Improving WTO Dispute Settlement Rules:
Lessons from the Korea-China Garlic Dispute

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I. Introduction

Since Korea and China reestablished diplomatic tie in 1992, their economic relationship has been increasingly interdependent. As a result, the volume of trade between two countries has sharply increased from five billion dollars in 1992 to over 100 billion dollars in 2005. These outstanding bilateral developments lead to noteworthy outcomes. One is the fact that China has become Korea's top trading partner since 2004. The other is that Korea is the most target country of China's trade remedies, primarily anti-dumping measures. Notwithstanding a number of bilateral trade issues, it is expected that their economic tie will be strengthened.

In the process of developing their bilateral trade relation, they experienced one important incident that is deemed to have far-reaching effects on future path of their trade relation. It is the garlic dispute that lasted for about two years. The dispute started with Korean garlic growers' application for safeguard measures with their investigating authorities and later was escalated to a kind of fierce trade war. Recognizing notable features of the dispute, several researchers analyzed the case. Among them include Ahn (2004) and Choi (2000). While Ahn analyzed the case from negotiation point of view, Choi focused on legal aspects of WTO Safeguards Agreement with policy implications.

But it appears that the previous studies did not touch upon the dispute's implications for the multilateral trading system. Thus, we will analyze this dispute with an aim of exploring lessons for the World Trade Organization (WTO) system. In particular, recognizing that the WTO Dispute Settlement Understanding (DSU) did not play any

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role in resolving the dispute between WTO Member, Korea, and then accession applicant developing country, China, we will figure out the limitations of DSU. Then, we will make some policy recommendations for the WTO dispute settlement rules.

Our study is organized as follows. Section II describes background of the dispute briefly. It consists of two parts: developments until Korea's formal imposition of safeguards measure and trade dispute after the imposition. With a view to exploring policies for better dispute settlement system, Section III analyzes the dispute from two aspects: negotiation and WTO rules one. Section IV provides the recommendations to improve the WTO dispute settlement mechanism, taking into account its limitations in dealing with disputes between WTO Member and accession applicant developing country. This paper is concluded with future issues.

II. Background of the garlic dispute[4]

The garlic dispute has been developed in two stages. The first stage is the period that covers the Korean farmers association's submission of an application for a safeguard investigation and the subsequent Korean government's decision to impose a safeguard measure. The second stage covers developments that took place after the Chinese government took a unilateral action to restrict importation of certain Korean products in response to the safeguard measure. We begin with the processes concerning the safeguard decision and then illustrate how two countries reacted to each other after imposition of the trade remedy.

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1. Korea's imposition of safeguard measure

The garlic dispute started with submission of application for a safeguard investigation by the National Agricultural Cooperative Federation (NACF) with the Korea Trade Commission (KTC) on September 30, 1999. After KTC decided to initiate the investigation on October 11, it gathered a variety of relevant information and examined them. In the middle of investigation, KTC determined that the situation was critical[5]

[4] This Section is primarily based on Ahn (2004) and various news reports.

[5] Article 6 of the WTO Agreement on Safeguards(SG Agreement) defines a critical circumstance as the situation where delay would cause damage which it would be difficult to repair.

such that a provisional safeguard measure[6] shall be taken. Thus on October 27, it recommended the Korean Ministry of Finance and Economy (MOFE)[7] to impose a provisional safeguard measure of 285% on imported frozen garlic and acid processed garlic for 200 days. MOFE adopted KTC's recommendations on November 18, 1999.

Since then, KTC continued its investigations. At the same time, both governments of Korea and China had tried unsuccessfully to resolve the dispute through negotiations. Thus, Korean government determined to impose a safeguard measure on certain types of garlic which entered into force on June 1. The determination includes additional 285% tariff or 1,707 won per kg[8] on frozen garlic and acid processed garlic and application of tariff quota rate on peeled garlic[9].

