

CHAPTER 8

SAFEGUARDS

A. OVERVIEW OF RULES

1. OVERVIEW OF RULES

Today, safeguard generally refers to the measures conforming to Article XIX of the GATT (emergency action to restrict imports of specific products) and the Agreement on Safeguards, which is a part of the Marrakesh Agreement that established the World Trade Organization. It is an emergency measure of tariff increases or import volume restrictions that the government of the importing country triggers in response to a surge in imports that causes (or threatens) serious injury to a domestic industry.

1) SAFEGUARD SYSTEMS BEFORE THE ESTABLISHMENT OF THE WTO

The safeguard (also known as an escape clause) is said to have been included for the first time in the US-Mexico Trade Treaty in 1943. Later, it was incorporated into Article XIX of the GATT, which was established in 1947. The Article did not have any details such as requisites for triggering the measure. Awareness increased that more detailed and clearer safeguard rules were necessary to promote further advancement of trade liberalization.

Therefore, one of the goals specified for negotiations in the Tokyo Declaration that commenced in 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 applications of safeguard measures only against imports from specified countries; (b) clarification of requirements for implementation (such as the definition of “serious injury” in the provisions); (c) the conditions of measures if they are implemented (*i.e.*, the setting of maximum durations of safeguard measures); and (d) notification and consultation procedures, as well as the possibility of setting up an international surveillance system. However, aside from the selective application issue, which was the biggest focus, there were disagreements concerning how to perceive “serious injury” and how to supervise use of safeguard measures. In particular, there was a clash between the EU, which advocated approving selective application, and developing countries. As a result, no agreement was reached (the Round concluded in 1979).

From the 1970s onward, exporting countries started to take voluntary export restraints after receiving requests from importing countries that wished to protect domestic industries from a surge (so-called “grey-area measures”). This was because the application the safeguard measure implementation requirements stipulated in Article XIX of the GATT was not completely clear. These measures attempted to restrict imports in a form of “voluntary restriction” by evading the application of the safeguard measure implementation requirements. Aside from the fact that it was unclear whether such measures were consistent with the GATT (in particular with Article XI, which stipulates the general prohibition of volume restrictions), use of such measures risked the hollowing out of the GATT’s safeguard clause. With the spread of voluntary export restraints, the GATT Ministerial Meeting in November, 1982 issued a declaration that “there is need for an improved and

more efficient safeguard system.”

2) THE ESTABLISHMENT OF THE AGREEMENT ON SAFEGUARDS

Afterward, the Punta del Este Ministerial Declaration of September 1986, which declared the commencement of the Uruguay Round negotiations, stated that “a comprehensive agreement concerning safeguards [is] particularly important to the strengthening of the GATT system and the advancement of multilateral trade negotiation.” It added that the negotiation policies of “the 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 actions including the concept of serious injury or threat thereof, temporary nature, degressivity, 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”. As a result of the negotiations during the Round, the Agreement on Safeguards was agreed upon as part of the Marrakesh Agreement that established the World Trade Organization in April 1994.

The Agreement on Safeguards stipulates the definition of “serious injury”, “threat of serious injury” and “domestic industry”, which was not clear in Article XIX of the GATT, as well as setting provisions for the duration of measures. Furthermore, it implemented procedural provisions concerning transparency, in addition to including a strict prohibition on voluntary export restraints as mentioned above. The Agreement has detailed content that builds upon past negotiations and processes and is one of the most significant accomplishments of the Uruguay Round negotiations. For example, in terms of the coverage, the Agreement stipulates that, “safeguard measures shall be applied to a product being imported irrespective of its source” (Article 2.2 of the Agreement).¹

Additionally, the current WTO system approves special safeguard measures separate from the measures based on the Agreement on Subsidies, such as the special safeguard measures based on Article 5 of the Agreement on Agriculture (which permits such measures with respect to products as to which measures such as import volume restrictions, had been converted to ordinary customs duties as a result of the Uruguay Round).²

2. OUTLINE OF LEGAL REGULATIONS

1) TREATIES RELATED TO SAFEGUARDS

The Agreement on Safeguards not only clarified the implementation requirements of safeguard measures in relation to Article XIX of the GATT, it also prohibited voluntary export restraints. However, there is an aspect in which regulations prescribed by Article XIX of the GATT have been eased.

¹ It is said that the basic structure of the Agreement on Safeguards was based on Section 201 of the US Trade Act of 1974, the most developed safeguard legislation in the world at the time. (The Uruguay Round Agreements Act of 1994, which amended existing trade laws in order to implement the WTO Agreement in the US contained only very minor amendments to Section 201, in contrast to the relatively major overhaul that was given to its anti-dumping legislation). However, the non-conformity of Section 201 to the Agreement is beginning to become clearer as a result of decisions of Panels and the Appellate Body (*e.g.*, the nonexistence of requisites for “unforeseen developments” and the disparity of causal relation requirements). There is a need to monitor developments in the US, particularly the need for continuous attention to the possibility of modification of the Section 201 by the US Congress.

² Although temporary safeguard measures based on the Textile Agreement limited to textile and textile product field used to exist, the Agreement lapsed at the end of 2004. (*See* Column.) Similarly, temporary safeguard measures by product based on the WTO Accession Protocol of China also existed, but lapsed on December 10, 2013.

(1) Requisites of safeguard measures

The Agreement on Safeguards, as mentioned previously, has provisions defining “serious injury”, “threat of serious injury” and “domestic industry”, as well as provisions stipulating the method of determining causal relations between the increase in imports and injury or the threat of injury. The Agreement also implemented requirements concerning the content of measures to be implemented, as well as setting procedural requirements for information provided to interested parties during the investigation process, the opportunity to present opinions and evidence for public hearing, and the maximum duration for the implementation period (*see* Figure II-8-1).

(2) The prohibition of voluntary export restraints

The Agreement on Safeguards prohibited VER (voluntary export restraints), OMA (Orderly Marketing Arrangements) and measures that are categorized as these two (*i.e.*, export restraints, export and import price monitoring, export and import surveillance, forced import cartels and discretionary export and import permit systems), as well as prohibiting any country from requesting that another country take such measures (Article 11.1). Furthermore, it was stipulated that each country should not encourage or support the introduction and maintenance of measures equivalent to gray-area measures by public bodies or private companies (Article 11.3).

