms basically unfeasible. However, due especially to its regulatory thoroughness on the conditions for invocation and the conditions of application, the one in the Japan-Singapore FTA is, arguably, the least trade-restrictive, while other mechanisms adopting the same "substantial cause" requirement as the United States domestic safeguard mechanism[93] seem to have considerably alleviated the burden of proof on their conditions for invocation, and are thus considered somewhat more trade-restrictive than the others.

ii . GATT Type

On the other hand, the safeguard mechanisms under AFTA and the Australia-New Zealand FTA are, to a different degree, characterized by their resemblance to the more flexible mechanisms of GATT 19, thus deserving yet another category of bilateral and regional safeguard mechanism. Typically, this type of safeguard mechanism leaves the conditions for invocation and the conditions of application largely unspecific, while their domestic and international proceedings remain generally of a political nature. Therefore, their implementations are largely dependent on the political conditions present at a given time among each set of affected parties, and thus, theoretically, it remains uncertain how trade-restrictive such mechanisms are to be. However, the practices under GATT 19 and the subsequent need for its amendment clearly signify that politically oriented safeguard mechanisms most

93 These are namely the ones in the US-Singapore, US-Australia, and Korea-Singapore FTAs. The Japan-Mexico FTA also provides the same "substantial cause" standard, but remains silent on its definition.

likely lead to abuse, and therefore end up restricting trade much more significantly than those of a legal orientation. Between the two bilateral and regional safeguard mechanisms classified in this category, the one in the Australia-New Zealand FTA is much more responsive to the negative aspects of such politically oriented safeguard mechanisms, and its regulations better represent efforts to bring discipline and objectivity to the use of its safeguard measures.

iii. NAFTA Type

The safeguard mechanism provided in NAFTA shares the same feature with the GATT Type mechanisms in that the disputes arising from the mechanism cannot be subjected to the neutral dispute settlement procedures provided in the agreement. However, classifying this safeguard mechanism under the same category as that type of mechanism would be extremely misleading. Due to the highly rigid and detailed conditions as well as the exceptionally elaborate regulations to secure sufficient due process to the affected parties at the level of the domestic investigations, this safeguard mechanism seems by no means as vulnerable to political abuses as the aforementioned GATT Type mechanisms. Rather, as previously stated, the unavailability of international neutral dispute settlement procedures in this mechanism is better understood as the product of its state-to-businesses orientation rather than the state-to-state alternative in order to achieve the same purpose to secure fair and effective implementation of the safeguard mechanism. Thus, this safeguard mechanism is potentially much less trade-restrictive than the GATT Type mechanisms, not to mention those of the WTO Type.

(c) European Type

The last category of bilateral and regional safeguard mechanism is the type observed in EFTA and the EU-Mexico FTA. The bottom line of this type of mechanism is the different grounds that it provides for the invocation of measures other than the normal “injury to domestic industries” requirements. In fact, technically, this type of mechanism raises the question of conceptual delimitation of safeguard mechanisms, because if one understands the essence of the institution as the remedy to injured

import-competing industries, measures regulated under these "safeguard mechanisms," at least partially, go well beyond the scope of such conceptualization.

Aside from the reservation, the exact assessment of the trade-restrictive nature of these mechanisms in comparison with others, particularly with the GATT Type mechanisms, is impracticable because it essentially comes down to the weighing of negative effects arising from the risk of arbitral implementations of the measures on the one hand, and the effects of legitimate yet exceptionally permissive regulations on the invocation of measures on the other. However, it is worthwhile to acknowledge and stress that under these European Type mechanisms no matter how much the modes of application are elaborated in the regulations and ensured by detailed and neutral proceedings, contracting parties and member countries enjoy an enormous amount of discretion on the key factor of when such measures are initially applicable, without the otherwise harsh confrontations, both political and legal, with the affected exporting countries and their interested parties.

Finally, between the two mechanisms classified in this category, the one under the EC-Mexico FTA is clearly less trade-restrictive in that it is subject to more rigidity and specificity throughout its regulations.

3. Conclusion

We have investigated 12 different bilateral and regional safeguard mechanisms and attempted to evaluate which types of safeguard mechanism and which mechanisms among them are, on an ordinary basis, more trade-restrictive or less trade-restrictive than others.

However, although it provides essential insights for understanding of the respective safeguard mechanisms, as well as the FTAs in which these mechanisms are included, of utmost importance for the purpose of our analysis is the knowledge that this evaluation constitutes only half of the overall understanding of the significance of safeguard mechanisms. Specifically, the evaluation only addresses the negative impacts on trade of the safeguard mechanisms, while systemically dismissing the

possibility of their positive functions. In fact, examinations focused solely on the negative impacts of safeguard mechanisms contend, as some scholars argue[94], that the mechanisms merely reflect the interests of politically powerful import-competing industries and produce no significant outcomes favorable to overall free trade initiatives. Conversely, if one holds the position that the mechanisms, in fact, serve some positive functions other than just restricting trade, the evaluation of the preferability of the respective mechanisms is fully attained only after examining the trade-offs between the negative and the positive impacts that the mechanisms bring about.