2. Negotiations after the safeguard imposition

Chinese government made a quick movement in response to Korean government's decision to impose a safeguard measure. In particular, it announced its decision to retaliate against Korea's safeguard measure by restricting temporarily importation of two leading Korean goods, mobile phone handsets and polyethylene products. Their combined value amounts to about 500 million dollars. Concerned about the adverse effects on bilateral trade relation, both government officials sat at a negotiation table on June 29.[10] After a series of negotiations in Beijing, both sides reached an agreement on July 15, 2000.

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[6] A provisional safeguard measure may be taken on pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.

[7] While KTC is responsible for investigating the existence of import surge, serious injury to domestic industry and a causal link between increased imports of the product concerned and serious injury or threat thereof, MOFE has the authority to determine whether or not to impose a safeguard measure.

[8] The greater value shall be added to the applied tariff rate of 30%.

[9] The applicable measures vary depending on the amount of imports of garlic in question. The basis tariff rate of 50% applies to imports up to the pre-determined minimum market access (MMA) quantity. And for imports over MMA level, 376% or 1,880 won per kg, which is larger one, applies in addition to the basis rate of 50%.

[10] Both governments had fruitlessly conducted negotiations twice before the imposition of a safeguard measure, on April 24 and May 18.

The agreement consists of three elements. First, the safeguard measure will expire six months earlier than the initially determined timing. Thus, it will expire at the end of 2002. Second, Korea agreed to import certain amount of Chinese frozen garlic and acid processed garlic[11] in exchange for China's lift of trade restrictions on Korean mobile phone handsets and polyethylene products. In particular, Korea will impose 30% of basic tariff rate on those garlic products originating in China under tariff-quota rate (TQR) scheme. Third, Korea will apply 50% tariff rate[12] to certain Chinese garlic products under MMA.[13] The subject products include fresh, frozen and dried garlic.

The agreement was not the end of dispute. There was further dispute regarding implementation of the above-mentioned agreement. Complaining that Korea did not fulfill its obligations under the previous agreement, Chinese government warned another unilateral retaliation at the bilateral trade meeting held on April 6, 2001. The issue in question was whether Korea should import total amount of MMA and TQR. China alleged that since Korean government imported only 22,000 ton out of 32,000 ton earmarked for 2000, it failed to comply the agreement. On the other hand, Korean government argued that there was no obligation for it to import full amount of 32,000 ton. In addition, it claimed that since the agreement entered into force on August 2, 2000, it was too short to import the full quantity during the short remaining period of year 2000.[14]

Since then, both governments negotiated to resolve the implementation issue. Just two weeks after China's threat of retaliation against Korea's allegedly incomplete compliance, Korea agreed to import the remaining 10,000 ton by the end of August 2001. It also agreed to import full amounts for 2001 and 2002. After the Korean government lifted the safeguard measure at the end of 2002 in accordance with the first agreement, there was no further dispute concerning garlic.

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[11] The figures for period 2000-2002 are 20,105 ton, 21,190 ton and 22,267 ton, respectively.

[12] MMA amounts are 11,895 ton for 2000, 12,538 ton for 2001 and 13,181 ton 2002.

[13] While total amount of MMA will be imported by the Korea Agro-Fisheries Trade Corporation (KAFTC), a state trading company, the quantity of garlic other than MMA will be imported by the private sector.

[14] The fundamental reason for the second dispute was reportedly that the first agreement was written in both Korean and Chinese language rather than in an agreed single one. Thus, each side tried to interpret the agreement to their advantage.

III. Assessment of the dispute

Though the dispute may be deemed to have limited effects only on two countries, it has various useful implications. Among them include implications for negotiation and dispute settlement procedures. Here we analyze the case from both aspects with a view to exploring the policy recommendations that are discussed in the next Section.