In addition, countries could provisionally maintain “grey-area measures” which were in effect when the Agreement on Safeguards came into effect. However, all such measures were abolished on December 31, 1999 (Articles 11.1(b) and 11.2).

(3) Partial easing of regulation compared to Article XIX of the GATT

The Agreement on Safeguards has to an extent eased regulation based on Article XIX of the GATT, due to its consideration that the strict nature of the Article caused many incidents of “grey-area” measures.

Restrictions against the implementation of countermeasures

Article XIX of the GATT includes an obligation that importing countries which are considering implementing safeguard measures should provide exporting countries the opportunity to consult prior to taking such measures (Article XIX:2). Measures may be implemented without such a meeting being held, but if they are, the exporting country is allowed to implement countermeasures, such as increasing tariffs, against a “substantially equivalent level” of trade from the country imposing the safeguard (Article XIX:3). In this instance, during the above-mentioned meeting, the importing country needs to provide compensation, tariff decreases and such, to the exporting country involving products other than those subject to the safeguard measure in order to avoid implementation of countermeasures.

However, the provision of such compensation will decrease the tariff rate of specific items in the importing country. In addition, generally-speaking, compensation provided for products that have been subjected to high tariffs tend to involve products for which domestic demand to maintain tariffs is high (*i.e.*, sensitive products). Therefore, the provision of compensation is prone to cause political difficulties within the importing country. It cannot be denied that this has been a factor in leading countries to rely on “grey-area” measures.

Therefore, the Agreement on Safeguards set a limit on countermeasures by exporting countries. Thus, in case the safeguard measure was put in place as the result of an absolute increase in imports, and if the measure in question conforms to the Agreement, the exporting country cannot implement

a countermeasure within the first three years after the implementation of the safeguard measure (Article 8.3).

Special examples of import quotas (so-called “quota modulation”)

Article 5.2(a) of the Agreement on Safeguards stipulates that if the safeguard measure involves imposition of an import quota, the allocation among exporting countries can be based on agreement with the involved countries. If this is “not reasonably practicable”, it is stipulated that the quota must be allocated based on the import share of exporting countries having “a substantial interest in supplying the product” of the product during a previous representative period. However, where imports from only certain countries have increased greatly, implementing measures involving third countries will be difficult in reality.³

Therefore, if it has been clearly presented in consultations under the auspices of the Committee on Safeguards that the import volume from certain countries has increased by a “disproportionate percentage” in relation to the total increase of imports of the product, then the country imposing the safeguard may depart from the provisions of Article 5.2 (a) if the conditions of said departure are equitable suppliers (Article 5.2(b)). The duration of any such departure may not exceed four years and no extension is permitted. (Such departure is not permitted in the case of “threat” of significant injury (Article 5.2(b)).

(4) Relationships of safeguard measures based on Regional Trade Agreements

Article 2.2 of the Agreement on Safeguards stipulates that safeguard measures shall be applied to imported products “irrespective of their source”. However, some regional trade agreements (*i.e.*, NAFTA and MERCOSUR) stipulate that when the Members of the trade agreement implement measures based on the Agreement on Safeguards (WTO safeguards), the other Members of the corresponding trade agreement need to be exempted from the WTO safeguard measures (*see, e.g.*, NAFTA Article 802). This causes issues of compliance with the above Article, which requires application of safeguard measures irrespective of the source of the imported product. This point has been frequently disputed during the dispute settlement proceedings. Panels and the Appellate Body have processed it as a problem of parallelism, seeking correspondence between the countries being investigated and those subjected to safeguard measures. According to the precedent, if parallelism requirements are not met and a safeguard measure is invoked with some countries subject to investigation being exempt, the measure will be determined to violate the WTO Agreements. However, they have not directly determined whether the act of exempting specific countries complies with the Safeguards Agreement (*see* 2 below concerning Argentine-footwear (DS121) and US – Welded Carbon Quality Line Pipe Case (DS202)). As regional trade agreements are increasing, cases where partner countries of regional trade agreements are exempt when WTO safeguard measures are invoked are also expected to increase. The gap between the preferential measures of regional trade agreements and the WTO safeguard measures could be significant in some cases. Therefore, whether or not the measures comply with the “parallelism” requirements, the illegal nature of the measure needs to be carefully examined and dealt with. Furthermore, refer to Section III chapter I “Issues of goods trade” concerning the safeguard measures based on EPAs.

The EPAs that Japan has concluded have permitted WTO safeguard measures to be implemented against related countries, including EPA/FTA contracting partners. Concerning this point, no

³ As mentioned above, there were discussions on whether to allow the selective application of safeguard measures against imports from specific countries during the negotiation process of Article XIX of the GATT, before the Agreement on Safeguards was established.

problem of agreement compliance has emerged.

2) THE IMPLEMENTATION STATUS OF SAFEGUARD MEASURES

The majority of safeguard measures implemented during the GATT era have been against developed nations, such as Australia, the EU and the US (*see* Figure II-8-2). This is thought to be because protection of domestic industries provided only by high tariffs no longer is effective because developed countries have gradually decreased tariffs in conjunction with successive rounds of GATT negotiations.

From March 29, 1995, when the Marrakesh Agreement Establishing the WTO came into effect, until December 31, 2014, there were 295 cases in which the investigation of safeguard measures commenced, with 139 cases in which the measures were implemented (based on WTO reports). Since the Agreement on Safeguards came into effect, countries that implement safeguard measures and the number of implementations has been increasing gradually (Figure II-8-3), with matters submitted to Panels increasing as well (*see* 2. Major cases concerning the decisions of cases, panels and the Appellate Body).

Recently, in particular, the number of implementations by emerging countries, such as India, Indonesia and Turkey, has increased. Furthermore, Ukraine, which acceded to the WTO in May 2008, and Russia (which acceded in August 2012) tend to actively utilize safeguard measures.⁴ Attention needs to be paid to future developments in these countries.

