Chapter 7

SAFEGUARDS

1. OVERVIEW OF RULES

Article XIX of the GATT provides the rules to be observed when a Member government takes emergency action to restrict imports *via* safeguard measures -- measures applied to remedy serious injury to the domestic industry from a sudden surge in imports. The Article, however, does not clearly define the contingencies for implementing safeguard measures (*e.g.*, definition of serious injury or threat of serious injury to the domestic industry, factors to be considered before and when implementing safeguard measures, the duration of measures, selective application to specified countries, *etc.*). Consequently, there was a growing sentiment that an elaboration and clarification of the rules for applying safeguards was necessary, and, as a result, the issue was discussed during the Tokyo Round.

One of the goals specified for discussions in the Tokyo Declaration of September 1973 was "to include an examination of the adequacy of the multilateral safeguard system." Pursuant to this declaration, debate focused on the following four points: (a) the propriety of selective application of safeguard measures and the terms of their authorization; (b) the clarification of requirements for implementation (such as the definition of "serious injury"); (c) the conditions of safeguard measures (especially the obligation to liberalize progressively, maximum duration of safeguard measures, and the obligation for structural adjustment); and (d) notification and consultation procedures, as well as the possibility of setting up an international surveillance. However, on the most important issue, the question of selective application, the European Economic Community and the developing countries remained at loggerheads and no agreement could be obtained.

There were great many difficulties in the implementation of a safeguard measures system under Article XIX of GATT, including the fear that countries that were targets of safeguard measures would retaliate with their own restrictive measures. Since the 1970s, there had been a tendency to move to voluntary export restrictions -- so-called "grey-area measures" that have no clear basis in the GATT and, thus, raise concerns that the GATT system might become empty of meaning and substance. As a result, there was growing sentiment that the rules concerning safeguards ought to be strengthened to

deal with these grey-area measures. In this regard, the GATT Ministerial Meeting in 1982 issued a declaration that stated, in part, that "there is need for an improved and more efficient safeguard system." United States, Australia, New Zealand and other many developing countries argued that grey-area measures either should be scrapped or the rules on them strengthened. The EU believed that this position simply ignored reality. As a result, no concrete progress was made on the issue.

Negotiations on safeguards in the Uruguay Round proceeded on the basis of the aims spelled out in the Punta del Este Declaration of September 1986. The gist of the Declaration was that: "[t]he agreement on safeguards (a) shall be based on the basic principles of the GATT; (b) shall contain, *inter alia*, the following elements: transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and countermeasures, notification, consultation, multilateral surveillance, and dispute settlement; and (c) shall clarify and reinforce the disciplines of the GATT and should apply to all Contracting Parties."

The resulting Agreement on Safeguards was incorporated within the WTO Agreement. It should be noted that the Agreement on Agriculture provides for special safeguard measures. The special safeguard measures for textile and textile products (including clothes) under the Agreement on Textiles and Clothing (ATC) expired at the end of 2004 and can no longer be imposed by Member countries.

2. LEGAL FRAMEWORK

1) The Agreement on Safeguards

Article XIX of the GATT permits the imposition of safeguard measures (that is, emergency import restrictions) to counteract sharp and sudden increases in imports. Under this Article, import restrictions may be imposed if certain conditions are met: experience of serious injury by the domestic industry, no discrimination in application, and causal relationship between imports and injury. These conditions were considered difficult for importing countries to meet, and in the past it was more common for governments of importing countries, under internal protectionist pressure, to request or force exporting countries to implement voluntary export restraints ("VERs"). VERs and other grey-area measures have been explicitly prohibited, and conditions for the application of safeguard measures are more clearly elaborated in the Agreement on Safeguards (*see* Figure 7-1).

The Agreement on Safeguards explicitly prohibits the introduction and maintenance of VERs (one of the classic "grey-area" measures), orderly marketing arrangements and other similar measures, including export moderation, export or import price monitoring systems, export or import surveillance, compulsory import cartels, and

trade-restrictive, discretionary export or import licensing schemes. It also prohibits Members from seeking adoption of grey-area measures by other Members. The Agreement on Safeguards permits a Member to maintain only one grey-area measure in effect on the date of entry into force of the WTO Agreement but these measures had to be eliminated by December 31, 1999 (Articles 11.1 and 11.2 of the Agreement on Safeguards).

In addition, it was provided that Members shall neither encourage nor support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to "grey-area measures" (Article 11.3).

Figure 7-1
Conditions for Applying Safeguards

Conditions

Unforeseen Developments, etc.	Increased imports as a result of unforeseen developments and of the effect of WTO obligations (Article XIX of the GATT).
Increased Imports	Absolute or relative increase in imports of products subject to safeguard measures (Article 2 of the Safeguards Agreements).
"SeriousIinjury" and Causal Link	Serious injury found in terms of economic factors such as imports, production, sales, productivity, *etc*., and a causal link between increased imports and injury (Article 4 of the Safeguards Agreement).

Procedures

Investigation Procedures	Investigation procedures must be specified prior to investigations and all interested parties must be given an opportunity to present evidence; the findings of investigation must be published (Article 3).

Substance

Duration	Not to exceed four years initially, but may be extended to the maximum of eight years (Article 7.1 and 7.3).
Levels of Quantitative Restrictions	Must, in principle, not fall below the average of imports in the last three representative years (Article 5).
Prohibition on Application	Measures may not be invoked again for a period equivalent to the period of the duration of a preceding measure and a minimum of two years (Article 7.5).
Progressive Liberalization	Where the duration of a safeguard measure exceeds one year, the Member applying the measure is obligated to gradually liberalize the measure. Where the duration of the measure exceeds three years, the Member applying the measure is obligated to conduct a mid-term review of the measure (Article 7.4).