In domestic trade politics, it is generally the import-competing industries that enjoy the most influence on policy outcomes because they have the biggest stake in the subject and are thus politically the most mobilized. Safeguard mechanisms are considered to serve as a safety valve for this influence by the import-competing industries[95]. That is, by providing a mechanism which enables the policymakers to restrict trade at crucial moments, the protectionist pressures from these industries are alleviated, and, as a consequence, further trade liberalization is encouraged. If parties of a FTA are in need of a special safety valve to conciliate otherwise obstinate protectionist positions of their import-competing industries, it makes perfect sense that each bilateral and regional free trade agreement includes its own safeguard mechanism in order to achieve further liberalization under such an agreement[96]. To

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94 See, for example, Melvyn B. Krauss, *The New Protectionism: the welfare state and international trade*, New York: New York University Press, 1978, pp.66-67.

95 See, Alan O. Sykes, "Protectionism as a 'Safeguard': A Positive Analysis of the GATT 'Escape Mechanism' with Normative Speculations," *University of Chicago Law Review*, 58-1(1991), pp.255-303; Hyokusu Yu, *GATT dai 19 zyou to kokusai tsuusyou hou no kinou* [Article 19 of GATT and Functions of International Trade Law], Tokyo daigaku shuppan kai, 1994.

96 Besides the trade liberalization viewpoint, we can think of other positive economic functions of the safeguard mechanisms, such as the alleviation of adjustment costs by controlling the flow of imports (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?" *World Trade Review*, 2-3[2003], pp.395-430) and the achievement of distributive justice by preventing the expansion of income disparities arising from trade liberalization (see, Alan Deardoff, "Safeguards Policy and the Conservative Social Welfare Function," in Henryk Kierzkowski ed., *Protection and Competition in*

this effect, the fact that the safeguard mechanisms in FTAs often most allow an immediate execution of the rebalancing measures fortifies the opinion that bilateral and regional safeguard mechanisms are especially geared toward such a political function. Provision of compensation and acceptance of retaliatory trade measures practically constrain the actual use of safeguard measures, while the protectionist opposition of the import-competing industries is effectively mitigated by the almost false conviction that remedies are always available when the situation turns exceptionally difficult.

The importance of the political function of bilateral and regional safeguard mechanisms means that in order to evaluate the preferability of the respective safeguard mechanisms, we have to pay special attention to the level of political function they serve. Specifically, what is required for such an evaluation is to assess and compare the potential costs arising from the mechanisms' trade-restrictive nature on the one hand, and the benefits produced by the achievement of further trade liberalization through the existence on the other. Any final remarks on the comparative evaluation or the ranking of the mechanisms come, in that sense, only after such a cost and benefit analysis of the individual mechanisms is conducted. Thus, even when a certain safeguard mechanism is considered to be one of the least trade-restrictive mechanisms of all, if it contributes little to the further liberalization of trade under its bilateral or regional free trade agreement, it may not necessarily be the most preferable from the standpoint of the overall purpose of trade liberalization.

The analysis provided in this paper, which focuses on specific regulations of the respective safeguard mechanisms and investigates their trade-restrictiveness, is essential, but comprises only half of an overall analysis necessary for a complete and comprehensive understanding of the bilateral and regional safeguard mechanisms.

International Trade: Essays in Honor of W. M Corden, Oxford: Blackwell, 1987). However, these functions are not relevant in the context of our analysis since its purpose is to evaluate safeguard mechanisms in terms of the achievement of freer international trade and not the overall social welfare of their parties.

Table 1: Indicators and Their Descriptions in Terms of the Global Safeguard Clause