1. How China's retaliation and threat thereof worked?

In the view point of international negotiation theory, most important feature in the Korea-China garlic trade dispute was China's effective elaboration of retaliation threat effect. By showing strong willingness to retaliate against the two leading Korean goods, Chinese government was able to get unilateral concession from Korean government.[15]

According to the Research of Dr. Se-Young, Ahn (of 1998[16], 2004), U.S. and China effectively conducted such strategy in negotiations with their trading partners such as in the cases, 1995 U.S-Japan Automobile negotiation, 1997 Korea-U.S. Automobile negotiation and 1994 US-China IPR dispute.

In all of the above cases, none of such threats done by either U.S. or China were ultimately driven into actual trade retaliation, but ended up by mutual compromise in

[15] When Chinese government imposed tentative ban on the imports of Korean produced Mobile phones and Polyethylene, Korean government made concession to reduce for 6 months from the original safeguard period, makes obligatory import for the certain amount of Chinese garlic in MMA basis, and impose low base rate tariff on the amount bound in TRQ.

On April 6, 2001, when Chinese government warned retaliation to it's Korean counter-part that if Korean government does not import the amount which did not consumed (about 10,000 tons) from the quota amount of year 2000 (32,000 tons). It was due to fundamental differences between two parties on the way to interpret the terminology of Tariff quota. Korean side interpreted it as maximum import amounts under low tariff rate by international trade custom, while Chinese side interprets it as government guaranteed compulsory imports amount. However on the same month's Beijing meeting, Korean government accepted Chinese pursuance.

[16] Ahn, Se-Young , 1998, “US-Korea Automotive Issues : Super301 Designation on Korea Automotive Market Access in 1997”, 「Journal of International Trade & Industry Studies」, Vol. 3, No. 2, Dec. 1998

certain point of time or withdrew threat by themselves. The real objective of exercising such threatening is not to retaliate itself, but to get favorable concession from it's counter-parts by making credible threat and make them to be psychologically intimidated.

But, such strategy was not always effective.[17] In general, the effectiveness of a threat of retaliation strategy depends on four variables. They are (i) the invoking party's potential gains from the retaliation, (ii) its capacity to retaliate, (iii) the counterpart's compliance costs and 'broke-down' costs, and finally (iv) the counterpart's capability and willingness of counter-retaliation.[18]

Concerning the first determinant, China was expected to gain substantially large benefits if its retaliation worked as intended. That is why China took a hard position during the whole process of negotiations. When we take a look in detail, China, the world's top garlic producer, had a limited number of markets to sell its garlic.[19] More importantly, 99.9% of Chinese garlic was exported to Korea. Thus, Korea's safeguard measure means a kind of disaster to Chinese garlic industry. In other words, if China's retaliation worked well, it would bring enormous potential gains to China.

Second, China had a capacity to retaliate Korea. Main reason is that since Korea was a WTO Member, but China was not, the WTO DSU did not apply to dispute between them. Thus, China was not obliged to comply DSU which prohibits unilateral retaliation and also sets timeframe, even if Korea was presumed to impose a safeguard measure in violation of the Safeguards Agreement. Therefore, China was free to take any unilateral measure that it considered necessary to secure its economic interests regarding its garlic exports to Korea. On the other hand, Korea has very limited leverage, if any, to affect the path of China's unilateral retaliation.

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Third, facing China's unilateral and seemingly groundless restrictions on Korean major exports, Korea should take into account costs that it would bear when it complied China's demands ('compliance cost') and when it rejected them ('broken-down cost'). If Korea bowed to China's unilateral demands, it should shorten the period of a safeguard

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[17] The USTR warned imposition of retaliatory measure based on Special clause to 301 China and India those in disputes with the U.S. on Intellectual Property Rights related issues e.g. during 1990s. However U.S. had to withdraw it since by other party's warning of counter-retaliation or absolute no-reaction

[18] McMillan (1990, p. 207).

[19] Major garlic consuming countries are Korea, China and France.

measure and accept other concessions. These outcomes would cause substantial costs to domestic growers of garlic, the fourth important agricultural product in Korea.