Recognizing that strict requirements provided for in Article XIX of the GATT were partly responsible for the prevalence of "grey-area measures", the Agreement on Safeguards has relaxed the conditions on application to some extent.

First, it provides for a special method for allocating import quotas ("quota modulation") to exporting countries. Under Article XIII of the GATT and Article 5 of the Agreement on Safeguards, these allocations must, on principle, be based on total quantity or value of imports of the product during a previous representative period. However, where imports from certain countries have increased in disproportionate percentage in relation to the total increase of imports of the product, the imposition of safeguard measures would negatively affect third countries from which there is no increase in imports. As a result, under the Agreement, if a Member can demonstrate the need and justification to the satisfaction of the Committee on Safeguards, the Member may depart from the provisions and place priority restrictions on imports from the country in question. For a period of no more than four years, restrictions may be placed mainly on the country responsible for the surge of imports and restrictions on third countries may be made relatively lenient (Article 5.2(b)).

Second, the right of exporting countries to take countermeasures in response to safeguard actions is restricted for a certain period under certain terms and conditions. When applying import restrictions under the Safeguard Agreement, an importing country is required to provide some sort of compensation to exporting countries, usually in the form of a tariff reduction on other items. If no agreement is reached in the consultations, and the importing country applies safeguard measures not withstanding, exporting countries may have recourse to countermeasures. The provision of compensation is often politically sensitive, since it may provoke conflicts between the interests of different industries within the importing country. Without doubt, this was one reason why countries so frequently resorted to grey-area measures. Under the Agreement on Safeguards, the right of suspension shall not be exercised for the first three years that a safeguard measure is in effect, if the measure has been taken as a result of an absolute increase in imports and conforms to the provisions of the Agreement (Article 8.3). Under the GATT, safeguard measures were invoked mainly by developed economies such as Australia, the European Union and the United States (*see* Figure 7-2). The frequent use of these measures is due partly to tariff rates in developed countries that were bound at such a low level that it was virtually impossible to protect domestic industries through the use of tariffs.

Figure 7-2

Application of Safeguard Measures Under the GATT

	1970-74	1975-79	1980-84	1985-89	1990-94
United States	3	6	4(1)	0	0
European Union	1	2(1)	7(4)	7(5)	4(4)
Canada	6(3)	7(1)	3(1)	1(1)	1
Australia	1	16(1)	4	0	1
Others	1	4	5(4)	6(3)	6(2)
TOTAL	12(3)	35(3)	23(10)	14(9)	12(6)

Note: Numbers in parentheses are the number of safeguards on agricultural products.

From January 1995 (when the WTO agreement took effect) until October 2006, 155 safeguard investigations have been carried out. Of these investigations, 76 resulted in the implementation of safeguard measures (based on notifications to the WTO).

It is clear from the statistics below that, after the Agreement on Safeguards relaxed the requirement in Article XIX of the GATT, the number of safeguards applied increased; the number of cases brought before WTO panels also increased. (*See* "Major Cases" on cases and rulings by WTO panels and the Appellate Body.)

Figure 7-3

Implementation of SafeguardMeasures (Investigation, Provisional and Definitive) over the Past 10 Years (January 1997 – October 2006)

Country	CY	97	98	99	00	01	02	03	04	05	06	Total
US	(Investigation)	1	1	2	2	1				-	-	7
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	1	1	2	-	1	-	-	-	-	5
EU	(Investigation)	-	-	-	-	-	1	1	1	-	-	3
	(Provisional)	-	-	-	-	-	1	1	1	-	-	3
	(Definitive)	-	-	-	-	-	1	-	1	1	-	3

Canada	(Investigation)	-	-	-	-	-	1	-	-	1	-	2
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	-	-	-	-	-	-	-	-	-	0
Australia	(Investigation)	-	1	-	-	-	-	-	-	-	-	1
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	-	-	-	-	-	-	-	-	-	0
Japan	(Investigation)	-	-	-	1	-	-	-	-	-	-	1
	(Provisional)	-	-	-	-	1	-	-	-	-	-	1
	(Definitive)	-	-	-	-	-	-	-	-	-	-	0
China	(Investigation)	-	-	-	-	-	1	-	-	-	-	1
	(Provisional)	-	-	-	-	-	1	-	-	-	-	1
	(Definitive)	-	-	-	-	-	1	-	-	-	-	1
Philippines	(Investigation)	-	-	-	-	3	-	3	-	-	4	10
	(Provisional)	-	-	-	-	2	-	3	-	-	1	6
	(Definitive)	-	-	-	-	-	-	3	1	1	1	6
India	(Investigation)	1	5	3	2	-	2	1	1	-	-	15
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	3	2	1	-	2	-	-	-	-	8
Turkey	(Investigation)	-	-	-	-	-	-	-	5	-	4	9
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	-	-	-	-	-	-	-	-	4	4
Jordan	(Investigation)	-	-	-	1	-	8	-	-	1	1	11
	(Provisional)	-	-	-	-	-	1	-	-	-	-	1
	(Definitive)	-	-	-	-	1	1	2	-	-	-	4
Czech Republic	(Investigation)	-	-	1	2	1	5	-	-	-	-	9
	(Provisional)	-	-	1	-	2	-	1	-	-	-	4
	(Definitive)	-	-	1	-	1	1	2	-	-	-	5
Hungary	(Investigation)	-	-	-	-	-	1	2	-	-	-	3
	(Provisional)	-	-	-	-	-	1	2	-	-	-	3
	(Definitive)	-	-	-	-	-	-	3	-	-	-	3
Poland	(Investigation)	-	-	-	1	-	4	-	-	-	-	5
	(Provisional)	-	-	-	-	-	1	-	-	-	-	1
	(Definitive)	-	-	-	-	-	-	4	-	-	-	4
Egypt	(Investigation)	-	1	1	1	-	-	-	-	-	-	3
	(Provisional)	-	1	-	1	-	-	-	-	-	-	2
	(Definitive)	-	-	1	1	1	-	-	-	-	-	3

