Korea Journal, vol. 57, no. 2 (summer 2017): 69–101.

Proposals to Safeguard Measures in Korea's Future Preferential Trade Agreements*

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Abstract

The proliferation of preferential trade agreements (PTAs) is one notable phenomenon in recent international trade. Korea is actively participating in this trend by concluding a series of free trade agreements (FTAs) with its trading partners. Although PTAs promote internal trade liberalization, trade remedies including safeguard measures may act as a trade barrier because they hinder free flow of products from their countries of origin into importing countries. This article briefly reviews some points of PTAs. Then, it presents proposals to safeguard measures for Korea's future PTAs. The proposals are made for bilateral and global safeguards, considering the fact that all existing PTAs of Korea have both types of safeguards. However, the proposals include stricter requirements than those of the GATT and the Agreement on Safeguards. Some proposals may be applicable to both bilateral and global safeguards. Some proposals for bilateral safeguards are different from those for global safeguards applied to the other PTA parties, due to the difference in nature between them. Proposals to prevent a simultaneous or a continuous application of a safeguard measure against a product, which has been subject to another safeguard measure, are also presented. The proposals presented in this article will be helpful in negotiations for safeguard measures of Korea's future PTAs since they are viable ones based on comparing the relevant provisions of existing PTAs.

Keywords: Korean preferential trade agreement (PTA), Korean free trade agreement (FTA), regional trade agreement (RTA), regional integration, bilateral safeguards, global safeguards, trade remedy

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* This work was supported by the Hankuk University of Foreign Studies Research Fund of 2017.

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Introduction

Since the GATT regime began after the Second World War, world trade at the multilateral level has focused on decreasing tariffs in trade in goods and eliminating other trade barriers through several phases of multilateral trade negotiations called *rounds*. As the level of the tariffs on goods was lowered, the GATT member countries extended the coverage of the trade negotiations from trade in goods to other areas, such as trade in services and intellectual property, and a more enforceable dispute settlement mechanism.

The current multilateral trade regime represented by the GATT and the WTO is considered to be successful in pursuing global free trade. The principle of most favored nation (MFN) set out in Article I of the GATT is a branch of non-discrimination principles. It requires that the WTO member states not discriminate among imported products based on their national origin.

However, regionalism represented by preferential trade agreements (PTAs) concluded by several economies under art. XXIV of the GATT is an important exception to the MFN principle. Under art. XXIV of the GATT, the WTO member states are allowed to avoid full compliance with the MFN principle if the PTAs they conclude meet the requirements of art. XXIV of the GATT.

The WTO multilateral trading system and regionalism represented by PTAs are said to be successful partly because both systems allow the signatory parties to each system to restrict the possibility of the occurrence of potentially injurious trade between the parties. Safeguards are one mechanism enabling the parties to do this.

Since the early 2000s, Korea has been actively participating both in the WTO multilateral trade regime and, specifically, in regionalism by concluding PTAs. Although art. XXIV of the GATT recognizes two types of PTAs—customs unions and free-trade areas—thus far Korea has concluded only free trade agreements (FTAs), through which free-trade areas are formed. The objective of this article is to research and determine the legal issues on safeguards and to provide viable proposals regarding safeguard provisions for future Korean FTAs. However, the proposals will be also applicable to Korea's

future PTAs for the formation of customs unions.

Among three types of trade remedies, anti-dumping measures are applied against an unfair trade practice called dumping, while safeguard measures are applied to provide domestic industries with temporary protection irrespective of whether there are fair or unfair trade practices. Considering the fact that safeguard measures are more practical since they are applied irrespective of whether there are fair or unfair trade practices, some scholars claim that substituting safeguard actions for anti-dumping actions is advantageous. Barfield presents four advantages for substituting safeguard actions for anti-dumping actions, namely: safeguard actions are much more flexible in both substance and duration; the authority can take into account in determining a safeguard action the overall national welfare and other political and diplomatic factors which cannot be done with anti-dumping actions; safeguard actions require that the petitioning industry prepare a plan to increase its competitiveness in order not to allow industries to enjoy government protection without doing anything; and increased use of safeguard actions reduces the inflammatory and often-spurious comparisons made between fair and unfair trade practices (Barfield 2005, 730–731). Lee recommends that anti-dumping measures which have the possibility of arbitrary or abusive application be replaced by safeguard measures (Lee 2005, 199–203).

A problem in attempting to the shift from anti-dumping actions to safeguards is that anti-dumping actions are more frequently used. According to statistics (KTC 2016), 29 petitions were received by the Korea Trade Commission (KTC) for safeguards from 1987 to 1996. From 1997 to 2016, the number of safeguard petitions dropped to five. During that same time period (1987–1996), 50 anti-dumping petitions were filed with the KTC, while 228 petitions were received by the KTC from 1997 to 2016. One explanation for the reason anti-dumping actions are more frequently used is that anti-dumping petitioners must show only material injury while safeguard petitioners are required to show serious injury, which is stricter standard (Barfield 2005, 732).

In this situation, Staiger (2005) suggests that anti-dumping measures can be substituted by safeguard measures by introducing into safeguard rules the "material injury" standard for cases where injury is caused by dumped

imports. Richardson argues for maintaining safeguard measures while completely abolishing anti-dumping and countervailing measures, or reforming anti-dumping and countervailing measures substantially in order for them to function as safeguard measures (Richardson 2009, 228–229). Although anti-dumping measures are more frequently used, the fact that legal standards for imposing anti-dumping and safeguard measures are different, particularly the fact that anti-dumping measures cannot be imposed where dumping does not exist, allows for the existence of safeguard measures. In fact, all Korean FTAs have safeguard measures. Thus, it is desirable to set new regulations regarding safeguard measures when those measures are not frequently used.

Some previous studies have covered safeguard measures or specific Korean FTAs in a general manner. However, few studies have analyzed and compared safeguard regulations of all Korean PTAs on an issue by issue basis, and then presented proposals for future Korean PTAs. Pauwelyn (2004) analyzes the requirements of art. XXIV of the GATT and those required by the WTO Appellate Body in order to reconcile PTAs and global safeguards in the WTO system. According to Pauwelyn, the exemption of PTA partners from a global safeguard measure can be justified if it meets the requirements of art. XXIV of the GATT, especially art. XXIV, paras. 4 and 8 (Pauwelyn 2004, 136–138). Messerlin and Fridh (2006, 747–751) present proposals for changes to the Agreement on Safeguards. Among these proposals, they argue for the exemption of PTA partners from global safeguards, that global safeguards should be allowed only to avoid effects of liberalization undertaken in the WTO context, and that PTA partners may be excluded from global safeguard measures only when a measure is imposed for the regional trade area as a whole (for example, in the case of customs unions). They also argue with respect to causation that the increase in imports should be the main (most significant) cause of injury. Some other proposals presented by Messerlin and Fridh include: (1) anti-dumping and countervailing measures against products which have enjoyed a safeguard should be prohibited for a certain number of years after the safeguard has been withdrawn; and (2) introduction of a compulsory public interest test. Lee (2011) examines ways to reconcile PTAs with the WTO multilateral trading sys-

tem. He argues that PTA preferences should be extended to all WTO member countries after a substantial period of time has passed in order to merge PTAs with WTO disciplines. His proposal also takes into account some preferential considerations for developing countries to meet their economic development needs.

Following this introductory section, some basic points regarding PTAs are briefly discussed. This is followed by an explanation of safeguards in the context of the WTO, and then proposals for safeguard provisions for future Korean PTAs are presented.