In turn they would mobilize their strong political clout to protect their interests. [20]

On the other hand, when Korea let China to restrict Korean exports further, financial losses would amount to big figure. [21] Recognizing that the broken-down costs outnumbered the compliance costs, Korean government concluded to comply China's demands for less stricter safeguard measure.

Finally, Korea had a limited capacity and willingness to counter-retaliate against China mainly because Korea's export to China had increased continuously and markedly since mid-1990s.[22]

Thus, the longer the row continued, the greater losses Korea would suffer.

In addition to such economic factor, Korea's capability and willingness was fundamentally limited in non-economic view point such as international political arena, external security issues, and other factors. Korea needed China's cooperation to solve North Korean nuclear issue. Under those circumstances, it was difficult to imagine Korean government's strong willingness to counter-retaliate.

Based on the above analysis we are of the view that the four determinants of effectiveness of retaliation worked in favor of China.

2. Legal assessment

We may assess legally the dispute in two aspects. One is whether Korea imposed a safeguard measure at issue in conformity with the Safeguards Agreement (SG

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[20] In 1999, the time Korea-China garlic trade negotiation convened, 420 thousand households involved in the cultivation of garlic, which equivalent to 31% of total 1.38 million households involved in agriculture.

[21] If China took retaliatory measure in practice, Korea will make the loss of U.S$ 512 million from the trade with China. Especially, as exports destined to Chinese market took 40.7% of total Korea's polyethylene exports, the industry might be the one pay huge Broke-down Cost. At that time, share of Mobile phone exports to China accounted only 1.2% of Korea's total exports amount of Mobile phone, however when industry had to consider the potential of rapidly growing Chinese market, its potential Broke-down Cost could not be negligible for Electronics Industrial sector.

[22] In trade structure, Korea's export to China was dramatically increasing since mid-1990s. Therefore, share of Chinese market in Korea's total exports increased from 8% of 1995, 10% in 1997, 10% in 1999, 11.9% of 2000, and it reached 12.1% of total exports in year 2001

Agreement). The other is how the WTO dispute settlement rules played a role in the process of resolving the dispute.

(1) Consistency with SG Agreement

Under SG Agreement, the importing country shall meet three requirements to impose a safeguard measure. They are (i) an import surge, (ii) serious injury or threat thereof to a domestic industry and (iii) the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. On the other hand, when the investigating authorities determines that delay of the measure would cause damage which it would be difficult to repair, the importing country may take a provisional safeguard measure. The provisional measure shall be taken pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.[23]

Chinese government had expressed concerns about the possibility of imposing a safeguard measure as the investigation approached to the conclusion. It is noted that Chinese government did not take any noticeable action during a few months after imposition of the provisional measure. Both governments entered into negotiations twice before Korea's final decision to impose a safeguard measure. While China raised reportedly complaints about KTC's determinations with a warning against a possible safeguard measure, Korea was said to respond to China's arguments by insisting that it reached the determination in full compliance with SG Agreement. Korea maintained the above-mentioned position during the post-measure negotiations. But Korea's rules-based approach did not bring any effect on China's aggressive approach.

Though details of China's complains were not disclosed publicly, the main issues, which were said to be raised, include whether Korean garlic domestic industry suffered a serious injury due to an increase of garlic imports and whether the extent of Korea's safeguard measure is appropriate. Regarding the existence of serious injury, Korea argued that it evaluated all relevant factors of an objective and quantifiable nature having a bearing on the situation of Korean garlic industry. It is controversial whether Korea reached the conclusion of serious injury on a reasonable and objective basis. However, since SG Agreement stipulates what factors to examine, but not how to do them, the Korean investigating authorities may exercise discretion in interpreting

[23] The duration of the provisional measure shall not exceed 200 days.

the outcome of all factors considered. Therefore, it is difficult to conclude that Korea made its determination of serious injury in violation of SG Agreement.