Figure II-8-1 Conditions for Applying Safeguards

Conditions

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

Procedures

<i>Investigation Procedures</i>	Investigation procedures must be specified prior to investigations and all interested parties must be given an opportunity to present evidence in public hearings or other appropriate means; the findings of investigation must be published (Article 3).
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Substance

<i>Duration</i>	Not to exceed four years initially, but may be extended to the maximum of eight
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⁴ In particular, with regard to the case in which Ukraine invoked safeguard measures in April 2013, a panel (DS468) was established in response to Japan’s request, and Ukraine’s measures were determined to be WTO-inconsistent (See (8) of 2. Major Cases).

	years (Articles 7.1 and 7.3).
<i>Levels of Quantitative Restrictions</i>	Must, in principle, not fall below the average of imports in the last three representative years (Article 5).
<i>Prohibition on Application</i>	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).
<i>Progressive Liberalization</i>	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).

Figure II-8-2 Application of Safeguard Measures Under the GATT⁵

	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)

Figure II-8-3 Implementation of Safeguard Measures (Investigation, Provisional and Definitive) after WTO establishment (January 1998 – October 2007)

		1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	Total (1995 - 2015)	
USA	Initiation	1	2	1	1	2	2	1																10
	Definitive		1		1	1	2		1															
EU	Initiation								1	1	1	1					1							5
	Definitive								1		1	1												3
Canada	Initiation								1			2												3
	Definitive																							0
Australia	Initiation				1									1						2				4
	Definitive																							0
Japan	Initiation						1																	1
	Definitive																							0
China	Initiation								1															1
	Definitive								1															1
Philippines	Initiation							3		3			1		1	1					2			11
	Definitive								1	1	3					1		1						7

⁵ Numbers in parentheses are the number of safeguards on agricultural products.

India	Initiation			1	5	3	2		2	1	1				1	10	1	1	1	3	7			39
	Definitive				4	1	1		2			1				3		1	2		4			19
Indonesia	Initiation										1	1	1		2		7	4	7		3			26
	Definitive												1			2		7	3	1	2	2		16
Turkey	Initiation										5		5	3	1	1		1	1	1	3	1		22
	Definitive											2	4	1	4	1		1			1			14
Russia	Initiation																	1	3					4
	Definitive																		1	1	1			3
Ukraine	Initiation													2	1	2	3	2		1				11
	Definitive														1	1				1	1			4
Jordan	Initiation						1		8			1	1	1	2		1		1		1			17
	Definitive							1	1	2		1		1			1			1		1		8
Egypt	Initiation				1	1	1								1			1	4		2	1		12
	Definitive					1	1	1							1				1			1		6
Brazil	Initiation		1					1							1				1					4
	Definitive			1					1															2
Chile	Initiation					2	3	2	2		1		1			1			1	2				15
	Definitive						2	1	2			1	1						1					8
Ecuador	Initiation					2			1	4							1				1			9
	Definitive							1		1	1						1							4
Others	Initiation	1	2		1	4	12	3	13	4	4	2	3	1		10	4	2	5	7	6			84
	Definitive			1		1	1	2	3		1		1	2		2	2	1		4	5	1		27
Total	Initiation	2	5	3	10	15	25	12	34	15	14	7	13	8	10	25	20	12	24	18	23	2		297
	Definitive		1	3	5	5	7	9	14	15	6	6	7	5	6	10	4	11	6	8	14	5		147

(Prepared by the Ministry of Economy, Trade and Industry based on WTO notifications)

3) AGREEMENT ON AGRICULTURE

See Part II, Chapter 3 “Quantitative Restrictions.”

COLUMN: HISTORY FOLLOWING THE EXPIRY OF THE AGREEMENT ON TEXTILES AND CLOTHING

1) OUTLINE OF THE AGREEMENT ON TEXTILES AND CLOTHING (ATC)

From 1974 to 1994, trade in the field of textiles and clothing was governed by special rules under the Arrangement Regarding International Trade in Textiles, the so-called Multi-Fiber Arrangement (“MFA”), with regulations different from the GATT being applied.⁶

The MFA provided for safeguard measures that were easier to apply than normal measures under Article XIX of the GATT. For example, the MFA allowed the application of discriminatory import restrictions (import restrictions covering specific regions only) and did not require countries imposing restrictions to offer compensation or to accept countermeasures. 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).

During the Uruguay Round negotiations (1986-1994), the negotiating countries agreed to gradually integrate the MFA system into GATT disciplines (*see* Figure II-8-4). 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 were gradually eliminated by this sequenced integration. By the end of 2004, when the ATC ceased to have effect, trade in textiles and clothing was completely compliant with the rules of the GATT (and the WTO). During the transition period, the application of transitional safeguards (TSG) was permitted, but they were applicable only to non-integrated items of textiles and clothing. Although such measures were frequently implemented by specific countries before the termination of the ATC, the number of measures decreased due to the strict examination undertaken by the Textiles Monitoring Body (“TMB”).

The ATC expired and terminated on December 31, 2004, ten years after coming into effect. The TSG system also expired in conjunction with the termination of the ATC.

Figure II-8-4 Method of Integration under the ATC

Integration rates	After dividing the transitional period into three stages of three years, four years, and three years, items that corresponded to no less than 16 percent, 17 percent and 18 percent (a total of 51 percent) of the total volume of textiles traded in 1990 were integrated into the GATT. In the first day of the eleventh year, the remainder was also integrated to the GATT (Articles 2.6 and 2.8).
Method of Integration	At the beginning of each stage, integration programs for each Member country were to 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 by the MFA, but have been included in the ATC (Article 1.7 (Annex)).
Residual MFA Restrictions	The integration of restricted items into the GATT gradually eliminated MFA restrictions. Until that time, MFA restrictions could continue, but the level of remaining restrictions must be increased at a specified uniform increase rate

⁶ The MFA covered cotton, wool, artificial fibers, flaxen and other plant fiber products, and partial silk weaves. Pure silk products were not included.