PTAs in Brief

PTAs and RTAs

Recent international trade, particularly since the formation of the WTO, has witnessed the phenomenon of the proliferation of PTAs. As of July 1, 2016, 635 PTAs (counting goods, services, and accessions separately) have been reported to the GATT/WTO, of which 423 were in force (WTO 2016a).

The term PTAs is often used synonymously for regional trade agreements (RTAs). According to one view, RTAs may be defined in the WTO context as any trade agreement, whether a customs union or a FTA between two or more customs territories within or across regions where the tariffs or other barriers to trade are to be reduced or eliminated reciprocally (Close 2006, 865n1). The WTO also uses the term RTAs in its organizational body, such as the Committee on Regional Trade Agreements, and in its documents. However, it recognizes RTAs concluded by countries located at a long distance. In such a situation, some scholars argue that the term PTAs is more adequate than the term RTAs because WTO member countries are now increasingly concluding such intercontinental trade agreements, compared with those in the past that were primarily between neighboring countries (Cottier and Foltea 2006, 44n2). Considering the growing number of trade agreements concluded between the countries of great distances from one another, the term PTAs is more suitable to describe them. Thus, the term

PTAs is used in this article in place of the term RTAs. In addition, in order to avoid any misunderstanding, it is important to note that the term PTAs in this article is different from that used in the WTO context. In the WTO, the term PTAs is an acronym for preferential trade arrangements, which are unilateral trade preferences such as generalized systems of preferences (WTO 2016a).

Proliferation of PTAs

For decades following the formation of the GATT the European continent led regionalism, from the formation of the European Coal and Steel Community to the European Union (EU). The United States began to participate in regionalism from the mid-1980s by concluding some FTAs, including the North American Free Trade Agreement (NAFTA). Many PTAs on other continents ensued as part of this momentum, such as the MERCOSUR (Southern Common Market) in South America and the ASEAN Free Trade Area (AFTA) in Southeast Asia. From the late 1990s, regionalism has proliferated. Statistics show that most PTAs—511 of the 635—have been notified to the WTO after the establishment of the WTO (WTO 2016b). PTA trends in this new regionalism—growing importance of PTAs in commercial policy of countries across the world, including those who formerly focused on multilateralism, increasing number of *reciprocal* PTAs between developed and developing countries and PTAs between developing countries, complex PTAs by regulating some beyond-WTO topics, and PTAs of a crossregional or continent-wide nature—are presented by Crawford and Fiorentino (2005, 2).

Korea has been concluding PTAs since the early 2000s for the purpose of defending its interests in the face of the proliferation of regionalism and reforming its economic system through trade liberalization. Korea carries out its PTA negotiations simultaneously and aims for a comprehensive trade liberalization beyond the WTO standards (MOTIE 2016). As will be shown below, 14 PTAs are in effect and one has been signed. In addition, Korea is currently negotiating several PTAs, including a China–Japan–Korea trilateral FTA and the Regional Comprehensive Economic Partnership (RCEP).

Safeguards in the WTO System

Trade remedies are generally said to be the measures that are applied to provide domestic industry injured by certain trade practices with temporary protection. Typical examples of trade remedies include safeguard, antidumping, and countervailing measures. Regarding safeguard measures, art. 1 of the Agreement on Safeguards provides that this agreement establishes rules for the application of safeguard measures provided for in art. XIX of the GATT 1994.[1] According to art. XIX of the GATT 1994, a WTO member is free to suspend the obligation or to withdraw or modify the concession with respect to a certain product if, as a result of unforeseen developments, the product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten serious injury to its domestic producers of like or directly competitive products.

Various opinions are presented to explain the justification for trade remedies including safeguards. However, it is important to note that, in fact, most PTAs, except the EU which abolish the application of all types of trade remedies on intraregional trade, maintain at least one form of trade remedy. Thus, this section does not focus on whether trade remedies should be maintained. Rather, it summarizes the existing explanations of the reasons trade remedies are still used. These explanations can be categorized roughly into three groups.

The first group, focusing on the efficiency of trade remedies, considers trade remedies as a safety valve to secure deeper commitments where economic and political uncertainty exists (Bagwell and Staiger 1990; 2005), as an insurance mechanism in unexpected circumstances (Fischer and Prusa 2003, 751), as an adjustment tool for the domestic economy affected by external events (Jackson 1997, 176), as a form of compensation in order to accept more rapid trade liberalization (Ethier 2002, 278), or as a means to deter other countries from enforcing WTO inconsistent actions (Martin and

1. Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, April 15, 1994, 1869 UNTS 154, art. 1 (hereinafter, Safeguard Agreement).

Vergote 2008, 73–75). According to the opinion of trade remedies as a safety valve, trade remedies can act as a safety valve in the economic sphere. According to Bagwell and Staiger, in case of a surge in imports, governments have a strong incentive to defect from cooperative trading arrangements and will attempt to manage the volume of trade with unilateral protective instruments which serve to dampen fluctuations in the volume of trade. They argue that trade remedies used by governments to deter a surge in imports can help avoid a reversion to noncooperative interaction among countries. In other words, trade remedies can act as a safety valve to maintain international cooperation when trade volume is unexpectedly high (Bagwell and Staiger 1990). They also claim that trade remedies are efficient responses to cases where there is domestic political uncertainty about the state of the world that will exist at the time an international agreement is actually implemented, where governments, at the time of the implementation of the agreement, have private information concerning the extent of pressures from domestic interest groups on their trade policy choices, and where the commitments made in the agreement will be implemented successfully only if they are self-enforcing. According to them, market access commitments made in the GATT/WTO apparently fall within such cases. Based on this fact, they explore the optimal design of self-enforcing trade agreements (in other words, the value of introducing an escape clause in some form, as a way to enhance the ability of governments to benefit from self-enforcing tariff commitments) when governments acquire private information over time. Thus, it is inferred from their view that trade remedies also have a powerful safety-valve function in the political sphere since they allow governments to reach trade agreements (Bagwell and Staiger 2005).

The second group finds the justification for trade remedies in the incompleteness of trade agreements. Since it is almost impossible for trade agreements to cover all possible future areas and conditions (Copeland 1990, 86), or governments consciously choose to contract incomplete trade agreements (Horn, Maggi, and Staiger 2010, 394–395), some level of discretion for governments, such as trade remedies, provides domestic industry with temporary protection in case of uncertainty.

The third group, focusing on the political point of view, suggests that if

government officials who pursue their own political interests, such as votes or other support, must conclude a trade agreement under conditions wherein they do not know the exact political consequences of the agreement at that time, the existence of flexibilities such as safeguard measures is beneficial because it allows them to revoke some of the concessions by applying such flexibilities when the political gains to officials in the importing country are considerably high and the costs to officials in the exporting country are modest (Sykes 1991, 274–289).

Although there are some WTO cases regarding PTAs and safeguards, the Appellate Body concluded that the measures at issue failed to meet certain requirements for the application of safeguard measures and has avoided ruling on the question of whether excluding PTA parties from safeguard measures can be justified by art. XXIV of the GATT 1994 or relevant provisions of the Safeguard Agreement.[2] Thus, issues related to PTA exemption from a global safeguard measure remain open.