Brazil	(Investigation)	-	-	-	-	1	-	-	-	-	1	2
	(Provisional)	-	-	-	-	-	-	-	-	-	-	0
	(Definitive)	-	-	-	-	-	2	-	-	-	1	3
Chile	(Investigation)	-	-	2	3	2	2	-	1	-	1	11
	(Provisional)	-	-	1	2	1	1	-	1	-	1	7
	(Definitive)	-	-	-	2	1	2	-	-	1	-	6
Ecuador	(Investigation)	-	-	2	-	-	1	4	-	-	-	7
	(Provisional)	-	-	-	1	-	-	2	-	-	-	3
	(Definitive)	-	-	-	-	1	-	1	1	-	-	3
Argentina	(Investigation)	1	1	-	1	1	-	-	1	-	1	6
	(Provisional)	1	-	-	-	1	-	-	-	-	-	2
	(Definitive)	1	-	-	-	2	-	-	-	-	-	3
Others	(Investigation)	0	1	4	11	3	8	4	5	2	4	42
	(Provisional)	-	1	3	1	-	2	-	2	-	-	9
	(Definitive)	2	-	1	1	2	5	-	1	-	2	14

Note: Prepared by the Ministry of Economy, Trade and Industry based on WTO Notifications

Some FTAs and tariff unions such as NAFTA and MERCOSUR have provisions allowing a Member to apply WTO safeguard actions while in principle exempting other Member nations from WTO safeguards (e.g. NAFTA Article 802, etc.). This presents problems of compliance with the non-discrimination principle of the WTO Agreement on Safeguards (Article 2.2; *see US – Welded Carbon Quality Line Pipe* Case (DS202)). However, in the EPA entered into by Japan, even among ratifying countries, authorities reserve their right to apply measures following the Safeguard Agreement. Therefore, WTO safeguards can be applied to all relevant countries, including FTA partners. In principle, this system is consistent with the WTO Agreement.

2) Agreement on Textiles and Clothing

From 1974 to the end of 1994, trade in the field of textiles and clothing was governed by the special rules under the Arrangement Regarding International Trade in Textiles, the so-called Multi-Fibre Arrangement ("MFA"). These rules were different from ordinary GATT regulations.

The MFA provided for special safeguard measures that were easier to apply than normal safeguard measures under Article XIX of the GATT. For example, the MFA allowed the application of discriminatory import restrictions (import restrictions covering specific sources only) and did not require countries imposing restrictions to offer compensation or to accept retaliatory measures. As of December 1994, MFA membership consisted of 43 countries and the EU. Of this number, the United States, the EU, Canada and Norway had invoked import restrictions based on MFA provisions (Article 3 or Article 4). In the Uruguay Round negotiations, the Members agreed that

trade in the field of textiles and clothing would be liberalized by way of gradual integration of this sector into GATT disciplines with a ten-year transition period (*see* Figure 7-4). When the WTO Agreement took effect in 1995, the Agreement on Textiles and Clothing ("ATC") also entered into force. The import restrictions that had been maintained under the MFA will be gradually eliminated by this integration. Trade in textiles and clothing, which up to this point had been subject to less restrictive rules than ordinary GATT disciplines, was completely integrated into the GATT by the end of 2004 when the ATC terminated.

During the transition period, the ATC permitted transitional safeguards (TSG), which were applicable only to non-integrated items of textiles and clothing, and different from normal safeguard measures stipulated in the Agreement of Safeguards. Certain countries frequently applied TSG after the ATC took effect, but the number of measures decreased due to the strict examination undertaken by the Textiles Monitoring Body ("TMB"). The TSG system expired with the termination of the ATC at the end of 2004 and textiles and clothing are now subject to normal safeguard measures. However, the Special Measure on Chinese Textiles and Clothing product is in effect until December 31, 2008.

Figure 7-4

Method of Integration Under the ATC

Transitional Period	Ten years from the date of the entry into force of the WTO Agreement. (Article 9)
Integration Rates	After 37 months, 85 months and 121 months since the WTO Agreement took effect, products to be integrated in respect of items whose trade volume is no less than 16 percent, 17 percent and 18 percent (total of 51 percent) of the total volume of textiles trade at the beginning of each stage, with the remaining 49 percent to be integrated by the end of the final (tenth) year (Articles 2.6 and 2.8).
Method of Integration	At the beginning of each stage, integration programmes for each country will be submitted to the TMB (Articles 2.6, 2.7, 2.8 and 2.11).
Products Covered	The ATC covers essentially all of the textiles and clothing covered by the MFA. Pure silk products were not covered in the MFA, but have been included in the ATC (Article 1.7 (Annex)).[1]
Residual MFA Restrictions	The integration of restricted items into the GATT/WTO will gradually eliminate MFA restrictions. Until that time, residual MFA restrictions may continue, but the level of each remaining restriction shall be liberalized annually by certain prescribed ratios (Articles 2.13 and 2.14).
Non-MFA Restrictions	Restrictions contravening the GATT/WTO must be brought into conformity within one year of the ATC taking effect or must be phased out over a period of ten years (Article 3.2).
Transitional Safeguards	Any WTO Member may apply TSG with respect to non-integrated items. (Integrated items will fall under the general safeguard disciplines.) (a) developing country Members' exports of handloom fabrics of cottage industries, or hand-made cottage industry products made of such handloom fabrics, or traditional folklore handicraft textile and clothing products, provided that such products are properly certified under arrangements established between the Members concerned; (b) historically traded textile products that were internationally traded in commercially significant quantities prior to 1982, such as bags, sacks, carpetbacking, cordage, luggage, mats, mattings and carpets typically made from fibres such as jute, coir, sisal, abaca, maguey, and henequen; (c) products made of pure silk. When applying measures the level of such restraint shall be fixed at a level not lower than the actual level of exports or imports from the Member concerned during the 12-month period terminating 2 months preceding the month in which the request for consultation was made.