	(Articles 2.13 and 2.14).
Non-MFA Restrictions	Restrictions contravening the GATT 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).
TSG	<p>Any WTO Member may apply to transitional safeguard (TSG) measures with respect to non-integrated items. However, the Agreement on Safeguards will be applicable to integrated items and to the following:</p> <ul style="list-style-type: none"> • 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; and • Historically traded textile products that were internationally traded in commercially significant quantities prior to 1982, such as pure silk. <p>When applying measures, (1) 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; (2) the countries to which measures are applied can be selected; and (3) the duration of implementation shall be no more than three years (Article 6).</p>

2) THE SITUATION AFTER 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 applicable to textile and textile products from China and others expired. In response, China introduced the Export Tariffs on Textiles, as a specific duty on all textile products destined for global markets from China (January 1, 2005), as a voluntary measure to restrict exports, and introduced the Temporary Measures of Automatic Permission for Textile Export to the European, the US and Hong Kong markets (March 1, 2005).⁷

Afterward on June 11, 2005, the People's Republic of China and the EU agreed upon placing export quotas on ten categories of Chinese textile products (restricting import growth in the ten categories to between 8 and 12.5 percent per year for 2005 through 2007). Given this outcome, China announced that it would not implement Temporary Measures of Automatic Permission for Textile Export to the EU, the US and Hong Kong markets, but instead would introduce Provisional Administrative Measures on Textile Exports.⁸ However, from July of 2005, the export volume from China to the EU increased greatly. Since annual quotas for certain products, including pullovers and men's trousers, based on the previous agreement were exceeded, an embargo was placed on the entry of products by customs authorities in the EU. Therefore, the two parties conducted consultations once again, and on September 5, 2005, they agreed upon the release of this cargo.⁹

⁷ China implemented a measure to restrict exports through the issuance of automatic export licenses (E/L) for Chinese textile products exported to the EU, US or Hong Kong. Despite these measures, from April 2005, the number of requests from domestic industries in the EU and the US 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 increased dramatically.

⁸ 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"

⁹ 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.

In the case of the US, on November 8, 2005, China agreed that the US could impose quantitative restrictions (quotas) on 21 Chinese textile products from January 1, 2006 to December 31, 2008¹⁰.

In accordance with the above 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 Chinese textile products.

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. Given concerns that the sharp increase could cause market disruption, Japan selected and monitored a number of sensitive products, and tried to fully understand the actual status of import trends.

Quantitative restrictions between China and the US were removed as scheduled, and afterwards no similar restrictions or export control on textile products were taken.

3. ECONOMIC ASPECTS AND SIGNIFICANCE

The economic and political functions of safeguard measures can be categorized as follows.

1) FUNCTIONS OF SAFEGUARD MEASURES

(1) Securing a grace period to handle surges in imports

First, safeguard measures entail the function of providing a grace period for the domestic industries to adjust their structure or strengthen their competitiveness in order to handle a surge in imports.

Safeguard measures temporarily suspend WTO obligations 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 due to the development of unforeseen circumstances. Therefore, due to the objective of the system, the implementation of safeguard measures is only be permitted when there is a causal link between increased imports of the product concerned and serious injury or the threat thereof (Agreement on Safeguards, Articles 2.1 and 4.2). Furthermore, Members shall apply safeguard measures only to the extent and duration necessary to prevent serious injury and to facilitate adjustment (Articles 5.1 and 7.1).

If domestic industries suffer serious injury due to such surges, in some cases it may result in extensive political and social confusion, in addition to massive economic confusion from, 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 labor force to be retrained. On the other hand, where a domestic industry is only suffering from a temporary loss in its competitive edge, it is expected to use the grace period, and profits garnered from the safeguard measures, to institute technological reform and to make capital investment in order to restore the industry's competitiveness to international levels. It is clear that this is the intent of the Agreement on Safeguards based on its preamble, which recognizes the importance of structural adjustment and the

¹⁰ 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

need to enhance competition in international markets.¹¹

Since safeguard measures are emergency measures approved in order to prevent loss to domestic industries and to provide aid due to a surge in imports, safeguard measures are different from anti-dumping and countervailing duties, in the sense that safeguard measures do not have dumping by exporting industries and specific actions by governments (*i.e.*, subsidies expenditure) as implementation requisites. For this reason, Article 2.2 of the Agreement on Safeguards bans the selective application of safeguard measures to specific exporting countries. In addition, Article 8 notes that the Member imposing a safeguard measure shall provide compensation to the relevant exporting countries, within certain limits, or be subject to countermeasures by the exporting countries.

(2) Control of pressures from protectionists within importing countries

Next, safeguards are expected to function as “safety valves” which control excessive pressures from protectionists which can occur in importing countries. In other words, implementing safeguard measures allows governments to reduce protectionist pressure, preventing the introduction of more stringent protectionist measures. In this sense, safeguard measures in the WTO Agreements, where serious injury to domestic industries are recognized, have the effect of preventing excess protectionist pressures and measures within the importing countries by providing limited and temporary protections to domestic industries based on their rules.

(3) Promotion of trade liberalization

Furthermore, safeguard systems also function to facilitate trade liberalization.

In most cases, at the point when it is liberalized, it is difficult for relevant industries to predict what kind of influence a specific trade liberalization measure will pose in the future. If they fear that a “dark shadow will be cast over them in the future”, they will adamantly oppose government efforts for import liberalization. In such cases, if the government can explain to the relevant industries that they can apply for safeguard measures if they need to restrict import in future, the government can ease their resistance, opening the way for more positive progress with liberalization.

2) POINTS OF ATTENTION CONCERNING THE OPERATION AND INSTITUTIONAL DESIGN OF THE SAFEGUARD SYSTEM

Although the significance of safeguards has been acknowledged as a system that fulfills the above functions, if the measures are used too readily, this may 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 of international trade relations”. Therefore, the application of safeguards is restricted by stringent requirements in the Agreement, and measures must be limited to the necessary scope for the protection of domestic industries from losses. Furthermore, to achieve these policy goals, importing countries must also pursue structural adjustment of relevant domestic industries and forecast the prospects for industrial revitalization before deciding upon the implementation of safeguard measures. Article 6 of the Agreement on Safeguards allows Member countries to apply provisional safeguards, but this again should be based on careful judgment.