Proposals of Provisions regarding Safeguards for Korea's New FTAs

In this section, proposals for safeguard provisions for future Korean FTAs will be presented based on relevant provisions of existing PTAs. As stated above, however, the proposals will also be applicable to Korea's future PTAs for the formation of customs unions. All existing Korean PTAs are exam-

2. *Argentina—Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, December 14, 1999, para. 114; *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R, December 22, 2000, para. 99; *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, May 1, 2001, para. 196; *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Appellate Body Report, WT/DS202/AB/R, February 15, 2002, para. 198; *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, Appellate Body Report, 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, November 10, 2003, paras. 466 and 468.

ined.[3] For suggestions in cases of PTAs concluded among several countries, some PTAs are also examined.[4] Provisions of some other PTAs are com-

3. Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Republic of Korea and the Member Countries of the Association of Southeast Asian Nations, August 24, 2006, http://www.fta.go.kr/main/situation/kfta/lov5/asean/2/ (hereinafter, Korea–ASEAN Trade in Goods); Free Trade Agreement between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part, October 6, 2010, 2011, OJ L 127/6, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2011_127_R_0001_01&rid=1 (hereinafter, Korea–EU); Agreement on Trade in Goods between the Republic of Korea and the Republic of Turkey, August 1, 2012, http://www.fta.go.kr/main/situation/kfta/lov5/tr/2/ (hereinafter, Korea–Turkey Trade in Goods); Free Trade Agreement between the Republic of Korea and the United States of America, June 30, 2007, 46 ILM 642 (2007); 19 USC, sec. 3805, note (2012 & Supp. I 2014), http://www.fta.go.kr/us/doc/1/ (hereinafter, Korea–US); Free Trade Agreement, Chile–Korea, February 15, 2003, http://www.fta.go.kr/main/situation/kfta/lov5/cl/2/ (hereinafter, Korea–Chile); Free Trade Agreement between the Republic of Korea and the EFTA States, December 15, 2005, http://www.fta.go.kr/main/situation/kfta/lov5/efta/2/ (hereinafter, Korea–EFTA); Free Trade Agreement, Korea–Singapore, August 4, 2005, http://www.fta.go.kr/main/situation/kfta/lov5/sg/2/ (hereinafter, Korea–Singapore); Comprehensive Economic Partnership Agreement, India–Korea, August 7, 2009, http://www.fta.go.kr/main/situation/kfta/lov5/in/2/ (hereinafter, Korea–India); Free Trade Agreement, Korea–Peru, March 21, 2011, http://www.fta.go.kr/main/situation/kfta/lov5/pe/2/ (hereinafter, Korea–Peru); Free Trade Agreement, Colombia–Korea, February 21, 2013, http://www.fta.go.kr/main/situation/kfta/lov5/co/2/ (hereinafter, Korea–Colombia); Free Trade Agreement, Australia–Korea, April 8, 2014, http://www.fta.go.kr/main/situation/kfta/lov5/au/2/ (hereinafter, Korea–Australia); Free Trade Agreement, Canada–Korea, September 23, 2014, http://www.fta.go.kr/main/situation/kfta/lov5/ca/2/ (hereinafter, Korea–Canada); Free Trade Agreement, Korea–New Zealand, March 23, 2015, http://www.fta.go.kr/main/situation/kfta/lov5/nz/2/ (hereinafter, Korea–New Zealand); Free Trade Agreement, Korea–Vietnam, May 5, 2015, http://www.fta.go.kr/main/situation/kfta/lov5/vn/2/ (hereinafter, Korea–Vietnam); and Free Trade Agreement, China–Korea, June 1, 2015, http://www.fta.go.kr/cn/doc/1/ (hereinafter, Korea–China).
4. Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, November 29, 2004, http://www.asean.org/wp-content/uploads/images/2013/economic/afta/ACFTA/3-%20Agreement%20ACFTA%20TIG%20Agreement%20%28Body%20Agreement%29.pdf (hereinafter, ASEAN–China Trade in Goods); Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan, April 14, 2008, http://www.asean.org/storage/images/archive/agreements/AJCEP/Agreement.pdf (hereinafter, ASEAN–Japan); Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation

pared when relevant.

As noted above, 15 Korean FTAs are currently in force. In order to promote the understanding of the proposals, the basic features of safeguard regulations in Korea's existing PTAs are presented as follows:

- All FTAs have both bilateral and global safeguard measures.
- Although bilateral safeguards have provisions similar in many aspects to those of the Safeguard Agreement, some FTAs set requirements which are stricter than those of the Safeguard Agreement.
  1. Unforeseen development is expressly required in some FTAs.
  2. Increased imports should be the substantial cause of serious injury in some FTAs.
  3. Transition periods vary. However, some FTAs do not set transition periods.
  4. All FTAs prohibit the use of quantitative restrictions.
  5. All FTAs have shorter duration periods for bilateral safeguard measures than those set in the Safeguard Agreement.
  6. Progressive liberalization of a bilateral safeguard measure is generally required (with some exceptions), and a mid-term review is not required in many FTAs.
  7. Regulations regarding the reapplication of a bilateral safeguard measure on the same product vary (from prohibition of the reapplication of a bilateral safeguard measure on the same product, following the WTO disciplines, setting looser or stricter conditions than those of the Safeguard Agreement, to no regulations regarding this matter).
  8. In some FTAs, the right of suspension of concession shall not be exercised for a certain period of time regardless of whether there exists

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between the Association of Southeast Asian Nations and the Republic of India, August 13, 2009, http://www.asean.org/wp-content/uploads/images/2013/economic/afta/ASEAN%20India%20TIG%20-%20CTC%20scan%20(complete).pdf (hereinafter, ASEAN–India Trade in Goods); Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, February 27, 2009, 2672 UNTS 3, http://www.asean.org/storage/images/2013/economic/afta/AANZFTA/Agreement%20Establishing%20the%20AANZFTA.pdf (hereinafter, ASEAN–Australia–New Zealand); Trans-Pacific Partnership Agreement, Australia–Brunei–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–US–Vietnam, February 4, 2016, https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership (hereinafter, TPP).

an absolute increase in imports.

9. Many FTAs (with some exceptions) prohibit the application of a bilateral and global safeguard at the same time with respect to the same product.

- In all FTAs, each party to the FTA retains its rights and obligations under art. XIX of the GATT 1994 and the Safeguard Agreement.
- In many FTAs, a party taking a global safeguard measure may exclude imports from the other party if such imports are not a substantial cause of serious injury.
- Some FTAs set special provisions regarding the obligation to provide information.

Elimination of Safeguards in PTAs

Art. XXIV, paras. 8(a) and 8(b) of the GATT require that PTAs eliminate barriers on substantially all trade between the PTA parties. Various opinions exist regarding the question of whether safeguards as a trade barrier should be eliminated from PTAs, or to what extent a PTA party can exempt other parties from a safeguard measure.

