

Exclusion of FTA partners from Global Safeguard Measure

Woonho Lee
Standing Commissioner
Korea Trade Commission

I. FTA and Safeguard in WTO

1. Articles related to FTA and Exclusion of FTA Partners from Global Safeguard Measures

2. Related Dispute Cases

3. Related Articles in FTAs

1. Articles related to FTA and Exclusion of FTA Partners from Global Safeguard Measure

GATT XXIV:4 allows formation of a Free-trade area, provided that duties and other regulations of commerce on non-contracting parties of the FTA shall not be higher or more restrictive than existing duties and regulation

GATT XIX allows Emergency Action on Imports of Particular Products (Safeguard Measures)

However, **Safeguard Measures shall be applied** to a product being imported **irrespective of its source** (WTO Safeguard Agreement article 2.2)

GATT XIII requires **Non-discriminatory Administration of Quantitative Restriction**

Is “Exclusion of FTA partners from Safeguard Measures” allowed regardless of GATT XIII and Safeguard Agreement article 2.2 ???

2. Related Dispute Cases

Argentina - Footwear Safeguard(DS121)

(AB) Based on the ordinary meaning of Safeguards Agreement articles 2.1, 2.2 and 4.1(c), AB concluded that **an investigation which evaluates imports from "all" sources, "can only lead to the imposition of safeguard measures on imports from all sources."**

Therefore, the AB found that **Argentina's investigation**, which was based on an investigation of imports from all countries, including MERCOSUR countries, **"cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures."**

However, AB emphasized that **it was not ruling on the issue of whether, "as a general principle, a member of customs union can exclude other members of that customs union from the application of a safeguard measure."**

2. Related Dispute Cases (cont.)

US – Line Pipe Safeguard(DS202)

(AB) A “Gap” between imports covered under the investigation and imports falling within the scope of the measure **can be justified only if** the competent authorities “**establish explicitly**” that imports from sources covered by the measure satisfy the conditions for the application of a safeguard measure.

As noted in *U.S.– Lamb Safeguards*, “**establish explicitly**” implies that the competent authorities must provide “*a reasoned and adequate explanation of how the facts support their determination.*”

U.S. violated art. 2 and 4 by including Canada and Mexico in the analysis of whether increased imports caused or threatened to cause serious injury, while excluding Canada and Mexico from the application of the SG measure, “**without providing a reasoned and adequate explanation that establishes explicitly that imports from non-NAFTA sources by themselves satisfied the conditions for the application of a safeguard measure.**”

2. Related Dispute Cases (cont.)

- ❁ **No general conclusion** by DSBs as to exclusion of FTA partners from Global Safeguard Measures.

DSB reserved the general judgment whether excluding FTA partners from GSG Measures is in compliance with GATT and WTO.

- ❁ Instead, Panel and AB focused on **whether a SG measure which excluded FTA partners is fully in compliance with the conditions** mentioned in WTO Safeguards Agreement.
 - **(Parallelism)** an investigation which evaluates imports from “*all*” sources, “can only lead to the imposition of safeguard measures on imports from all sources.”
- Scope of an investigation = Scope of the safeguard measure**
- **Causation** between measure and injury “established explicitly”.

3. Related Articles in FTAs

Shall exclude : NAFTA Article 802

Each Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

- (a) imports from a Party, considered individually, account for a substantial share of total imports; and
- (b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

3. Related Articles in FTAs (cont.)

Shall exclude : Israel-Mexico FTA Article 5-03

Each Party retains its rights and obligations under Article XIX of the GATT 1994, the WTO Agreement on Safeguards or any other safeguard agreement pursuant thereto except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article. Any Party taking an emergency action under Article XIX or any such agreement shall exclude imports of a good from each other Party from the action unless:

- (a) imports from the other Party account for a substantial share of total imports; and
- (b) imports from the other Party contribute importantly to the serious injury or threat thereof caused by total imports.