¹¹ In Japan, structural adjustment plans were submitted by the Japanese government and industries as part of the safeguard investigation on three agricultural products undertaken in December 2000, as well as investigations involving towels and other textile products

The chain reaction of steel safeguards that occurred in 2002 (See (5) of 2. Major Cases) further showed the difficulties in maintaining a proper balance between efforts to prevent the abuse of safeguard measures and the efforts to construct a system that enables its dynamic application. Under the Safeguards Agreement, the exporting country cannot implement a countermeasure within the first three years if the measure is based on the absolute increase in imports as the reason for its implementation and conforms to the provisions of the Agreement (Article 8.3). Under this provision, it will be difficult to implement countermeasures until a Panel or the Appellate Body finds that the safeguard measures are inconsistent with the Agreement. Even if the exporting country decided to initiate dispute settlement procedures immediately after the implementation of the measure, this process usually lasts from 18 months to two years, including the Appellate Procedure. Furthermore, relief from dispute settlement procedures is limited to the abolition of measures in the future, and does not include sanctions for past violations. As result, the current WTO safeguards and dispute settlement systems structurally create incentives for the importing country to implement safeguard measures without properly investigating Agreement consistency, and the ability to maintain the measure while the dispute procedure is underway.

B. MAJOR CASES

(1) Argentina - Footwear (DS121)

In April 1998, the EU requested the establishment of a panel concerning the safeguard measures Argentina applied on September 13, 1997 against footwear (setting of minimum specific duties against specific products). The panel was composed in July.

<Panel Report>

The Panel report (issued on June 25, 1999) ruled that (1) the investigation revealed that (1) not all listed items of Agreement on Safeguard Article 4.2(a) had been considered and (ii) the causal relation between an increase in imports and significant injury, as stipulated in Articles 2.1 and 4.2(b), had not been proven using objective evidence. Furthermore, “factors other than an increase in exports”, as stipulated in Article 4.2(b) had not been sufficiently investigated when determining the causal link, and the existence of “the threat of significant injury”, in accordance with Articles 2 and 4, had not been conducted. (2) While Article XXIV: 8 of the GATT does not prohibit customs unions members from applying safeguard measures against all import sources, including other member countries, Article 2 of the Agreement on Safeguards prohibits including imports from customs union (MERCOSUR) partners during the investigation phase and then excluding them when applying safeguard measures.

<Appellate Body Report>

The Appellate Body (issued on December 14, 1999) ruled that, firstly, while supporting the conclusion of Panel that Argentina’s investigation concerning the “increase in imports” and a “causal relation” was not consistent with Articles 2.1 and 4.2(a) and (b), it is necessary for the increase in imports must have been “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively”, to cause or threaten to cause serious injury.¹²

Next, concerning the exclusion of MERCOSUR countries from the implementation of the

¹² The Appellate Body in US-Certain Steel Products (mentioned later) elaborated on the decision of the Appellate Body in this case.

safeguard measures, the Appellate Body (1) ruled that Article XXIV: 8 of the GATT was irrelevant to the case, and reversed the panel's finding that it was relevant. However, (2) it ruled that if the investigation covered imports from all countries, including MERCOSUR countries, safeguard measures based on this investigation should have been applicable to imports from all countries (the so-called "parallelism" principle)). Therefore, the Appellate Body affirmed the judgment of the panel that the measures were in violation of the Agreement. However, the Appellate Body did not decide whether the customs union member countries can determine whether to exclude other member nations from the application of safeguard measures in general.

Concerning the relationship between Article XIX: 1 of the GATT and the Agreement on Safeguards, the Appellate Body overturned the decision of the panel. It stated that while the first clause of Article XIX: 1(a) of the GATT -- "the result of unforeseen development" -- is not "an independent condition for the application of the safeguard measure," it must be demonstrated as a matter of fact in order for a safeguard measure to be applied. The Appellate Body clarified that consistency with Article XIX of the GATT is not obtained by only satisfying the predetermined requirements of the Agreement on Safeguards.

(2) US - Wheat Gluten (DS166)

In March 1999, the EU requested consultations with the United States regarding safeguard measures (quantitative restrictions for three years¹³) applied in June 1998 against wheat gluten. A panel was established in July 1999.

<Panel Report>

The Panel report (issued on July 31, 2000) found: (1) in order to demonstrate "significant injury" in relation to the non-attribution requirement of Article 4.2(b) of the Agreement on Safeguards, there must be a link in which increased imports on their own have caused serious injury (it is insufficient if significant injury arose for the first time because increased imports and factors other than increased imports combined). However, the investigation by the US did not sufficiently fulfill this and so a violation of the above Article was found). (2) Excluding imports from Canada from the implementation of the measures despite the investigation having included imports from Canada is inconsistent with the principle of parallelism (*see* Argentine-footwear Appellate Body Decision above) and so is inconsistent with Articles 2.1 and 4.2, (3) Since the initiation of the investigation, the finding of serious injury and the implementation of measures were not conducted in a timely manner, this violates Article 12.1(a) and (c); and (4) the fact that the US did not conduct consultations with related exporting countries before the implementation of measures violates Article 12.3.

<Appellate Body Report>

The US appealed the decision to the Appellate Body. The Appellate Body report, issued on December 22, 2000, supported the panel's decision concerning (2) and (4). However, with regard to point (1), the Appellate Body overturned the interpretation of the Panel that a relation in which only imports caused significant injury was required. According to the Appellate Body, Article 4.2(b) does not prevent a determination of the existence of a causal relation even if factors other than "increased imports" contributed to the occurrence of serious injury. Instead, the effects of factors other than "increased imports" that brought "harm" should be distinguished separately; and if there is a genuine and substantial causal relationship between increased imports and injury, that

¹³ The total import quota was calculated based on the average import volume of the product in question from July 1993 to July 1995. This measure allocated the quotas based on the average import share during the same period. Canada and other exporting countries were exempted from the measure.

was enough for safeguards to be applied. (However, the Appellate Body did find a violation of Article 4.2(b) by the US using the above interpretation as the premise for its finding). Concerning (4), the Appellate Body supported the Panel decision in respect to Articles 12.1 (a) and (b). However, it overturned the Panel's ruling that the analysis of the case pursuant to Article 12.1(c) had to be conducted before the implementation of measures, stating that reporting five days after deciding on the implementation of measures fulfilled the requisite of "immediately" as stipulated in Article 1.