One opinion argues that a safeguard measure must not be applied to the products from PTA parties.[5] On the opposite side, another opinion claims that a safeguard measure must be applied to the products from PTA parties.[6] In the middle of the spectrum, a third opinion argues that a safeguard measure must not be applied to the members of a customs union since maintaining a safeguard measure in a customs union is inconsistent with the definition of a customs union, which requires the formation of a common external policy,[7] but it may not be applied to products from FTA partners.[8] Another

5. Committee on Regional Trade Agreements, Communication from Australia, WT/REG/W/18, November 17, 1997, paras. 21–22.
6. Committee on Regional Trade Agreements, Note on the Meetings of 3–5 November 1997, WT/REG/M/14, November 24, 1997, para. 7.
7. Committee on Regional Trade Agreements, Note on the Meetings of 27 November and 4–5 December 1997, WT/REG/M/15, January 13, 1998, para. 44.
8. Committee on Regional Trade Agreements, *supra* note 6, para. 9.

opinion asserts that a safeguard measure may not be applied to products from the members of a customs union, but must be applied to FTA partners (Messerlin and Fridh 2006, 749). Although one may claim total elimination of safeguards from PTAs, art. XXIV of the GATT does not require such total elimination. Thus, if PTA parties are allowed to maintain global safeguards in their PTAs, it is more reasonable to say that a global safeguard measure may at times not be applied to the products from the members of a FTA or a customs union, since art. XXIV, paras. 8(a) and 8(b) of the GATT do not identify any distinction between a free-trade area and a customs union with respect to the application of a safeguard measure (Mathis 2002, 240).

It is important to note that the explanation above is applicable to a global safeguard measure provided for in art. XIX of the GATT and the Safeguard Agreement. There is another form of safeguard measure that is imposed only on imports from the other PTA parties (a bilateral safeguard measure). A bilateral safeguard measure is allowed since it is applied only to imports from the other PTA parties and non-PTA parties are not to be harmed by the measure.

There are some PTAs which totally eliminate both global and bilateral safeguards from trade between the PTA parties.[9] However, all PTAs examined here, particularly all existing PTAs of Korea, have both types of safeguards applicable to their PTA parties. Thus, it is more probable that future Korean PTAs will have both types of safeguards. Nevertheless, in my view, it is desirable to strengthen the conditions for the application of a safeguard measure to restrict the possibility of imposing such measure on PTA parties, considering internal trade liberalization through a PTA.

9. E.g., Free Trade Agreement, Australia–Singapore, February 17, 2003, 2257 UNTS 103, ch. 2, art. 9, https://treaties.un.org/doc/Publication/UNTS/Volume%202257/v2257.pdf; Protocol to the Australia–New Zealand Closer Economic Relations Trade Agreement on Acceleration of Free Trade in Goods, Australia–New Zealand, August 18, 1988, 1536 UNTS 71, arts. 1–2, https://treaties.un.org/doc/Publication/UNTS/Volume%201536/v1536.pdf.

Bilateral Safeguards

1) Increased Imports

All PTAs examined maintain the same standard as that of art. 2, para. 1 of the Safeguard Agreement by requiring increase in imports, *absolute or relative to domestic production,* from the other PTA parties, or by requiring increase in imports from the other PTA parties without using such a term.[10] However, there are PTAs which require *absolute* increase in imports from the other PTA parties.[11] These PTAs require a higher standard compared to the WTO disciplines. Although future PTAs are likely to adopt an *absolute or relative to domestic production* standard considering the existing provisions, it is possible to adopt an *absolute* increase standard for the purpose of lowering the possibility of the application of a measure to the other PTA parties.

2) Cause of Serious Injury

Among the PTAs examined, some require that an increase in imports cause serious injury to domestic industry.[12] The remainder of the PTAs require that an increase in imports constitute a *substantial* cause of serious injury to domestic industry.

With a view to restricting the application of a measure to the PTA parties, it is desirable, in my view, to set a *substantial* cause test in a bilateral safeguard measure of future PTAs. The condition to be a *substantial* cause may be qualitative, as in art. 10.6 of the Korea–US FTA, which requires it to be *a cause that is important and not less than any other cause,* or quantitative by

10. Korea–Chile, *supra* note 3, art. 3.12, para. 1; Korea-Canada, *supra* note 3, art. 7.2, para. 1.
11. E.g., North American Free Trade Agreement, US–Canada–Mexico, December 17, 1992, 32 ILM 289 (1993); 19 USC, sec. 3301–3473 (2012 & Supp. I 2014), art. 801, para. 1, http://www.sice.oas.org/agreements_e.asp (hereinafter, NAFTA).
12. ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 3; ASEAN–Japan, *supra* note 4, art. 20, para. 2; ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 3; Korea–EU, *supra* note 3, art. 3.1, para. 1; Korea–Turkey Trade in Goods, *supra* note 3, art. 4.1, para. 1; Korea–Chile, *supra* note 3, art. 3.12, para. 1; Korea–New Zealand, *supra* note 3, art. 7.2; Korea–China, *supra* note 3, art. 7.1; and TPP, *supra* note 4, art. 6.3, paras. 1(a)–1(b).

providing, for example, *injury caused by increased imports from the other PTA party being more than 30 percent of the total injury to domestic industry.* And such a condition may be applicable not only to a bilateral safeguard measure but also to a global safeguard measure. If that is the case, a PTA party who considers imports from the other parties as a *substantial* cause of serious injury will either apply a global safeguard measure to its PTA parties as well, or apply a bilateral safeguard measure only to the other parties, avoiding opposition from non-PTA parties.

There is one relevant question with respect to PTAs among many countries. This is whether a bilateral safeguard measure can be applied only to some PTA parties. Art. 6.3, paras. 1(a) and 1(b) of TPP allow a TPP party to apply a bilateral safeguard measure to one, some, or all other TPP parties. However, serious injury may be caused by increased imports from all PTA parties as a whole, and a safeguard measure is applied regardless of whether serious injury is a result of unfair trade practices. In such a situation, one may worry about a targeted safeguard by a selective application of a measure to certain PTA parties. Thus, it is reasonable to apply a bilateral safeguard measure to all parties to a future PTA except the party whose import volume is *de minimis.*

3) Period of Application

Unlike a global safeguard measure, many PTAs set a limitation for the application of a bilateral safeguard measure to within a certain period of time. The time limitation is often referred to as the *transition period.* Among the PTAs examined, Korea–Chile and Korea–Singapore do not set a transition period. The remainder of the PTAs have their own transition period.

If one interprets art. XIX of the GATT 1994, which requires that conditions for the application of a global safeguard measure should occur *as a result of the effect of the obligations incurred under the GATT* strictly, a global safeguard measure cannot be applied in cases where an increase in imports occurs as a result of the tariff reduction under the PTA (Messerlin and Fridh 2006, 748). If one accepts this opinion, the PTA parties will be free of bilateral safeguards as well as global safeguards in most cases after the transition

period elapses because most products of the PTA parties will be imported under the PTA tariff concessions. However, since the Appellate Body does not consider that phrase seriously (Messerlin and Fridh 2006, 748), a WTO member is tacitly allowed to include imports under PTA tariff concessions into total imports subject to an investigation for a global safeguard measure. This implies that a WTO member may apply a global safeguard measure to its PTA parties after the transition period ends. The problem is that, it is uncertain whether the parties to future PTAs will accept such a strict interpretation; they may not agree to it. In such a case, a future PTA may set a transition period. However, a PTA party may apply a global safeguard measure to the other parties after the transition period ends even when an increase in imports occurs as a result of the tariff reduction under the PTA. On the other hand, even if the parties accept such a strict interpretation, they still may want to apply a safeguard measure to the other parties without a time limitation. In such a case, it is more probable that a future PTA will not set a transition period and that the parties will review the possibility of the elimination of the bilateral safeguards at a certain point in the future. If, however, a future PTA which adopts such a strict opinion sets a transition period in order to further internal trade liberalization, it will be necessary to provide explicitly in the PTA a phrase purporting that a global safeguard measure can be applied to the other PTA parties only when the conditions for the application of a measure occur as a result of the effect of the obligations under the GATT 1994.