Next, since Korea took a safeguard measure in the form of a large tariff increase of 285% or 1,887 won per kilogram, it was quite natural to raise a question as to whether Korea applied the safeguard measure to the extent necessary to remedy serious injury and to facilitate adjustment of Korean garlic industry. Though the necessity issue is one of the most important issues concerning SG Agreement, the Agreement does not stipulate explicitly any guidance on how to determine the appropriate level of a safeguard measure.

On the other hand, WTO case laws may offer a useful guidance on the necessity issue. A panel and the Appellate Body ruled the necessity issue in *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products* (*Korea-Dairy Products*) case. However, they examined the scope of requirement to explain the necessity of a safeguard measure rather than criteria on calculation of the necessary level. The panel found that Members are required, in their recommendations or determinations on the application of a safeguard measure, to explain how they considered the facts before than and why they concluded, at the time of the decision, that the measure to be applied was necessary to remedy serious injury and facilitate the adjustment of the industry.[24] On the other hand, the Appellate Body stated that it did not agree with the Panel's finding.[25] Thus, there is difficulty in drawing a conclusion that the safeguard measure taken by Korea was not necessary to remedy serious injury and facilitate the adjustment of Korean garlic industry.

[24] Panel Report on *Korea-Dairy Products* (WT/DS98/R), paragraph 7.109.

[25] Appellate Body Report on *Korea-Dairy Products* (WT/DS98/AB/R), paragraph 100.

(2) Role of DSU

We analyze the role of the WTO dispute settlement rules in the process of resolving the dispute. When there occurs a dispute arising under SG Agreement, parties involved shall follow Article 14 of SG Agreement. In particular, the applicable rules are Articles XXII and XXIII of GATT 1994 as elaborated and applied by the DSU. However, Korea faced difficulty in applying the dispute settlement rules. There are two interrelated reasons for the failure to apply DSU. First reason is that while Korea was a WTO Member, China was not at that time. Second one is that DSU applies only to consultations and the settlement of disputes between Members. Thus, China had free hands to take any unilateral actions in a manner inconsistent with DSU.

We analyze China's actions in connection with DSU, though China did not have any obligation to abide by it. First, China failed to afford Korea adequate opportunity for consultation opportunity before it took unilateral actions. It is inconsistent with Article 4 of DSU. Surprisingly, China took retaliation in less than a week after Korea's safeguard measure entered into effect. While the swift action might be deemed as a good move from the negotiation point of view, it could receive a negative assessment in the dispute settlement context. It is noted that under DSU, certain period of time shall be given to one Member to reply to the request when it receives a request for consultation from another Member.[26]

Second, China failed to decide the level of retaliation on the objective and reasonable basis. While Korea's safeguard measure was expected to affect 8.2 million dollars of Chinese garlic, China's retaliation restricted over 500 million dollars of Korean exports to China[27]. Under DSU, when recommendations and rulings of the WTO Dispute Settlement Body (DSB) are not implemented within a reasonable period of time, the complaining Member may suspend its concessions or other obligations.[28] But it cannot determine the level of suspension by itself. Instead, an arbitrator determines the level

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[26] In accordance with Article 4.3 of DSU, if a request for consultation is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

[27] The figure consists of 41 million dollars of mobile phone handsets and 471 million dollars of polyethylene products.

[28] Article 22.1 of DSU.

of suspension. In addition, the suspension level shall be set up at the level equivalent to the level of nullification or impairment that the complaining country suffered.[29] Thus, China took retaliation not in conformity with DSU.

In short, there was no or limited, if any, room for DSU to play any role in resolving the dispute in which a WTO Member and an accession applicant country were involved. Therefore, there is a need to improve the existing DSU in a way to cover the disputes where an accession applicant is a party. We will touch upon the issue in the next Section.

IV. Policy recommendations

1. Transitory dispute settlement rules

As seen in the previous Section, limitations of DSU were revealed in the event of dispute where a WTO Member and an accession applicant were parties. Though DSU covers only disputes between Members concerning the covered agreements, it is hard to tolerate the situation where a WTO Member was exposed to the risk of being hurt by a non-Member of WTO regardless of causes of actions. More importantly, the Member could not get any assistance or protection from the multilateral trading scheme in those types of disputes. Therefore we are going to explore policies which make DSU function well under the aegis of the WTO system.