Indicators		Global Safeguard Clause (Safeguard Agreement),
1 .Injury (threat of injury)	① Criteria for injury	"serious injury (Art.2.1)" defined as "a significant overall impairment in the position of a domestic industry (Art.4.1(a))"
	② Criteria for threat of injury	"threat of serious injury" defined as "serious injury that is clearly imminent" whose determination "be based on facts and not merely on allegation, conjecture or remote possibility (Art. 4.2(b))"
	③ Indicators for determination	"all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment (Art.4.2(a))
2. Increased Imports	Mode of increase	"absolute or relative to domestic production (Art.2.1)"
3. Causation	① Criteria for causation	no specific regulation
	② Method for determination	non-attribution rule, stated as "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 (Art.4.2(b))"
4. Application	① Period of initial application	"4 years (Art.7.1)"
	② Period of extension	"a total maximum period of 8 years (Art.7.3)"
	③ Need for liberalization	progressive liberalization at regular intervals where the expected duration of a measure is over 1 year (Art.7.4)
5. Adjustment	Reference to the concept of "adjustment"	In relation to the determination of the period of initial application (Art.7.1), the allowability of the extension (Art.7.2), and the purpose of the progressive liberalization of the initial measures (Art.7.4)
6. Reapplication	Interval for reapplication	"a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least 2 years (Art 7.5)"
7. Domestic Investigation	Mode of domestic investigation	"investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporter and other interested parties could present evidence and their views (Art.3.1)"
8. Notification and Consultation	Need for notification and consultation	notification to the Committee at initiation of investigation, finding of serious injury, and determination of application (Art.12.1)., consultation with affected parties prior to application (Art.12.3)
9. Dispute Settlement Procedure	Applicability of neutral dispute settlement procedure	applicable (Art.14)

Table 2: Actual Regulations of the Selected Bilateral Safeguard Clauses (GSC stands for the provisions of the global safeguard clause described in Table 1)

indicators	NAFTA (1994)	EFTA (1960, amended in 2001)	AFTA (1993)
1-①	GSC	"If serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persisit are arising, a Member State may unilaterally take appropriate measures "	"serious injury"
1-②	GSC		"threat of serious injury"
1-③	GSC+"may also consider other economic factors, such as changes in prices and inventories, and the ability of firms in the industry to generate capital"		no specific regulation
2	"in absolute terms"		no specific regulation
3-①	"the imports of such good from that Party alone constitute a substantial cause"		no specific regulation
3-②	GSC		no specific regulation
4-①	"3 years"	no specific regulations	no specific regulation
4-②	"1 year"	no specific regulation	no specific regulation
4-③	no specific regulation	no specific regulation	no specific regulation
5	as a condition for extension	no specific regulation	no reference
6	not reapplicable	no specific regulation	no specific regulation
7	more detailed than GSC, especially on the institution of a proceeding, the contents of a petition or complaint, and the notice requirement, determinations by investigating authority subject to review by judicial or administrative tribunals to the extent provided by domestic law	no specific regulation	no specific regulation
8	notification to and consultation with the affected parties at institution of a proceeding that could result in emergency action	notification and consultation in the Council prior to application, notification to the Council where measures a re taken, consultations in the Council every 3 month after their adaption	notification to the Council where measures are taken
9	not applicable	submission to the Council comprising the representatives from each Member State	submission to the minister level Council comprising one nominee from each Member State and the Secretary-General of the ASEAN Secretariat, or the ASEAN Economic Minister (AEM)

Selected Bilateral Safeguard Clauses

indicators	EC-Mexico (2000)	US-Australia (2005)	Australia-New Zealand (1983)
1-①	“serious injury”	GSC	“severe material injury”
1-②	“threat of serious injury”	GSC	“an imminent and demonstrable threat”
1-③	no specific regulation	GSC	no specific regulation
2	no specific regulation	GSC	no specific regulation
3-①	no specific regulation	“substantial cause” defined as “important and not less than another cause”	no specific regulation
3-②	no specific regulation	no specific regulation	no specific regulation
4-①	“1 year”	“2 years”	“2 years”
4-②	“a total maximum period of 3 years”	“2 years”	no specific regulation
4-③	“shall contain clear elements progressively leading to their elimination at the end of the set period , at the latest”	GSC	no specific regulation
5	no reference	as a restriction to the duration of initial application, and as a condition for extension	no reference
6	“3 years”	not reapplicable	no specific regulation
7	no specific regulation	GSC	an opportunity for evidence to be presented from the other party be provided
8	referral of the difficulties of the importing country for examination to the Joint Committee, which may take any decisions needed to put an end to such difficulties, notification to and consultation with the Joint Committee when measures are applied	notification to the other party at initiation of investigation, consultation with the other party prior to application	consultation with the other party to seek a mutually acceptable solution before investigation, at determining material injury, annual review with the other party of the need for the continuation of measures
9	applicable	applicable	not applicable