4) Notification and Consultation

Some of the PTAs examined in this study simply incorporate art. 12, paras. 1 through 4 of the Safeguard Agreement regarding notification and consultation.[13] Many other PTAs have their own provisions on these matters to enhance transparency, which include elements similar to those of the Safe-

13. Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 6; ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 6; and ASEAN–India Trade in Goods, *supra* note 4, art. 10, para. 6.

guard Agreement.[14] Among them, some PTAs put an obligation to inform the other parties concerned before applying a provisional measure, though consultations regarding a provisional measure shall be initiated after the provisional measure is applied.[15] Some others require that a party applying a provisional measure publish a public notice and provide interested parties at least 20 days to submit evidence and views regarding the application of a provisional measure before making a preliminary determination.[16] Korea–EFTA puts the same obligation of prior notice, prior provision of relevant information, and prior consultation as those required when applying a definitive measure.[17] However, TPP does not set provisions regarding notification and consultation for provisional measures since TPP does not recognize a provisional measure.

Considering the urgent need for a provisional measure, it appears that the Safeguard Agreement does not require prior consultation to the parties concerned before applying a provisional measure. However, the need of prior consultation before applying a provisional measure exists for transparency purposes. Thus, the better option for future PTAs will be to require a prior notice *and* prior consultations before applying a provisional measure, as in the case of a definitive measure. Setting a fixed period of time to submit relevant information before applying a provisional measure will be also good. Other requirements of art. 12, paras. 1–4 of the Safeguard Agreement can be adopted in future PTAs, too.

5) Duration and Extension of a Bilateral Safeguard Measure

Unlike art. 7, paras. 1, 2, and 3 of the Safeguard Agreement, which sets dura-

14. E.g., ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 5, paras. 1–5; and Korea–India, *supra* note 3, art. 2.23, paras. (a)–(c).
15. ASEAN–Japan, *supra* note 4, art. 20, para. 11(b); Korea–Turkey Trade in Goods, *supra* note 3, art. 4.3, para 2; Korea–Singapore, *supra* note 3, art. 6.4, para. 3; Korea–Australia, *supra* note 3, art. 6.3, para. 2; Korea–New Zealand, *supra* note 3, art. 7.4, para. 2; Korea–Vietnam, *supra* note 3, art. 7.3, para. 3; and Korea–China, *supra* note 3, art. 7.3, para. 2.
16. Korea–US, *supra* note 3, art. 10.3, para 2; Korea–Colombia, *supra* note 3, art. 7.3, para. 2; Korea–Canada, *supra* note 3, art. 7.3, para 2; and Korea–Vietnam, *supra* note 3, art. 7.3, para 2.
17. Korea–EFTA, *supra* note 3, art. 2.11, para. 8.

tion and extension of a global safeguard measure—up to four years each—most of the PTAs examined set a short duration of a bilateral safeguard measure compared to that of the Safeguard Agreement.[18] However, Korea–Chile does not set provisions regarding these matters.

Considering the fact that many PTAs have a transition period, it is expected that compared to those of the Safeguard Agreement, future PTAs will set a short duration of a measure with a short period of extension. In cases where a future PTA among several countries sets a short transition period applicable to all PTA parties equally, a need to provide certain developing country members with a preference of extended period for the initial application and the extension of a measure, as in art. 9, para. 2 of the Safeguard Agreement, is not high.

6) Progressive Liberalization of a Bilateral Safeguard Measure

Art. 7, para. 4 of the Safeguard Agreement set a provision regarding progressive liberalization and a mid-term review of a measure. Most of the PTAs examined have a provision for progressive liberalization of a measure.[19] However, no PTAs examined require a mid-term review. A party to Korea–EU, Korea–Chile, Korea–EFTA, Korea–India, and Korea–Canada can apply a bilateral safeguard measure without progressive liberalization or a mid-term review since those PTAs do not have provisions regarding these matters.

Considering the fact that a safeguard measure is applied to fair trade practices, progressive liberalization of a measure is needed. However, the need of a mid-term review is low if a measure is applied for a short period of time. Thus, future PTAs may adopt a provision for progressive liberalization of a safeguard measure. But they may not require a mid-term review of a measure if they set a period of less than three years for a measure required by

18. E.g., Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 5; Korea–EU, *supra* note 3, art. 3.2, para. 5(b); Korea–US, *supra* note 3, art. 10.2, para. 5(b); ASEAN–India Trade in Goods, *supra* note 4, art. 10, para. 5; and ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 6, para. 1(b).
19. E.g., Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 6; Korea–US, *supra* note 3, art. 10.2, para. 7; Korea–China, *supra* note 3, art. 7.2, para. 7; ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 6; and ASEAN–Japan, *supra* note 4, art. 20, para. 7(d).

art. 7, para. 4 of the Safeguard Agreement. However, a kind of review shall be required before an extension of a measure even if a mid-term review is not required.

7) Reapplication of a Bilateral Safeguard Measure

Art. 7, para. 5 of the Safeguard Agreement sets a provision regarding reapplication of a global safeguard measure. Art. 7, para. 6 of the Safeguard Agreement sets a special provision for a measure of 180 days or less.

The PTAs examined have various provisions regarding this matter. Some PTAs incorporate the provisions of the Safeguard Agreement.[20] Thus, these PTAs also have provisions on a measure of a short duration. However, no other PTAs examined have provisions for a measure of a short duration. This may be because bilateral safeguards generally have a relatively short duration compared to global safeguards. Some PTAs stipulate that a bilateral safeguard measure can be applied again to the product which has been subject to a measure only after a period equal to the duration of the previous measure has passed *and* the period of non-application is at least a certain period of time,[21] or only after a period equal to the duration of the previous measure or certain period of time, whichever is longer, has passed,[22] or only after certain period of time has passed.[23] Some PTAs allow a bilateral safeguard measure on the same product only one time.[24] On the other hand, a party to Korea–EU, Korea–Chile, Korea–Singapore, or Korea–Canada can apply a bilateral safeguard measure against the same product again

20. Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 6; and ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 6.
21. Korea–India, *supra* note 3, art. 2.23, para. (j); Korea–Peru, *supra* note 3, art. 8.3, para. 4; and Korea–China, *supra* note 3, art. 7.2, para. 6.
22. ASEAN–Japan, *supra* note 4, art. 20, para. 7(e); and ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 6, para. 6.
23. Korea–EFTA, *supra* note 3, art. 2.11, para. 5.
24. Korea–Turkey Trade in Goods, *supra* note 3, art. 4.2, para. 7; Korea–US, *supra* note 3, art. 10.2, para. 6; Korea–Colombia, *supra* note 3, art. 7.2, para. 5; Korea–Australia, *supra* note 3, art. 6.2, para. 5; Korea–New Zealand, *supra* note 3, art. 7.3, para. 5; Korea–Vietnam, *supra* note 3, art. 7.2, para. 6; and TPP, *supra* note 4, art. 6.4, para. 6.

without any time restriction since those PTAs do not have a provision regarding this matter.

Considering the fact that bilateral safeguards generally have shorter duration than that of global safeguards, a need for regulating the measures of a short duration is not high. In fact, most of the PTAs examined do not have provisions for such measures. Secondly, although many existing PTAs of Korea allow a bilateral safeguard measure on the same product only one time, in my opinion, future PTAs do not need to set such restriction. It would be better to allow a PTA party to apply a new safeguard measure against the product which has been subject to another measure after a certain period of time passes. For this purpose, a good option is that a bilateral safeguard measure be applied again to the same product only after a period equal to the duration of the previous measure *or* certain period of time, whichever is longer, has passed. A period of one year would be good for this purpose if a PTA sets a short period of duration and extension of a measure compared to those of the Safeguard Agreement. This can ensure some reasonable time of non-application of a bilateral safeguard measure, even if a measure is applied for a short duration.