[1] The MFA covered cotton, wool, artificial fibres, flaxen and other plant fibre products, and partial silk weaves. Pure silk products were not included.

Column: Trends Following the Expiry of the Agreement on Textiles and Clothing

With the expiry of the Agreement on Textiles and Clothing (ATC) on December 31, 2004, the quota systems operated by the US, the EU and others expired. As a voluntary measure against the sudden increase in exports of textile products from China to the US and EU, China introduced Export Tariffs on Textiles as a specific duty on all textile products destined for global markets from China (January 1, 2005) and introduced Temporary Measures of Automatic Permission for Textile Export to the European, the US and Hong Kong markets (March 1, 2005) (Note 1).

Despite these measures, from April 2005, the number of requests from domestic industries in the EU and the US increased dramatically for imposition of the Special Measure on Chinese Textiles based on Paragraph 242 of the Report of the Working Party on the Accession of China to the WTO.

The EU signed the "Memorandum of Understanding between the European Commission and the Ministry of Commerce of the People's Republic of China on the Export of Certain Chinese Textile and Clothing Products to the European Union" on June 11, 2005, the final deadline for a decision on the imposition of safeguard measures, thus narrowly avoiding the imposition of safeguard measures. It covers ten categories of Chinese textile products, placing export quotas on them (restricting import growth in the ten categories to between 8 and 12.5 percent per year for 2005 through 2007). Given this outcome, on July 1, 2005, China announced that it would not implement Temporary Measures of Automatic Permission for Textile Export to the European, the US and Hong Kong markets (issued: June 27, 2005; enforced: July 1, 2005), but instead would introduce Provisional Administrative Measures on Textile Export (issued: June 19, 2005, enforced: July 20, 2005). However, from July of 2005, the quotas for certain products, including pullovers and men's trousers, were exceeded. This caused an embargo on entry of products at customs authorities in the EU, and consultations on the issue were entered into again. On September 5, 2005, in order to pass these products through customs, "Minutes of the consultations regarding the establishment of transitional flexibility measures on the Memorandum of Understanding between the European Commission and the Ministry of Commerce of the People's Republic of China on the Export of Certain Textile and Clothing Products to the EU" were exchanged.

In the case of the US, five months of negotiations, beginning in June 2005, resulted in the signing on November 8, 2005 the "Memorandum of Understanding between the Governments of the United States of America and the People's Republic of China Concerning Trade in Textiles and Apparel Products." In the Memorandum, the US and China agreed to impose quantitative restrictions (quotas) on 21 Chinese textile products from January 1, 2006 to December 31, 2008. Paragraph 242 of the Report of the Working Party on the Accession of China to the WTO, the basis for the negotiations and agreement between the US and China, has a regulation that in exceptional cases "excludes instances where there is a special agreement between China and other

member countries." We need to pay attention that the regulation state that measures based on Paragraph 242 "shall not be in effect for more than one year."

In accordance with these agreements, on January 1, 2006, the Chinese authorities adjusted the products subject to Provisional Administrative Measures on Textile Export, and cancelled the Export Tariffs on Textiles.

During this period, Japan was concerned about the sharp increase in imports of textile products to the Japanese market, including circumvention exports, brought about by the import restrictions imposed by the EU and the US on Chinese textile products. Given concerns that the sharp increase could cause market disruption, Japan selected and monitored a number of sensitive products, and tried to fully grasp the actual status of import trends.

Note: (A measure whereby export administration is implemented through the issuance of automatic export licenses (E/L) on Chinese textile products to the EU, US or Hong Kong.)

3) Agreement on Agriculture

See Part II, Chapter 3 "Quantitative Restrictions."

4) Transitional Safeguards for Chinese Products

See Part I, Chapter 2 "China."

3. ECONOMIC ASPECTS AND SIGNIFICANCE

The economic and political functions of safeguard measures under GATT Article XIX can be categorized as follows.

First, safeguard measures entail the temporary suspension of WTO obligation as an emergency means of preventing serious injury to the domestic industry that produces like or directly competitive products from products being imported into its territory in increased quantities. Therefore, the determination shall not be made unless this investigation demonstrates the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof (Articles 2 and 4.2) and Members shall apply safeguard measures only to the extent necessary to prevent serious injury and to facilitate adjustment (Articles 5.1 and 7.1).

A significant overall impairment in the position of domestic industry due to such surges can, in some cases, cause extensive political and social confusion in the form of, for example, bankruptcy and unemployment. Safeguard measures provide a grace

period for domestic industries which have lost their competitive advantage, enabling capital and facilities to be shifted into industries which retain this advantage and the labour force to be retrained. This process is called structural adjustment. On the other hand, where a domestic industry is only suffering from a temporary loss in its competitive edge, no major structural adjustment is necessary. In such cases, the domestic industry is expected to use the grace period, and profit garnered from the safeguard measures, to institute technological reform and plant and equipment investment in order to restore the industry's competitiveness to international levels.