(3) US - fresh, chilled and frozen lamb meat (DS177, 178)

In October 1999, Australia and New Zealand requested WTO consultations regarding the United States' safeguard measures (a tariff-rate quota for three years¹⁴) on imports of lamb meat commenced in July. A panel was established in November of that year.

<Panel Report>

The panel report (issued on December 21, 2000) ruled that: (1) as an issue of fact-finding, the US had not demonstrated the presence of "unforeseen developments", as prescribed by Article XIX of the GATT, thereby violating that Article; (2) Article 4.1(c) of the Agreement on Safeguards, which defines "domestic industry", states that "producers" signify those who produce the like or directly competitive products and does not include the providers of raw materials (since producers do not include packers and breakers of lamb meat, including growers and feeders of live meat in "domestic industries" in safeguard investigations of lamb meat violates Articles 4.1(c) and 2.1); (3) the data that the US used to determine injury to domestic industries was not sufficiently representative of a major proportion of domestic aggregate output, as stipulated in Article 4.1(c), and so violates the Articles 4.1(c) and 2.1; and (4) since the US was not able to prove the existence of a threat of serious injury arising from factors other than increased imports to increased imports in accordance with Article 4.2(b), the US to violates Article 4.2(b) and 2.1.

<Appellate Body Report>

The Appellate Body report (issued on May 1, 2001) supported the Panel's findings on (1) and (2). (In respect to (2), while the panel emphasized the distinction between lamb and lamb meat during the production process to demarcate the scope of "domestic industries", the Appellate Body held that what should be focused on was whether each product was in a relationship of "like product or direct competition" or not and not the production process).

Concerning (3) above, although the Appellate Body supported the decision by the Panel that the representative of data was insufficient, the Article statement on which they based the violation was Article 4.2(b). (Article 4.1(c) is simply a provision of definition and not an obligation). Furthermore, when determining "threat of serious injury" in accordance to Article 4.1(b), the Appellate Body stated that it is necessary to base the decision on a factual determination. Even if the data of the most recent period was particularly important, the data needs to be ascertained in relation to the data for--of the entire investigating period. Therefore, the Appellate Body overturned the panel's decision, which supported the US claim that "the threat of significant injury" was based on data from the last 21 months of the five-year investigation period. Thereafter, the Appellate Body found a violation of Articles 4.2 (a) and 2.1, since the US did not sufficiently explain how the

¹⁴ The US measure divided exporting countries (*i.e.*, Australia, New Zealand and others) into three categories depending on the import volume of the product in question. Afterward, the quota for each country was set. This measure imposed a maximum 40% tariff on the imported amount that exceeded the quota (within the allotted amount, the maximum tariff was 95). The quota gradually increased while the tariffs gradually decreased. Canada, Mexico and other specified countries were exempted from the measure.

fact that the price data from the most recent period had undercut the data from the initial investigation period and so disproved the determination of threat of serious injury.

Concerning (4), the Appellate Body overturned the Panel decision that it is necessary for “increased exports” only to cause significant injury. Instead, it held that it was necessary to determine a “genuine and substantial cause and effect relationship” between the increased exports and injury (this is the same decision as in the US-Wheat Gluten Appellate Body decision). In order to determine the harmful effect of “increased imports” in case several factors may be the cause of injury simultaneously, the Appellate Body held that the harmful effect of the other factors needs to be distinguished and separated. It determined that the US simply concluded that the “increased imports” were “relatively important” compared to other factors that contributed to the injury. Since the US did not distinguish and separate harmful effects by other factors, the Body found the US in violation of Article 4.2 (b).¹⁵

(4) US - Welded Carbon Quality Line Pipes (DS202)

On June 15, 2000, Republic of Korea requested WTO consultations with the United States regarding US safeguard measures (a tariff-rate quota for three years¹⁶) applied in March 2000 against welded line pipes. A panel was established in October 2000.

<Panel Report>

The panel report (issued on October 29, 2001), found that: (1) in regard to Article XIII of the GATT, which stipulates “Non-discriminatory Administration of Quantitative Restrictions”, this measure was not expressed with regard to the past trade pattern (share of all import volume for each country). Since this measure was not found to “aim at a distribution of trade of such products approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions,” it was a violation with Article XIII: 2 of GATT. (By uniformly setting the quota for each country including Republic of Korea, the biggest provider to the US market historically-speaking, the quota for Republic of Korea had been decreased to the same level as a small provider). Furthermore, since no total quantity allowed for low-tariff import was stipulated, the Panel found the US in violation of Article XIII: 2(d).

Furthermore, the Panel found that the US violated Article 4.2(b) since (2) the US did not clarify the nature and degree of injury caused by factors other than “increased imports”, and did not separately examine the harmful effect of “increased imports” and other effects (the effect of non-attribution of the latter to “increased imports” has not been determined). (This is the same finding as in the US-Wheat Gluten Appellate Body decision and the US-lamb meat Appellate Body decision), (3) the investigation authority’s report did not make any mention of “unforeseen development”, which violates Article XIX of the GATT (*see* US-lamb meat Appellate Body

¹⁵ After receiving the Appellate Report, the US President announced the termination of the measure on November 14, 2001. Furthermore, in respect to the determination of the scope of “domestic industries”, the US first had lamb meat, an imported item, and live lambs, which are stock animals that receive injury, are not like products. The US then claimed that if there is a continuous line of production, and if there is substantial coincidence of economic interest to those industries, the producers of lamb and the butchers both constitute the domestic industry without distinction. However, the Appellate Body rejected the Panel’s approach to aim to demarcate the scope of “domestic industry” from the perspective of whether the “lamb meat” and “lamb” change their shape during the “like products” production process, and whether the production process of “like products” can be separated and distinguished. In this respect, how the relationship, which is similar to this case, between frozen food importers and the producer of agriculture that forms its raw material will be dealt with will be a task for the future.

¹⁶ A measure that sets a uniform quota against each exporting country, and subjecting a maximum of 19% of additional tax to imports that exceed the quota. The tax rate gradually decreases. Canada and Mexico were exempted from the measure.

decision). (4) Concerning the provision of sufficient opportunity for prior consultation involving exporting countries in accordance with Article 12.3, which requires the provision of sufficient detailed information to the said countries on the measure in question, the US did not provide any other information on measures except for press releases. Therefore, the Panel found the US in violation of Article 8.1.