8) Compensation and Suspension of Concessions

Art. 8, paras. 1, 2, and 3 of the Safeguard Agreement regulates trade compensation and suspension of concessions. The PTAs examined show variations of provisions regarding compensation and suspension of concessions. Some PTAs incorporate the provisions of the Safeguard Agreement.[25] Thus, these PTAs also have provisions on the obligation to provide compensation, a right to suspend concessions, and time restriction on suspension of concessions in case of absolute increase in imports. Some PTAs recognize an obligation to provide compensation and a right to suspend concessions, but do not have provisions regarding time restriction on suspension of concessions in case of absolute increase in imports nor prior notice to the other PTA par-

25. Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 6; ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 6; and ASEAN–India Trade in Goods, *supra* note 4, art. 10, para. 6.

ties before suspending concessions.[26] TPP recognizes an obligation to provide compensation, a right to suspend concessions, and prior notice to the other PTA parties before suspending concessions, but do not have a provision on time restriction on suspension of concessions in case of absolute increase in imports.[27] Some PTAs set an obligation to provide compensation, a right to suspend concessions, and a time restriction on suspension of concessions in case of absolute increase in imports, but do not have a provision on prior notice to the other PTA parties before suspending concessions.[28] Some PTAs set an obligation to provide compensation, a right to suspend concessions, time restriction on suspension of concessions in case of absolute increase in imports, and a provision on prior notice to the other PTA parties before suspending concessions.[29] Some PTAs set an obligation to provide compensation, a right to suspend concessions, time restriction on suspension of concessions regardless of whether imports increase in absolute terms or relative to domestic production, but do not have a provision on prior notice to the other PTA parties before suspending concessions.[30]

As shown above, provisions regarding this matter set out in a PTA differ from each other. It depends on the particular situation of each PTA. Considering the fact that a safeguard measure is applied against fair trade practices, there is a need for adequate compensation to maintain an equivalent level of concessions. At the same time, an urgent need of a safeguard measure should be considered. A country may not be able to offer a mutually agreeable compensation in face of such an emergency. Therefore, in future PTAs,

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26. Korea–US, *supra* note 3, art. 10.4, paras. 1–2; Korea–Chile, *supra* note 3, art. 3.12, para. 5; Korea–EFTA, *supra* note 3, art. 2.11, para. 3, art. 2.11, para. 6, art. 2.11, para. 8; Korea–Singapore, *supra* note 3, art. 6.4, para. 8; Korea–Peru, *supra* note 3, art. 8.7; Korea–Australia, *supra* note 3, art. 6.4, paras. 1–2; and Korea–New Zealand, *supra* note 3, art. 7.5, paras. 1–2.
27. TPP, *supra* note 4, art. 6.7, paras. 1–3.
28. ASEAN–Japan, *supra* note 4, art. 20, para. 8(c); Korea–Turkey Trade in Goods, *supra* note 3, art. 4.4, para. 3; Korea–India, *supra* note 3, art. 2.25, paras. 1–2; Korea–Colombia, *supra* note 3, art. 7.4, para. 3; and Korea–Vietnam, *supra* note 3, art. 7.4, para. 5.
29. ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 8, paras. 1–4; and Korea–China, *supra* note 3, art. 7.4, paras. 1–2, art. 7.4, para. 4.
30. Korea–EU, *supra* note 3, art. 3.4, para. 3; and Korea–Canada, *supra* note 3, art. 7.2, para. 4.

it is desirable to allow time restriction on suspension of concessions only when a safeguard measure has been taken as a result of an absolute increase in imports. And a period of two years would be reasonable as a time restriction on suspension of concessions if a new PTA sets a shorter duration of a bilateral safeguard measure compared to that of the Safeguard Agreement. It is also appropriate to require a prior notice to the other PTA parties before suspending concessions.

9) Threshold Volume and Special Treatment for Developing Countries

Art. 9, para. 1 of the Safeguard Agreement provides a preference with a developing country member of the WTO when a global safeguard measure is applied to it. Some of the PTAs examined provide that a bilateral safeguard measure cannot be applied to a developing country member of the PTA if the import share of such a country individually does not exceed three percent of total imports of the good concerned from the other PTA parties, provided that those countries with less than three percent import share collectively account for not more than nine percent of total imports of the good concerned from the other PTA parties.[31] Some others provide that a bilateral safeguard measure cannot be applied against a product originating in the territory of a PTA party regardless of whether the party is a developing country, so long as its share of imports of the product concerned in the importing PTA party does not exceed three percent of the total imports from the PTA parties.[32] The rest of the PTAs examined do not have provisions regarding *de minimis* volume for the exemption from a safeguard measure and preferences for a developing country member of the PTAs.

There are some questions to be answered. The first is whether a future PTA should set a *de minimis* volume only for developing country members of a PTA as a preference. This question is important particularly in a PTA

31. ASEAN–Japan, *supra* note 4, art. 20, para. 3; and ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 6, para. 2.
32. Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 7; ASEAN–China Trade in Goods, *supra* note 4, art. 9, para. 7; and ASEAN–India Trade in Goods, *supra* note 4, art. 10, para. 7.

among many countries. Among Korea's PTAs, Korea–ASEAN Trade in Goods set a *de minimis* volume applicable to all PTA parties regardless of whether the party is a developing country. Considering this fact, future PTAs of Korea are expected to set a *de minimis* volume applicable to all PTA parties regardless of whether the party is a developing country.

Secondly, even if a PTA sets a *de minimis* volume, a question of whether the threshold volume should be contingent on imports from *all countries* or whether it should be based on imports from *only the parties to the PTA* must be answered. In the case of a PTA between two countries, the threshold volume will be contingent on imports from all countries. In case of a PTA among many countries shown above, the threshold volume is contingent on imports from only the parties to the PTA. However, considering the fact that a safeguard measure is needed to remedy serious injury incurred to domestic industry, it is better to set a threshold volume contingent on imports from all countries rather than imports from only the parties to the PTA.

Although the proposal above is a possible solution for future PTAs, a remaining question of whether the threshold volume should be contingent on *import share* or *market share* should be considered. Many PTAs shown above adopt an import share test. However, there is a PTA which adopts a combination of a market share test and an import share test in calculating threshold volume.[33] One opinion argues that, regarding the calculation of negligible volume in anti-dumping or countervailing duty measures, a market share test is more sensible than an import share test (Lima-Campos 2005, 247–249). Considering the common nature of anti-dumping, countervailing duty, and safeguard measures as trade remedies to deal with injury incurred to domestic industry, this opinion can be extended to the case of bilateral safeguard measures. And if a PTA among a small number of countries sets a threshold which will be applied to all PTA parties, a need to maintain a collective share standard will be low as long as such collective share is not high enough to constitute a substantial cause of serious injury.

33. Comprehensive Economic Cooperation Agreement, India–Singapore, June 29, 2005, art. 2.9.2, para. (f), https://www.iesingapore.gov.sg/Trade-From-Singapore/International-Agreements/free-trade-agreements/Singapore-FTA.