The intent of safeguard measures are clearly indicated in the preamble to the Agreement on Safeguards, which recognize the importance of structural adjustment and the need to enhance rather than limit competition in international markets. Conscious of this point, both the Japanese government and industry submitted structural adjustment plans as part of the safeguard investigation on three agricultural products undertaken in December 2000, as well as in the investigations involving towels and other textile products.

Second, the application of safeguard measures does not require the existence of "unfair" trade by exporting countries or industries, such as dumping, subsidization or intellectual property rights infringement. Safeguard measures apply to imports that outcompete domestic producers due to their comparative advantage created through the efforts of the exporting industries. In this sense, safeguard measures are quite different from anti-dumping and countervailing duties, both of which are specifically designed to offset unfair trade. For this reason, Article 2.2 of the Agreement on Safeguards bans the selective application of safeguard measures to specific exporting countries. Also, Article 8 notes that the Member imposing a safeguard measure shall provide compensation to the relevant exporting countries, or be subject to countermeasures within certain limits.

Third, safeguards are expected to function as "safety valves" for pressures from protectionists. The presence of safeguard measures allows governments to reduce protectionist pressure, preventing the introduction of more stringent protectionist measures. More specifically, absent of any kind of safeguard measures in the WTO Agreements, the pressure may be manifest in more protectionist ways than the current WTO safeguard measures. On the other hand, through restricting its implementation to cases where increased imports seriously injure domestic industries and narrowing its protections to limited and temporary measures provided under rules, the Safeguard Agreement has the effect of allowing excess protectionist pressures to escape.

Fourth, safeguards facilitate trade liberalization from the perspective of public selection. Industries facing import competition cannot ascertain the future impact of liberalization. Where they fear a "shadow of the future," they will adamantly oppose government efforts at import liberalization. In such cases, if the government can explain to the industry in question that they can always apply for safeguard measures if necessary, domestic industry will decrease its resistance and, thereby, open the way for more positive progress with liberalization.

Conversely, the too-ready implementation of safeguard measures tends to contravene the basic objectives of the WTO Agreement, namely the "substantial reduction of trade barriers and other barriers to trade" and "the elimination of discriminatory treatment in international trade relations". As noted above, the application of safeguards is restricted by stringent requirements and measures must be limited to the necessary scope. To achieve these policy goals, governments must also pursue structural adjustment and forecast the prospects for industrial revitalization. Article 6 of the Agreement on Safeguards allows Member countries to apply provisional safeguards in emergencies, but this again should be based on careful judgment.

However, the chain reaction of steel safeguards that occurred in 2002 further shows the difficulties in maintaining a proper balance between efforts to prevent the abuse of safeguard measures and efforts to provide for dynamic application. Under the Safeguards Agreement, an exporting country is allowed to immediately take countermeasures against safeguard measures only when the measures are inconsistent with the Agreement or when imports have not increased in absolute terms (Article 8.2). Under this provision, countermeasures are suspended until the panel or the Appellate Body finds that the safeguard measures are inconsistent with the Agreement, and this procedure usually requires a period of 18 months to two years. This gives the importing country an incentive to maintain safeguard measures whether or not they are ultimately found to be consistent with the Agreement; they have "nothing to lose" This issue was raised by Australia in the negotiations on improving the DSU as a part of the Doha Development Agenda (DDA). Australia proposes to shorten the time frame of the dispute settlement procedures that apply to safeguard disputes.

4. MAJOR CASES

1) US – Wheat Gluten (DS166)

In March 1999, the EU requested consultations with the United States regarding US safeguard measures (quantitative restrictions) applied in June 1998 against rapidly increasing imports of wheat gluten. A panel was established in July 1999.

The Panel issued its report on July 31, 2000, finding: (a) members imposing safeguards must consider factors raised by interested parties in addition to the factors listed in Article 4.2 of the Agreement on Safeguards; (b) there must be causal link in which imports on their own have caused serious injury; (c) when imports from specific countries are excepted from the measures because they are members of free trade agreements, the authority must determine whether increased imports from other countries have caused serious injury to the domestic industry; and (d) members imposing safeguard measures must make required notifications before the safeguard takes effect. The Panel therefore found that the US safeguard measures were inconsistent with Article XIX of the GATT and the Agreement on Safeguards.

The US appealed the decision to the Appellate Body on September 26, 2000. The

Appellate Body circulated its report on December 22, 2000, finding with regard to point (b), above, that it was not necessary to demonstrate that imports were the sole cause of serious injury. If serious injury was caused in conjunction with other factors, but there was still a genuine and substantial causal relationship between imports and injury, safeguards could be applied. Notwithstanding, the Appellate Body upheld the conclusion of the Panel that the US measure was inconsistent with Article XIX of the GATT and the Agreement on Safeguards.

This was a reasonable judgment. However, it should be done in a prudent manner to identify a "genuine and substantial causal relationship" between imports and injury. Japan will continue to vigilantly monitor administration of this standard.

2) US – Lamb Meat (DS177)

In October 1999, Australia and New Zealand requested WTO consultations over the United States' safeguard measures (a tariff-rate quota) on rapidly increasing imports of lamb meat. A panel was established in November of that year.

The main issues in this case were: (a) the significance of "as a result of unforeseeable developments"; (b) the scope of domestic industry; and (c) causal link between imports and serious injury.