3. Related Articles in FTAs (cont.)

Shall exclude : Japan - Mexico Article 51.2

Nothing in this Agreement shall prevent a Party from applying safeguard measures in accordance with Article XIX of the GATT 1994 and the Agreement on Safeguards in Annex 1A to the WTO Agreement, as may be amended. Except for the bilateral safeguard measures provided for in this Chapter, no Party shall apply safeguard measures to originating goods which are accorded the preferential tariff treatment in accordance with Article 5, outside the scope of Article XIX of the GATT 1994 and the Agreement on Safeguards in Annex 1A to the WTO Agreement, as may be amended.

* *Exclusion from a safeguard measure is only applied to products accorded the preferential tariff treatment due to the FTA?*

3. Related Articles in FTAs(cont.)

May exclude : Korea-India Article 2.27

Each Party retains its rights and obligations under Article XIX of GATT 1994 and the Safeguard Agreement. This Agreement does not confer any additional rights or impose any additional obligations on the Parties with regard to measures taken pursuant to Article XIX of GATT 1994 and the Safeguards Agreement, *except that a Party taking a safeguard measure under Article XIX of GATT 1994 and the Safeguards Agreement **may**, to the extent consistent with the obligations under the WTO Agreement, **exclude imports of an originating good of the other Party** if such imports are not a substantial cause of serious injury or threat thereof.*

3. Related Articles in FTAs(cont.)

May exclude : Korea - U.S.A. Article 10.5

Each Party retains its rights and obligations under Article XIX of GATT 1994 and the Safeguard Agreement. This Agreement does not confer any additional rights or impose any additional obligations on the Parties with regard to actions taken under Article XIX of GATT 1994 and the Safeguards Agreement, *except that a Party taking a global safeguard measure may exclude imports of an originating good of the other Party if such imports are not a substantial cause of serious injury or threat thereof.*

3. Related Articles in FTAs(cont.)

May exclude : China - New Zealand Article 64.1

A Party taking any measure pursuant to Article XIX of GATT 1994 and the Safeguards Agreement *may exclude imports of an originating good from the other Party from the action if such imports are non-injurious.*