In relation to the exclusion of NAFTA members from the measures in question, the panel determined that, (5) the US could reject the claims of Republic of Korea that the exclusion was in violation of non-discrimination principles of Article I, XIII and XIV of the GATT and Article 2.2 of the Agreement on Safeguards based on Article XIV of the GATT. (6) Further, the panel determined that Republic of Korea did not provide sufficient proof of the claim concerning the violation of the principle of parallelism (*see* Argentine-footwear Appellate Body decision).

Furthermore, the Panel found that (7) in relation to Article 5(1), the measure in question is a tariff quota and does not constitute to a quantity restriction mentioned in Articles 1.2 or 2(a) regarding the allotment between supplying countries. It does not violate these articles. Contrary to Republic of Korea's claim that the measure in question was more restrictive than the proposal of measure or USITC (United States International Trade Commission) recommendations¹⁷, and that the measure exceeded the "degree necessary to prevent and rescue [the US industry] from serious injury" of Article 5.1, the Panel determined that the Republic of Korea could not prove the violation of the clause by the US, since Clause 1 of Article 5 does not require the country implementing the measure to explain whether or not the measure is consistent with the clause.

<Appellate Body Report>

The US and Republic of Korea appealed the panel report. The Appellate Body issued its report on February 15, 2002, supporting the panel's findings in regard to (2), but with respect to (4), while supporting the Panel's decision that found violations of Articles 12.3 and 8.1 (that it was necessary to provide "sufficient information and time concerning the measure" "before consultation" in order to make meaningful exchanges of opinion possible), the Appellate Body concluded that since Republic of Korea learned about the measure eight days prior to the implementation, it was not provided sufficient time to prepare for consultation with the US (after analyzing and reviewing the measure and holding domestic consultations).

Concerning the exemption of Canada and Mexico from the measure, the Appellate Body stated that in respect to (5), whether Article XXIV of the GATT provided an exception to Article 2 of the Agreement on Safeguards depended on the following: (i) whether the imports excluded from the measure were exempted from the review conducted for the determination of "significant injury"; or (ii) whether the imports excluded from the measure were reviewed during the determination of "significant injury" and a reasonable and adequate explanation was clearly presented concerning the application of measures only to imports from outside the free trade area. The Appellate Body said that since in this case the US included imports from Canada and Mexico within their investigation, there was no need to judge the relationship of Article XXIV of the GATT with Article 2.2 of the Agreement on Subsidies, and so there was no legal authority for the Panel's decision concerning this point. The Appellate Body also overturned the Panel's decision concerning (6), finding that the US had violated Articles 2 and 4 since it included Canada and Mexico in the investigation yet exempted them from the safeguard measures, thereby going against the principle

¹⁷ Concerning this measure, the ITC conducted its research in August 1999 after receiving a request to implement the measure in June 1999. In December later in the year, the ITC issued the notification of the safeguard measure implementation. Upon receiving the notification, the US President announced the implementation of the measure in February 2000.

of parallelism.

In respect to (7), the Appellate Body ruled that Article 5.1 permits application of safeguard measures “only to the extent necessary to prevent or remedy serious injury” attributed to increased exports. The Appellate Body found the US had violated this Article, since a violation to Article 4.2 (b) (*see* (2) above) indicates that the measure in this case was not allowed by Article 5.1.

The Appellate Body overturned the Panel finding that the US had violated Articles 3.1 and 4.2 (c), since the US implemented the measure based on “serious injury or threat of serious injury”, stating that the country that implemented measures needs to clarify whether the measures were implemented due to “serious injury” or “the threat of serious injury”. However, the Appellate Body overturned the Panel’s decision and supported the US’ certification method, referring to Article 2.1, stating that the investigate authority can either pick one or integrate the two to make its judgment¹⁸.

(5) US - Steel and Steel Products (DS248, DS249, DS251, DS252, DS253, DS258, DS259)

On March 5, 2002, the US President made an affirmative determination to impose safeguards on fifteen steel product categories after receiving recommendations from the ITC. Japan immediately expressed its regret and requested consultations¹⁹ with the United States under Article 12.3 of the Safeguards Agreement. Although the consultations took place on the 7th of the same month, there was no mutually satisfactory resolution. Subsequently, the US safeguard measures took effect on March 20 and additional tariffs ranging from 8 to 30% (depending on the item) were imposed. However, imports from NAFTA members Canada and Mexico, as well as from Israel and Jordan, were exempted from the measure.

Japan subsequently requested bilateral consultations with the US pursuant to the WTO Dispute Settlement Understanding on the same day; consultations were held on April 11 and 12, 2002, with five other countries and regions, including the EU and Republic of Korea, participating. Following this, Japan requested the 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 established. Afterward, panels that were established as a result of requests of other countries were integrated (so that there were eight countries and regions -- Japan, the EU, Republic of Korea, China, Switzerland, Norway, New Zealand and Brazil -- included as complaining parties in one joint panel proceeding²⁰). After completing the panel meetings held in October and December 2002, the panel issued its report on July 11, 2003, and it was distributed to Member countries.

<Panel and Appellate Body Report>

Although there were many points of contention in this case²¹, the main subjects that the Panel and

¹⁸ The US abolished the safeguard measures again for life pipes from Republic of Korea in March 2003.

¹⁹ Article 12.3 of the Agreement on Safeguards requires parties taking definitive safeguard measures to consult with interested export Members in advance (The consultation is fundamentally bilateral).

²⁰ The joint applicants include Japan, the EU, Republic of Korea, China, Switzerland, Norway, New Zealand and Brazil.