Selected Bilateral Safeguard Clauses

indicators	US-Singapore (2004)	Japan-Mexico (2005)	Japan-Singapore (2002)
1-①	GSC	GSC	GSC
1-②	GSC	GSC	GSC
1-③	GSC	GSC＋”prices”	GSC
2	GSC	“in absolute terms”	“in absolute terms”
3-①	“substantial cause” defined as “important and not less than another cause”	“substantial cause”	“the imports of that originating good alone constitute a substantial cause “
3-②	GSC	GSC	GSC
4-①	“2 years”	“3 years”	“1 year”
4-②	“2 years”	“a total maximum period of 4 years”	“a total maximum of 3 years”
4-③	GSC	“shall present the other party a schedule leading to its progressive elimination”	no specific regulation
5	as a restriction to the duration of initial application, and as a condition for extension	as a restriction to the extent of a measure	as a restriction the duration of initial application
6	not reapplicable	“a period of time equal to the duration of the previous measure or 1 year”	not reapplicable
7	GSC	more detailed than GSC, especially on the procedure and the content of public notice at initiation of investigation, and access of information related to investigation to interested parties	GSC
8	notification to the other party at initiation of investigation, consultation with the other party prior to application	notification to the other party at initiation of investigation, and prior to application, consultation with the other party prior to application	notification to the other party at initiation of investigation, finding of serious injury, and determination of application, consultation with the other party prior to application
9	applicable	applicable	applicable

Selected Bilateral Safeguard Clauses

indicators	Korea-Chile (2004)	Korea-Singapore (2005)	China-ASEAN (2003)
1-①	no general bilateral safeguard clause	GSC	GSC
1-②		GSC	GSC
1-③		GSC	GSC
2		GSC	GSC
3-①		"substantial cause" defined as "important and not less than any other cause"	GSC
3-②		GSC	GSC
4-①		"2 years"	"3 years"
4-②		"2 years"	"1 year"
4-③		GSC	GSC
5		as a restriction to the duration of initial application, and as a condition for extension	GSC
6		no specific regulation	GSC
7		GSC	GSC
8		notification to the other party at initiation of investigation, consultation with the other party prior to application	GSC
9		applicable	applicable

Table 3: Generic Characterization of Respective Bilateral Safeguard Clause

NAFTA	Very rigid and detailed substantial conditions, rigid and detailed procedural conditions, very detailed and extensive domestic investigation proceedings, neutral international dispute settlement procedure not available
EFTA	Unique and extremely broad grounds for the invocation of measures, lax and nonspecific procedural conditions, no specific regulation on domestic investigation proceedings, dispute settlement procedure politically oriented.
AFTA	Lax and nonspecific conditions both substantial and procedural, no specific regulation on domestic investigation proceedings, dispute settlement procedure politically oriented
EU-Mexico	Lax and nonspecific substantial conditions, rigid and detailed procedural conditions, no specific regulations on domestic investigation proceedings, consultation prior to the application of measures, neutral dispute settlement procedure not available, "serious disturbances in any sector of the economy" and "difficulties which could bring about serious deterioration in the economic situation of a region of the importing country" as grounds for the invocation of measures
US-Australia	Rigid and detailed conditions both substantial and formal, detailed domestic and international proceedings
Australia-New Zealand	Transitional character between GATT 19 and Safeguard Agreement, lax and nonspecific substantial conditions, relatively detailed procedural conditions, relatively detailed regulations on domestic investigation, pursuit of political solutions prior to application of the measures, annual review, neutral dispute settlement procedure not available
US-Singapore	Similarity with Safeguard Agreement, rigid and detailed conditions both substantial and formal, detailed domestic and international proceedings
Japan-Mexico	Similarity with Safeguard Agreement, rigid and detailed conditions both substantial and formal, very detailed domestic proceedings, detailed international proceedings
Japan-Singapore	Similarity with Safeguard Agreement, very rigid and detailed conditions both substantial and formal, detailed domestic and international proceedings
Korea-Chile	Safeguard measures not applicable on the products under the FTA
Korea-Singapore	Similarity with Safeguard Agreement, rigid and detailed conditions both substantial and formal, detailed domestic and international proceedings
China-ASEAN	Great Similarity with Safeguard Agreement, general adoption of Safeguard Agreement regulations with few exceptions arising from structural differences between FTA and WTO

Table 4: Classification of the Selected Bilateral and Regional Safeguard Clauses

1. No General Safeguard Type

   No General Bilateral Safeguard Clause

   Korea-Chile FTA

2. Quasi Global Safeguard Type

   (1) WTO Type

   Similarity with the Safeguard Agreement (rigid and detailed conditions, detailed domestic and international proceedings)

   Japan-Singapore FTA, China-ASEAN FTA, Japan-Mexico FTA, US-Australia FTA, US-Singapore FTA, Korea-Singapore FTA

   (2) GATT Type

   Similarity with the GATT 19 (lax and non specific conditions, politically-governed implementation)

   AFTA, Australia-New Zealand FTA

   (3) Transnational Type

   Implementation Secured through Detailed Domestic Investigation (rigid and detailed conditions, especially detailed and through domestic investigation, no neutral international dispute settlement)

   NAFTA

3. European Type

   Broader Grounds for Invocation (grounds for invocation other than the normal "Injury to Domestic Industries" requirements)

   EFTA, EU-Mexico FTA