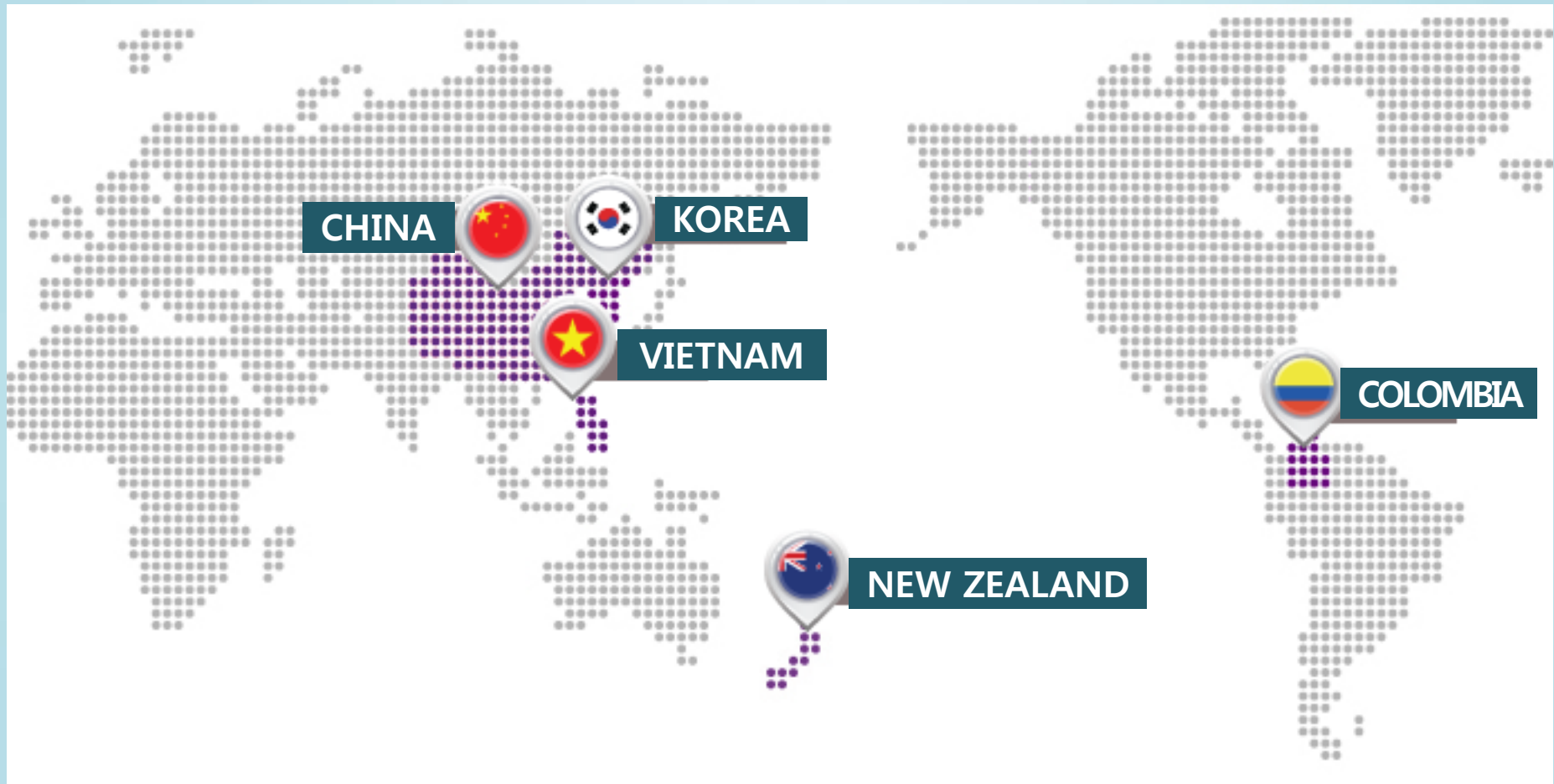
II. FTAs in KOREA

1. FTAs in effect
2. Concluded FTAs
3. Related articles in Korea FTAs

1. FTAs in Effect



2. Concluded FTAs



3. Related Articles in Korean FTA

Substantial cause of serious injury or threat thereof

(Except that) a Party taking a global safeguard measure may exclude imports of an originating good of the other party if such imports are not a substantial cause of serious injury or threat thereof

KOREA-India, Peru, U.S.A., Colombia, Canada, New Zealand

May exclude

(Except that) a Party applying such a measure under Article XIX of GATT 1994 and the Safeguards Agreement may exclude imports of an originating good of the other party, from the measure.

KOREA- Australia

3. Related Article in Korea FTA- continued

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- 2004 CHILE
 - 2006 SINGAPORE
 - 2006 EFTA
 - 2009 ASEAN
 - 2010 INDIA ← From here
 - 2011 EU
 - 2011 PERU
 - 2012 U.S.A.
 - 2013 TERKEY
 - 2014 AUSTRALIA
 - 2015 CANADA

However,
No global safeguard investigation
since 1999 in KOREA.

No bilateral safeguard investigation
ever.

III. Issues to be thought

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✿ **Extent of share of and injury by Imports from FTA partners**

Substantial share of total imports

Contribution to serious injury by imports from FTA partners

Can a SG measure be justified after the exclusion of FTA partners?

✿ **Rules of the Country of Origin**

Rules for FTA tariff treatments may differ from general rules of the country of origin

Which rule to investigate and exclude imports from FTA partners?

✿ **What is the real cause of an import surge and serious injury? (disguised global SG instead of bilateral SG?)**

If an import surge is caused by FTA partners due to the FTA, other countries under investigation are victims of the unfair global SG

III. Issues to be thought

❁ Exclude some parties? or all the parties to multilateral FTA?

Is it possible to select a party or some parties of a multilateral FTA to exclude from a global safeguard measure?

Discrimination between FTA partners *vs.* contribution to the injury?

❁ Not to raise barriers to the trade of other contracting parties with such territories(GATT XXIV:4)

Exclusion of FTA partners from a global SG measure is in fact raising barriers to the trade of other contracting parties to WTO or not?



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Thank you