The Panel circulated its report on July 31, 2000, ruling that: (a) authorities must demonstrate in their determination what the "unforeseeable developments" were; (b) manufacturers who produce the like or directly competitive products constitute the "domestic industry", and that raw material suppliers are not included in the definition of "domestic industry"; and (c) imports must be the sole cause of serious injury, as was the case in the *Wheat Gluten* panel report described above.

The US appealed the panel decision to the Appellate Body on February 1, 2001. The Appellate Body supported the Panel's findings on all the above points, except point (c) noting that, consistent with its decision in the *Wheat Gluten* case, it was not necessarily required to demonstrate that imports were the sole cause of serious injury. The US President responded by announcing that the safeguard measures would be terminated on November 14, 2001.

3) US – Welded Carbon Quality Line Pipes (DS202)

On June 13, 2000, Korea requested WTO consultations with the United States regarding US safeguard measures (a tariff-rate quota) applied in March 2000 against rapidly increasing imports of welded carbon quality line pipes. A panel was established in October 2000.

The panel issued its report on October 29, 2001, finding that the measures taken by the US violated the WTO Agreement because: (a) the uniform in-quota volume allocated by the US to each exporting country ignored the share of past import volume, thus violating the non-discrimination principle in Article XIII of GATT; (b) while

Article XIX of GATT and the Agreement on Safeguards require a finding of either serious injury or the threat thereof, the ITC simply claimed that there was "serious injury or threat thereof"; and (c) in determining the causal link, the ITC failed to separate and distinguish increased imports from other factors which contribute to serious injury.

In relation to the exclusion of NAFTA members from the measures in question, the panel determined that, (d) if NAFTA was assumed to be consistent with GATT Article XXIV, measures pursuant to Article XIX of GATT need not be applied to NAFTA members in a non-discriminatory manner. Moreover, in response to Korea's claim that the US measures infringed Article 5 of the Safeguards Agreement because they were excessively restrictive, (e) the panel noted that the US did not have an obligation to clarify the reasons why the extent of the measure was appropriate.

The US appealed the panel report on November 29; Korea cross appealed. On February 15, 2002, the Appellate Body issued a report supporting the panel's findings in regard to (c), but with respect to (e), ruled that the US measures were excessive. The Appellate Body also ruled that by including imports from NAFTA countries in determining injury, while excluding the same countries from the application of safeguard measures, the US violated the Agreement on Safeguards.

The Appellate Body reserved its findings on the relationship between Article XXIV of GATT and Article 2 of the Agreement on Safeguards in regard to (d). Japan would like to see this issue resolved and will pursue the issue at other opportunities. In July 2002, Korea and the US agreed to expand the quota and the measure continues to be in effect.

4) US－Certain Steel Products (DS248,DS249,DS251,DS252,DS253, DS258,DS259)

On March 5, 2002, US President George W. Bush made an affirmative determination to impose safeguards on to 14 steel product categories. Japan immediately requested consultations with the United States under Article 12.3 of the Safeguard Agreement[2]. Consultations took place on March 14 and the US safeguard measures took effect on March 20.

Japan subsequently requested bilateral consultations with the US pursuant to Article XXII of GATT and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes on the same day; consultations were held on April 11 and 12, 2002 with five other countries and regions, including the EU and South Korea.

Following this, Japan requested establishment of a Panel on May 21, 2002. The Panel was set up on June 14, 2002 by integrating it into the EU Panel already set up. Similar panels were set up at the requests of South Korea, China, Switzerland, Norway,

[2] Article 12.3 of the Safeguards Agreement requires parties taking definitive safeguard measures to consult with interested export members in advance. The consultation is basically bilateral.

New Zealand, and Brazil. These panels were integrated into one comprising eight countries and regions as a joint applicant. Panel meetings were held in October and December 2002. The final report was issued on July 11, 2003, and distributed to Member countries. In the report, the Panel ruled that the US had violated the WTO Agreement, holding that, among the following eight points of contention, with respect to (a), (c), (d) and (e), the US had not provided reasonable and sufficient explanations, though, as for (c) and (d), it accepted the consistency with the WTO Agreement for some products. For other points including (b), (f), (g) and (h), the Panel exercised judicial economy and did not make any judgment.

The US appealed to the Appellate Body on August 11, 2003 regarding the Panel's rulings regarding (a), (c), (d) and (e) the complainant parties also made a conditional cross appeal to the Appellate Body for judgment regarding (b), (f) and (h) in case the Appellate Body reversed the judgment of the Panel. The report of the Appellate Body issued on November 10, 2003 supported the holding of the Panel for (a), (c) and (e); however it did not make any judgment on (d) on the ground that the dispute could be satisfactorily solved as a result of its judgment of other points. As for (c), the Appellate Body reversed the judgment of the Panel as to certain products, but did not rule whether imports really increased or not. As to the conditional cross appeal, the Appellate Body did not rule, saying that the conditions were not met.

（Major legal claims of joint consulting parties including Japan to WTO Panel）

(a) Insufficient evidence of import increase or injury to domestic industry as a result of "unforeseen developments" (in violation of XIX:1(a) of GATT 1994, and the Safeguard Agreement 3:1);

(b) The definition of "like products" falling within the scope of the safeguard measures is inconsistent with Article 2.1 and 4.1(c) of the Agreement on Safeguards, and Articles XIX:1 and X:3(a) of GATT 1994;

(c) The findings of "increased imports" are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards;

(d) Failure to demonstrate the causal link between "increased imports" and "serious injury" is inconsistent with Article 4.2(b) of the Agreement on Safeguards;

(e) The inconsistency between the range of imports covered by the investigation and the range of imports to the measures applied which violates of Articles 2.1, 2.2 and 4.2 of the Agreement on Safeguards;

(f) The measures imposed are more restrictive than necessary to prevent or remedy serious injury and are inconsistent with Articles 3.1 and 5.1 of the Agreement on Safeguards;

(g) The measures that except imports from Israel, Jordan, Canada and Mexico (WTO Members which are FTA partners such as NAFTA) violate the principle of most-favored-nation treatment and violate Article 2.2 of the Agreement on Safeguards and Article I:1 of GATT 1994; and

(h) The President's treatment of the ITC's determination of injury on certain products (tin mill and stainless steel wire) is inconsistent with Articles 2.1, 3.1,

4.2(b) and (c) of the Agreement on Safeguards, and Article X:3(a) of GATT 1994.