Thus, the proposal for future Korean PTAs is that a PTA between two countries and a PTA among small number of countries may adopt a *de minimis* volume that is contingent on *market share* and that is applicable to all PTA parties regardless of whether the party is a developing country. A PTA among many countries may adopt the same *de minimis* volume as presented above, but a collective share standard may be added.

Global Safeguards

1) Exemption of a PTA Party from a Global Safeguard Measure

As explained above, various opinions exist regarding the elimination of global safeguards in PTAs and it is reasonable to say that a global safeguard measure may not be applied to the products imported from the PTA parties. The PTAs examined take various positions regarding the question of whether a PTA party can exempt its PTA parties from a global safeguard measure. Some PTAs allow a PTA party to exclude the other PTA party from the application of a global safeguard measure if imports from the other party are non-injurious,[34] or not a substantial cause of serious injury,[35] or even if imports from the other party cause serious injury.[36] However, no Korean PTA examined puts an obligation to exclude such imports when certain requirements are met.

Considering the fact that it is desirable to strengthen the conditions for a global safeguard measure to restrict the possibility of imposing such measures on PTA parties, a *substantial* cause test would be good regarding the conditions for the exemption, if the same test is adopted in bilateral safeguards. And as presented above, the condition to be a substantial cause may be qualitative or quantitative, depending on the agreement among the PTA parties. There is a notable example in this context. NAFTA provides that a

34. Korea–New Zealand, *supra* note 3, art. 7.6.
35. Korea–US, *supra* note 3, art. 10.5, para. 1; Korea–India, *supra* note 3, art. 2.27; Korea–Peru, *supra* note 3, art. 8.1, para. 2; Korea–Colombia, *supra* note 3, art. 7.5, para. 1; Korea–Canada, *supra* note 3, art. 7.1, para. 1; and Korea–Vietnam, *supra* note 3, art. 7.5, para. 1.
36. Korea–Australia, *supra* note 3, art. 6.5.

PTA party *shall* exclude imports from the other PTA party from a global safeguard measure, unless each party's import share accounts for a *substantial* share of total imports (in other words, the top five suppliers during the most recent three-year period) and imports from the other PTA party (or parties in exceptional circumstances) contribute *importantly* to the serious injury (in other words, the growth rate of imports from the other PTA party not being appreciably lower than the growth rate of total imports from all sources).[37] Although this condition does not explicitly require increased imports from the other PTA parties be a *substantial* cause of serious injury, it is similar to the condition required by NAFTA's bilateral safeguards (in other words, a *substantial* cause).

In addition, if the conditions for the application of a global safeguard measure to the other PTA parties are not met in the case of a PTA among several countries, the question of whether all PTA parties should be exempted, or only some PTA parties be exempted from the measure, should be answered. Indeed, there is a PTA which allows a selective exemption of a PTA party from a global safeguard measure if imports from the party individually are not a substantial cause of serious injury.[38] However, considering the fact that PTAs are used as a defense under art. XXIV of the GATT against a claim of a violation of non-discrimination principle under art. I of the GATT and art. 2, para. 2 of the Safeguard Agreement, and considering the need to avoid an arbitrary use of a selective exemption of a PTA party from a global safeguard measure, it is more reasonable to exempt all PTA parties from a global safeguard measure if the conditions for the application of the measure to the other PTA parties are not met.

2) Notification and Consultation

Art. 12, paras. 1 through 4 of the Safeguard Agreement provide certain requirements with which competent authorities shall comply regarding noti-

37. NAFTA, *supra* note 11, art. 802, paras. 1–2.

38. Dominican Republic–Central America–United States Free Trade Agreement, August 5, 2004, 19 USC, sec. 4001–4112 (2012 & Supp. I 2014), art. 8.6, para. 2, http://www.sice.oas.org/agreements_e.asp.

fication and consultation on safeguard measures for transparency purposes. Many PTAs examined do not have any special conditions for notification or consultation. Thus, parties to these PTAs shall follow the requirements of the Safeguard Agreement. Korea–EU requires a party taking a measure provide the other party who has a substantial interest (in other words, when it is among the five largest suppliers of the goods during the most recent three-year period) with a written notification of information on the initiation and findings of an investigation.[39] Korea–Turkey Trade in Goods and Korea–Vietnam require that a party shall provide the other party with all pertinent information regarding the initiation and findings of a safeguard investigation regardless of whether the other party has a substantial interest.[40] Korea–China has a provision similar to that of Korea–Turkey Trade in Goods and Korea–Vietnam, but the party does not have an obligation to provide such information.[41] ASEAN–Australia–New Zealand requires that a party shall initiate a prior consultation with the other party before taking a global safeguard measure regardless of whether the other party has a substantial interest as suppliers of the product concerned.[42] A party to TPP initiating a safeguard investigation shall provide to the other parties an electronic copy of the notification given to the WTO under art. 12, para. 1(a) of the Safeguards Agreement.[43]

Generally speaking, special requirements of these PTAs are the ones requiring either a direct notice to the other PTA party or the provision of adequate opportunity for prior consultation, or both. Since countries will follow the requirements of the Safeguard Agreement, these special requirements may not have significant importance compared with other substantive requirements. However, considering the need for balancing a global safeguard measure and a bilateral safeguard measure with respect to the application of a measure to the other PTA parties, it is desirable for future Korean

39. Korea–EU, *supra* note 3, art. 3.7, paras. 2–3.
40. Korea–Turkey Trade in Goods, *supra* note 3, art. 4.6, para. 2; and Korea–Vietnam, *supra* note 3, art. 7.5, para. 2.
41. Korea–China, *supra* note 3, art. 7.5, para. 2.
42. ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 9, para. 3.
43. TPP, *supra* note 4, art. 6.2, para. 3.

PTAs to require a PTA party provide the other parties, regardless of whether the other parties have a substantial interest or not, with written notification of the initiation and determination of a safeguard investigation, and of the application of a provisional measure, and also provide the other parties with adequate opportunity for consultation.

3) Limit of a Global Safeguard Measure

Unlike many PTAs, art. 5, para. 1 of the Safeguard Agreement allows the use of a quantitative restriction and art. 5, para. 2(a) of the Safeguard Agreement sets a requirement for a case where a quota is allocated among the countries.

No PTAs examined set a special requirement on this matter. Thus, these PTAs follow the requirements set out in art. 5 of the Safeguard Agreement. However, there are PTAs which have special provisions regarding this matter. For example, NAFTA further requires the preservation of the trend of imports of the product from the other party concerned over a recent representative base period with allowance for reasonable growth.[44] Another PTA provides that global safeguard measures shall preserve the level or margin of preference granted under the PTA.[45]

If a future PTA prohibits the use of a quantitative restriction such as a quota against the other PTA parties, provisions as in art. 5, paras. 1 and 2(a) of the Safeguard Agreement will not be needed. However, if a future PTA allows a quantitative restriction, it is possible to provide that a global safeguard measure, regardless of the form used, preserve the level or margin of preference granted under the PTA.

4) Threshold Volume and Special Treatment for Developing Countries

As explained above, art. 9, para. 1 of the Safeguard Agreement sets a *de minimis* volume standard for the application of a global safeguard measure as an

44. NAFTA, *supra* note 11, art. 802, para. 5(b).

45. Agreement Establishing an Association between the European Community and its Member States, of the One Part, and the Republic of Chile, of the Other Part, November 18, 2002, 2584 UNTS 3; 2002, OJ L352/3, art. 92, para. 6, https://treaties.un.org/doc/Publication/UNTS/Volume%202584/v2584.pdf.

advantage given to a developing country. In addition, according to art. 9, para. 2 of the Safeguard Agreement, a developing country can apply a global safeguard measure for the maximum period of up to ten years, which is a two-year extension of the period allowed to non-developing counties.