We begin with issues concerning the coverage of DSU. Under Article 1.1 of DSU, the rules and procedures of DSU apply to two types of disputes. The first type of disputes are those brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to DSU[30]. The second type of disputes are disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (WTO Agreement) and of DSU taken in isolation or in combination with any other covered agreement.

While the above-mentioned provision states explicitly that the second type of disputes shall be disputes between Members, it does not that the first type of disputes shall be disputes between Members. But the first type of disputes is in general presumed to be ones between Members. Moreover, even when DSU may apply to

[29] Article 22.7 of DSU.

[30] These agreements are referred to as the covered agreements in DSU.

disputes where non-Member is involved in, it is impossible to make non-Members implement recommendations and rulings unless both parties agree because they are not obliged to follow a variety of WTO Agreements and DSU.

Recognizing the limitations of DSU in resolving a garlic dispute between WTO Member and the accession applicant, we suggest an introduction of transitory dispute settlement rules, which cover disputes where an accession applicant is involved. The rationale for introducing the transitory rules is that if an applicant country is free from the obligations under DSU, it, as a would-be Member, may nullify or impair the benefits that would accrue to the Members directly or indirectly. This subsequent nullification or impairment of Members' benefits runs counter against the purposes of the multilateral trading system. Therefore, to restrain accession applicants from taking unilateral actions against Members, the transitory dispute settlement rules shall be established in line with the purposes of WTO system.

The transitory rules shall be designed to entail different elements from DSU, reflecting the status of applicants who do not entitle the benefits as a Member to the full extent. Once a country[31] submits an application for WTO accession, it shall be considered as a Member for the purpose of DSU with some exceptions. In other words, the accession applicant has the same rights and obligations under DSU as Members regardless of where the accession process stands in.

Next, we elaborate the procedures under the proposed transitory rules. If an accession applicant has complains concerning WTO Member's measures against it, it shall request consultations with the Member. Then both parties shall hold consultations with the complained party in accordance with the procedures and timeframe stipulated in DSU. Other procedures and rules of DSU shall apply for the stages of dispute settlement, including establishment of a panel, compensation and suspension of concessions. It is noted that the measures in question shall be taken after the applicant submitted its accession application.

We, however, may apply asymmetric transitory dispute settlement rules, taking into account the nature of the accession applicant, a complainant or a respondent. Taking into account the fact that most of existing and would-be accession applicants are developing countries, when Members have complaints about an applicant's measures, we call for Members to exercise due restraint in bringing matters. Also we may apply

[31] Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the WTO Agreement and the Multilateral Trade Agreements may become a WTO Member.

differentiated timeframe for procedures by allowing extension of the relevant period, with due respect for the applicant's level of development.

Finally, we may apply rules with different degree of obligations, depending on where the accession negotiation process stands. The closer to the end the negotiation process approaches, the stricter and greater obligations the applicant shall bear concerning the dispute settlement rules. In particular, we may categorize the applicants into three groups, depending upon the stages of negotiations. The first category is the applicants who submitted an application, but the accession working party is not established yet. The second category is the applicants whose accession working party was already established, but bilateral negotiations are under way.. The third type of applicants is the applicants who concluded bilateral accession negotiations but before becoming a Member.