In tandem with the Dispute Settlement Process, Japan proceeded with trade compensation procedures that exporting countries subject to safeguard measures are allowed to take under Agreement on Safeguards Article 8. Japan notified the WTO Council for Trade in Goods on May 17, 2002, of the covered amount, proposed items, additional tariff rates, etc., for: (a) immediate measures in case of absence of absolute increase in import (so-called "short list"[3]); and (b) the measures to be exercised after a decision by the Dispute Settlement Body that the US safeguard measure was in violation of WTO Agreements (so-called "long list"[4]). With respect to the short list measures, Japan implemented a Government Order for suspending bound tariffs on June 18, 2002. In consideration of constructive responses made by the US on August 30, 2002, Japan decided not to increase tariffs under the short list until the Dispute Settlement Body adopted the Panel and Appellate Body Reports.

On November 26, 2003, Japan made a supplemental notification to the WTO Council for Trade in Goods of items to be included on the long list and the additional tariff imposed on them based on the WTO Appellate Body report distributed to Member countries, Thus, Japan secured the right to implement re-balancing measures from December 26, 30 days after the notification date and after the adoption of the above report.

However, on December 4, 2003, the US officially decided to repeal the safeguard measure effective December 5, 2003. Japan decided not to implement the long list, and abolished the Order establishing the short list on December 12, 2003.

Although the US repealed the safeguard measure, an import licensing and monitoring system for steel imports has been kept in place. It is necessary to closely monitor the progress so that the monitoring measures by the US Government do not discriminate against foreign imports.

(Reference) WTO Safeguard Agreement Consistency of Section 201 of the Trade Act of 1974

Much of the basic structure for the WTO Agreement on Safeguards comes from US Section 201 of the Trade Act of 1974. The provision was the most developed safeguards legislation in the world at the time the agreement was negotiated, and served as a model for the negotiators. That is why the Uruguay Round Agreements Act of 1994, which amended existing trade laws for the implementation of the WTO

[3] In the consultation before the measure is imposed, an importing member affected by it may suspend the obligation of concession. The list of products which does not include goods whose imports have not increased in absolute terms and for which the obligation of concession is suspended within 90 days from the date of imposition of the measures is called the "short list."

[4] After the WTO determines an inconsistency with the WTO Agreement, or after three years have elapsed since imposition of the measure, the list of products proposed for suspension to compensate for trade losses as a result of the measure is called the "long list."

Agreement in the US, contained only very minor amendments to Section 201 (in contrast to the relatively major overhaul that was given to anti-dumping legislation).

A few recent panel and Appellate Body recommendations and rulings have identified the inconsistency of Section 201 of the US Trade Act with WTO agreements (absence of the "unforeseeable development" finding, difference in causal link requirements, etc.) Japan will closely observe developments on this issue, including the possibility of amendments of Section 201 by the US Congress.

Column: Repeal of Safeguard Measure on Imports of Certain Steel Products

The safeguard measure on imports of certain steel products was repealed after Appellate Body's judgement of its inconsistency with the WTO Agreement, before the adoption of the report. This is a reasonable result considering that the WTO stands on the rule-oriented principle. There were some complex elements observed before the US repealed the safeguard measure. Among them, the following three points are of noteworthy.

First of all, the decision to impose the measure was made by the US administrative body. There are four cases remaining (the import of Canadian softwood lumber; hot-rolled steel products; the Byrd Amendment; Section 211 Omnibus Appropriation Act of 1988; and Article 110(5) of the US Patent Act) where the US has not implemented the DSB's recommendations and rulings. In all of them Congress needs to amend the laws and regulations. As the amendment will require complicated processes and take a long time combined with the inherent vulnerability of being influenced by protectionists, flexible administrative measures cannot be expected. The reason why the safeguard measure on certain steel products was able to be repealed quite easily is that the ultimate decision for this was by the US President.

The second reason is in relation to US domestic affairs. Additional tariffs on the certain steel products by the safeguard measure should force the users such as auto manufacturers and others to purchase the item at a price higher than the market equilibrium prices under free competition. This would cause them uplifted production costs. In fact, in the US domestic market, after the safeguard measure was imposed, not enough high-end and special specification steel products were supplied to the market to meet the demand and steel prices jumped due to the short supply. The increase in the procurement cost should be compensated by increasing sales price, otherwise, the financial conditions of manufacturers would deteriorate and would suffer from losses. Assuming that the hike of procurement cost were to be shifted to ultimate consumers, loss of profit for the industry could normally be averted because of a decrease of demand due to the price hike. The loss of demand will further cause disadvantage to ultimate consumers.

Thus in the US, lobbying took place by users and consumers against imposition of the safeguard measures. The growth of such opponent groups seemed to have convinced the US President to make a political decision not to impose the safeguard measure. The political preference of the US Government not to impose the safeguard measure can be

observed from the fact that the US stressed the benefit to its domestic economy due to its decision, without mentioning the recognized violation of the WTO Agreement or disadvantages caused by the re-balancing measures imposed by the affected countries, and that it decided to continue the import licensing monitoring system introduced at the same time as the safeguard measures on steel.