As shown above, many PTAs examined just reaffirm the rights and obligations under art. XIX of the GATT 1994 and the Safeguard Agreement without having any special provisions regarding the application of a global safeguard measure to the PTA parties. This implies that the parties to future PTAs may want to secure the possibility of applying a safeguard measure to the other parties even after the transition period ends. Thus, in case where a *substantial* cause test is adopted in bilateral safeguards, it is reasonable to say that a global safeguard measure shall be applied to all PTA parties except a party whose import volume is *de minimis* if increased imports from the other PTA parties constitute a substantial cause of serious injury. With respect to *de minimis* volume, the standard for developing countries set in art. 9, para. 1 of the Safeguard Agreement can be adopted by future PTAs, since applying the same standard (in other words, art. 9, para. 1 of the Safeguard Agreement) to the PTA parties is desirable in case where a measure is also applied to the PTA parties. In fact, no PTAs examined have special provisions regarding *de minimis* volume and special treatment for developing countries. In addition, a need to provide an extended period set out in art. 9, para. 2 of the Safeguard Agreement still remains if a future PTA does not set a short duration of a global safeguard measure applicable only to its PTA parties.

5) Relationship between a Global Safeguard Measure and a Bilateral Safeguard Measure

If a PTA maintains both bilateral and global safeguard mechanism, the question of whether both safeguard measures can be applied to the same product simultaneously needs to be answered. The PTAs examined take various positions regarding this matter. Korea–Chile, Korea–EFTA and Korea–Singapore do not have any provisions with respect to this matter. Thus, it can be said that both types of safeguards may be applied to the same product at the same

time under these PTAs. The rest of the PTAs examined prohibit the simultaneous application of both types of safeguard measures. However, even these PTAs are categorized into some types. ASEAN–Japan stipulates that a PTA party may not impose a bilateral safeguard measure on a product subject to a global safeguard measure, and the period of a bilateral measure shall not be interrupted by the party's non-application of the bilateral measure.[46] This means that a PTA party may *resume* the application of the bilateral safeguard measure after the termination of the global safeguard measure. Many PTAs examined prohibit the simultaneous application of both types of safeguard measures by providing that neither PTA party may apply a bilateral and a global safeguard measure at the same time with respect to the same product.[47] However, these PTAs do not have any provisions regarding resumption of a bilateral safeguard measure and it is possible to understand that a PTA party may do so. ASEAN–Australia–New Zealand provides that a PTA party shall not apply a bilateral safeguard measure to a product subject to a global safeguard measure, and a PTA party shall not continue to *maintain* a bilateral safeguard measure on a product that becomes subject to a global safeguard measure.[48] Since there may be a conflict on the interpretation of the word *maintain*, this PTA also has the problem of resumption of a bilateral safeguard measure.

Firstly, it is possible to understand that both types of safeguard measures can be applied to the same product at the same time unless it is prohibited explicitly. However, if a safeguard measure is applied, it will remedy serious injury to the domestic industry concerned. Thus, it is better to understand that the simultaneous application of both types of safeguard measures may not be permitted in light of art. 5, para. 1 of the Safeguard Agreement which provides that a safeguard measure shall be applied only to the extent neces-

46. ASEAN–Japan, *supra* note 4, art. 20, paras. 9(a)–9(b).

47. Korea–EU, *supra* note 3, art. 3.7, para. 4; Korea–Turkey Trade in Goods, *supra* note 3, art. 4.6, para. 3; Korea–US, *supra* note 3, art. 10.5, para. 2; Korea–Peru, *supra* note 3, art. 8.1, para. 3; Korea–Colombia, *supra* note 3, art. 7.5, para. 2; Korea–Canada, *supra* note 3, art. 7.1, para. 2; Korea–Vietnam, *supra* note 3, art. 7.5, para. 3; Korea–China, *supra* note 3, art. 7.5, para. 3; and TPP, *supra* note 4, art. 6.2, para. 5.

48. ASEAN–Australia–New Zealand, *supra* note 4, ch. 7, art. 9, para. 2.

sary to prevent or remedy serious injury and to facilitate adjustment.

Secondly, even in cases where PTAs prohibit the simultaneous application of both types of safeguard measures, resumption of a bilateral safeguard measure that has been suspended during the period of application of a global safeguard measure is allowed explicitly or implicitly under many PTAs. This enables a PTA party to apply a safeguard measure continuously even after an extended global safeguard measure terminates, avoiding the time restriction on reapplication of a safeguard measure. However, in my view, it is desirable for future PTAs to provide that a PTA party may not impose a bilateral safeguard measure on a product subject to a global safeguard measure and it must *terminate* the existing bilateral safeguard measure applied to the product concerned before imposing a global safeguard measure on the same product, as found in some PTAs examined.[49]

Finally, although the proposal above is acceptable to future PTAs in order to prevent a simultaneous application of both types of safeguard measures and resumption of a bilateral safeguard measure, there still remains the possibility of a continuous imposition of safeguard measures on the same product after one safeguard measure ends. For example, even if a future PTA adopts the above proposal, a PTA party can impose a bilateral safeguard measure on the same product right after a global safeguard measure ends, and *vice versa*. Thus, there is a need to set a time period to restrict an immediate application of another form of safeguard measure against the same product after one safeguard measure ends, considering the fact that the Safeguard Agreement and many PTAs set such time restrictions before reapplying a safeguard measure against the product already subject to the same type of safeguard measure. In my view, a period of one year would be a good option for this purpose, if a future PTA sets one-year time restriction on the reapplication of a bilateral safeguard measure against the same product.

49. Korea–ASEAN Trade in Goods, *supra* note 3, art. 9, para. 10; ASEAN–India Trade in Goods, *supra* note 4, art. 10, para. 11; Korea–India, *supra* note 3, art. 2.23, para. (h); Korea–Australia, *supra* note 3, art. 6.2, para. 6; and Korea–New Zealand, *supra* note 3, art. 7.3, para. 6.

Concluding Remarks

This article presents proposals viable and acceptable to the parties to future Korean PTAs by mitigating the function of safeguard measures as a form of trade barrier, while not eliminating all safeguard measures completely, and by taking special treatment for a developing country into account. The proposals are made for bilateral safeguards and global safeguards, considering the fact that all existing Korean PTAs have both types of safeguards. However, the proposals include stricter requirements than those of the Safeguard Agreement. Some proposals, such as a substantial cause test and strict notification requirements, may be applicable to both bilateral and global safeguards. Some proposals for bilateral safeguards, such as a market share test for the threshold volume, are different from those for global safeguards applied to other PTA parties, due to the fact that bilateral safeguards are imposed only on the products imported from the other PTA parties. Some proposals for bilateral safeguards, such as a shorter time period required before suspension of concessions and little need of a mid-term review, are different from those for global safeguards applied to the other PTA parties because of a shorter duration of a bilateral safeguard measure. Proposals are also presented to prevent a simultaneous or a continuous application of both types of safeguard measures against the same product that has been subject to one safeguard measure. Since the proposals presented in this article are viable ones based on comparing existing PTAs, considering these proposals will prove helpful in negotiations for safeguard measures of future PTAs.

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