2. Application of negotiation principles

In addition to the transitory dispute settlement rules, we would like to recommend application of general negotiation principles to the accession negotiations with an aim of restraining unilateral actions by accession applicant countries. They include standstill and rollback principles. These principles were adopted during Uruguay Round negotiations. Under the standstill principle, negotiating parties shall meet three requirements. First, they are not allowed to introduce GATT-inconsistent trade restrictions during negotiations. Second, even when they apply GATT-consistent measures, the measures shall not go beyond a necessary minimum. Third, they shall not take any trade measures in such a manner as to improve their negotiating positions.[32]

On the other hand, rollback principle calls for one of the following commitments. One is that the negotiation participants shall phase out all GATT-inconsistent trade-restrictive or distorting measures by the end of Uruguay Round. The other is that the countries shall the GATT-inconsistent measures in conformity with the post-Uruguay Round rules.[33]

[32] Croome (1999, p. 26) and Rosenberg (2004).

[33] Croome (1999, pp. 26-27).

Therefore, when we apply the standstill principle until the conclusion of accession process, the applicants shall not introduce WTO-inconsistent measures.[34] Also their WTO-consistent measures are permitted to the minimum necessary extent. If the principle were in effect before the garlic dispute, China could not take unilaterally the seemingly WTO-inconsistent measure of restricting certain Korean products. The purpose of recommending standstill and other principles is to encourage the accession applicant countries to make every effort to bring their trade policies in conformity with WTO Agreements even before they are accepted as WTO Members formally. It is noted that the standstill commitment applies to both accession applicants and Members during the entire process of accession negotiations.

In conclusion, learning valuable lessons from the experience of garlic dispute where a WTO accession applicant was a party, we make two policy recommendations. One is the introduction of a transitory dispute settlement rules that apply to disputes involving accession applicants. The other is that certain negotiation principles such as standstill shall be applied during the accession negotiations with a view to preventing introduction of WTO-inconsistent measures. Finally, we would like to put an emphasis on our view that when both recommendations are in place together, the multilateral trading system will be strengthened.

V. Concluding remarks

In the previous Sections, we analyzed the garlic dispute containing unique features. After reviewing the background of the dispute, we examined the case from both negotiation and WTO legal aspect. While four determinants of effectiveness of retaliation worked in favor of China, while Korea had tried unsuccessfully to deploy workable negotiation strategies, China was able to enhance its bargaining power over Korea. But, it must be noted that , as discussed in previous chapter, the real purpose of China's retaliation threat was not to apply retaliatory measure against Korea in practical terms, but enhance its bargaining power by announcing retaliation threat. Actually, China's retaliatory measure against Korean Polyethylene and Mobile phone was '

[34] It is noted that the standstill commitment applies only to measures taken after the country in question applies for accession.

tentative', not 'definitive'; simply to announce the delay of customs clearance process and issuing of import documents for the targeted two Korean items.

Concerning the legal aspect, we are of the view that it is difficult to conclude that Korea made its determination on key issues such as serious injury and the level of safeguard measures. In addition, China failed to afford Korea adequate opportunity for consultation and to decide the level of retaliation on the objective and reasonable basis. Based on the above assessment, we make two policy recommendations. One is the introduction of the transitory dispute settlement rules covering disputes with accession applicants. The other is application of certain negotiation principles such as standstill during accession process.

Here we would like to make some comments for the future works on the dispute settlement rules. First, since Article XII of the WTO Agreement[35] does not stipulate any guidance on rules and procedures concerning accession negotiations explicitly, there is a need to adopt well-defined guidelines for rules and procedures for accession negotiations. In the event of developing the accession guidelines, special regard shall be given to the transitory dispute settlement rules. Second, since the existing DSU has limitations in covering disputes involving the accession applicants, Members may discuss this issue at the forum of DDA DSU negotiations.[36] Finally, since accession applicants are allowed to participate in the ongoing DDA negotiations,[37] it is necessary to provide them with adequate opportunities to express their views regarding the improved WTO dispute settlement rules.

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[35] This Article states who is eligible for accession and who makes decisions on accessions.

[36] Under paragraph 30 of the Doha Ministerial Declaration, Members have discussed how to improve and clarify DSU.

[37] Paragraph 48(ii) of the Doha Ministerial Declaration. However, they cannot make decisions on the outcome of the negotiations. Only WTO Members make decisions on them.

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