The third reason was the firm attitude of Japan and other affected countries in starting the WTO dispute settlement process and re-balancing measures pursuant to the Agreement on Safeguards. As the US did not show any sign of repealing the safeguard measure even after the WTO Appellate Body supported the Panel's holdings on November 10, 2003 and judged that the safeguard was in violation of the WTO Agreement, Japan announced the statement of the Minister of Economy, Trade and Industry urging the US to promptly respond appropriately, or otherwise, Japan would notify certain re-balancing measures to the WTO in November. As the US failed to respond to Japan's statement, Japan made an official notification to the WTO of the planned re-balancing measures on November 26. Japan cooperated with the EU and dealt with this inconsistent measure in an unwavering manner and subsequently, gained the support of public opinion worldwide. Such actions combined with the voices of steel users in the US calling for repeal of the safeguard measure resulted in actual termination of the measure by the US Government.

5) US– Combed Cotton Yarn (DS192)

On December 24, 1998, under Article 6 of the Agreement on Textiles and Clothing, the United States sought consultations with Pakistan regarding TSGs on imports of combed cotton yarn from Pakistan. The parties failed to reach an agreement and, consequently, the US imposed a TSG on March 17, 1999.

In a regular meeting of the Textiles Monitoring Body (TMB) in April 1999, the TMB recommended the US withdraw the measure based on a finding that the measure was inappropriate. Despite this recommendation, the US insisted that the measure was proper and had no reason to change it. On April 3, 2000, Pakistan requested the establishment of a panel under WTO dispute settlement procedures. The panel was established on June 19. India and the EU participated as third parties.

The Panel issued a report on May 31, 2001, finding that the US authorities had excluded the captive products (products created by vertically integrated U.S. textile manufacturers for their own internal use) from their definition of "domestic industry" goods. It also interpreted Article 6.4 of the Agreement on Textiles and Clothing as requiring the investigating authority to determine that imports from all Members cause the serious injury or threat of injury. Accordingly, the Panel concluded that the transitional safeguards in question were inconsistent with the Agreement on Textiles and Clothing because the US authorities did not examine the effect of imports from Mexico, the biggest exporter of combed cotton yarn into the US. The Panel recommended termination of the TSG as soon as possible.

The US appealed the panel's decision on July 9, 2001. On October 8, the Appellate Body circulated its report, overturning the panel's interpretation of Article 6.4

on the grounds that it had "no legal effect," but supported the Panel's ultimate finding that the TSG was inconsistent with the Agreement on Textiles and Clothing.

6) Argentina – Footwear (DS121)

On September 13, 1997, Argentina applied safeguard measures against footwear, and the EU and Indonesia requested the establishment of a panel, which was composed on July 23, 1998.

On June 25, 1999, the Panel reported that the safeguards were inconsistent with the Agreement on Safeguards on a number of grounds. The Panel found that, in its safeguards investigation, Argentina had not considered all factors listed in the Agreement on Safeguards for determination of injury. Further, the Panel considered that it was not justifiable for Argentina to include imports from customs union (MERCOSUR) partners during the investigation phase and then exclude them when applying safeguard measures. However, the Panel also found that GATT Article XXIV does not prohibit the institution of measures by customs unions members in regard to fellow partners.

Argentina appealed and, on December 4, 1999, the Appellate Body report generally upheld the Panel's findings. With respect to the exclusion of MERCOSUR countries from the application of the safeguard measure, the Appellate Body overruled the Panel, determining that GATT Article XXIV:8 was irrelevant to the case. Instead, it found that the non-discriminatory principle in Article 2.2 of the Agreement on Safeguards did not allow such exclusions. The Appellate Body also noted that the condition in Article XIX:1 of the GATT, that the increase of imports has to be "the result of unforeseen developments," must be met together with all the requirements of the Agreement on Safeguards.

Japan welcomed the decision in that it clarified the relationship between safeguard measures and customs unions and fully upheld the position—argued by Japan in the Committee on Safeguards and other fora—that a safeguard measure is an exceptional measure and should only be applied for emergency action pursuant to strict conditions.

(Reference) Japanese Safeguard measures on three products, including welsh onions

On December 22, 2000, Japan initiated an investigation of the possibility of imposing safeguards on three products: welsh onions, shiitake mushrooms and tatami-omote. On April 23, 2001, provisional safeguards were imposed on the import of these three products (tariff quota measures until November 8, 2001). In response, China requested the withdrawal of the measures and imposed a special tariff of 100 percent in addition to existing tariffs on Japanese-produced automobiles, mobile phones and car phones, and air conditioners from June 22, 2001.

China asserted that the measures imposed by Japan on the three products were discriminatory. In response, Japan stated that: (i) these were measures approved under the WTO Agreements; and (ii) since the special tariffs imposed by China were invoked against Japanese products alone, they were in contravention of Article 1.1 of the Japan-

China Trade Agreement (most favored nation treatment); and (iii) the measures imposed by China were not in accordance with the rules of the WTO, in which China applied to join (Note: China acceded to the WTO on December 11, 2001). Japan therefore requested that the special tariffs be revoked.

As a result of a number of bilateral consultations, on December 21, 2001, both governments agreed that: (i) Japan would not impose safeguard measures on welsh onions, shiitake mushrooms and tatami-omote; (ii) China would withdraw the special import tariffs on automobiles, mobile phones and car phones and air conditioners; and (iii) a Japan-China trade scheme would be created, including the establishment of a "Japan-China Trade Council on Agricultural Products" to deal with the three products.