²¹ Major legal claims of joint consulting parties including Japan to the WTO Panel were (i) Insufficient evidence of import increases or injury to domestic industries as a result of “unforeseen developments” (in violation of Article XIX:1(a) of the GATT 1994, and Article 3.1 of the Safeguards Agreement); (ii) The definition of “like products” falling within the scope of the safeguard measures is inconsistent with Articles 2.1 and 4.1(c) of the Agreement on Safeguards, and Articles XIX:1 and X:3(a) of the GATT 1994; (iii) The findings of “increased imports” are inconsistent with Articles 2.1 and 4.2(a) of the Agreement on Safeguards; iv) Failure to demonstrate the causal link between “increased imports” and “serious injury” is inconsistent with Article 4.2(b) of the Agreement on Safeguards; (v) The inconsistency between the range of imports covered by the investigation and the range of imports to which the measures applied violates of Articles 2.1, 2.2 and 4.2 of the Agreement on Safeguards; (vi) The measures imposed are

the Appellate Body examined were the four areas of “unforeseen developments”, “increased imports”, parallelism and causal relationship. The Panel report, issued on July 11, 2003, stated that reasonable and sufficient explanations were not provided regarding these four points and found that the US guilty had violated the Safeguards Agreement. (There were some other items and measures as to which the US was not found to have violated the Agreement, and still other issues where the Panel exercised judicial economy and did not make any judgment). The US was not satisfied with the panel decision and appealed. The complaining parties also made a conditional cross appeal, which sought rulings if the Appellate Body reversed panel findings of violations.

The outline of the judgment by the Appellate Body (report issued on November 10, 2003) is as follow:

a) Unforeseen Developments

The Appellate Body supported the Panel decision that found that the US had violated Article XIX: 1(a) of the GATT and Article 3.1 of the Safeguards Agreement (rejecting the US claim that the criteria of “reasonable and adequate explanation” did not apply to Article XIX: 1(a) of the GATT) and finding similar obligations applied with respect to the GATT and the Agreement on Safeguards. Thereafter, the Appellate Body stated that demonstration of the existence of “unforeseen developments” was required by Article 3.1 of the Agreement on Safeguards, which stipulates that the investigation authority’s report had to include reasoned findings or conclusions with respect to “all pertinent issues of fact and law”. Furthermore, “unforeseen developments” had to cause the increased importation of the items that are subject to the safeguard measure in question. If a measure includes multiple items, then the Appellate Body said that it had to be proved that “unforeseen events” had caused the “increase of a wide category of products” that included the items subjected to the measure.

b) Increased Imports

As a general point regarding the interpretation of “increased imports” mentioned in Articles 2.1 of the Agreement on Safeguards, the Appellate Body stated: (i) the Appellate decision in Argentine-Footwear that it is necessary for the increase in imports to have been “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively”, to cause or threaten to cause serious injury does not pertain to whether or not “increased imports” exist, but rather should be considered when analyzing the causal relationship of significant injury or threat of significant injury²²; and (ii) when determining “increased imports”, simply comparing the import volume of the initial and final periods investigated is not enough. The trends of imports throughout the investigation period need to be examined.

Building upon this, the Appellate Body examined the Panel’s decision item by item. Concerning carbon steel sheets, steel wire and stainless steel wire, the Appellate Body found that: (i) the explanation of reason for finding “increased imports” was insufficient; (ii) the data for the final portion of the investigation period is especially important (in this case, imports decreased during the final period); and (iii) an explanation for the finding that import “trends” were

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; and (vii) The exemption of the NAFTA and other FTA contracting countries violate the principle of non-discriminatory treatment and violate Article 2.2 of the Agreement on Safeguards and Article I:1 of the GATT 1994.

²² The Appellate Body supported the decision of the panel body in this regard seeing that the Panel didn't judge that the regency, suddenness, sharpness, and significance of import increase were indispensable when recognizing "increase in imports".

“increasing” was necessary, but the finding of “increased imports” was not explained sufficiently. Therefore, the Appellate Body affirmed the Panel’s decision that the US had violated Articles 2.1 and 3.1 of the Agreement on Safeguards.

On the other hand, concerning tin mill products and stainless steel wire, the Appellate Body overturned the Panel’s decision that the US had violated the above-mentioned Articles because the investigation authority did not give a consistent explanation for the finding of “increased imports”. The Appellate Body stated that the investigation authority is not prevented from presenting various reasons for finding regarding a measure, and the Panel should have made its decision by judging whether the authority’s decision “includes a reasonable explanation”, rather than the consistency of the reasoning.

c) Parallelism

Although the US covered all imported goods in the investigation, imported products from Canada, Israel, Mexico and Jordan were exempted from the measure. The Appellate Body mentioned the general idea of parallelism, and said that the report of the investigation authority had to clearly state that only imports from the countries subject to the measure in question were included in the injury analysis (*see* the US- Welded Carbon Quality Line Pipe Appellate Body Decision, above). Thereafter, the Appellate Body mentioned that: (i) imports from the countries exempted from the measure correspond to “factors other than increased imports” as used in Article 4.2(b). Therefore, the harmful effects from such factors must not be attributed to imports from countries subject to the measure (the application of non-attribution); and (ii) in order to satisfy the implementation standard, it is not sufficient to examine only the effects of imports from each country exempted from the measure²³; a single-joint examination has to be conducted. Therefore, the Appellate Body affirmed the Panel’s decision that found that the US had violated Articles 2 and 4 of the Agreement on Safeguards since it had not fulfilled the principle of parallelism.

d) Causal relationship

The Panel found that a reasonable and sufficient explanation regarding causal relationship was not given for the nine items subject to the safeguards measure. However, the Appellate Body found that since seven of those items already had been found to violate Article XIX of the GATT and Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards, it was not necessary for purposes of settling the dispute to make a decision regarding whether the causal relationship requirement had been satisfied. Concerning the other two steel products, the Appellate Body overturned the Panel’s decision, stating that it should have been judged by deciding whether the authority’s decision includes a reasonable and sufficient explanation. Therefore, it was not necessary to judge whether the existence of causal relation prerequisites had been proved.

<Events other than the dispute settlement procedure>

In tandem with the dispute settlement process, Japan proceeded with trade compensation procedures that exporting countries are allowed to take under Article 8 of the Agreement on Safeguards.²⁴ Japan notified the WTO Council for Trade in Goods on May 17, 2002, of the amount,

²³ For this case, the US examined the imports of stainless rods by separating the effects from imports from Canada and Mexico and that of imports from Israel and Jordan. As result, the US determined that they do not influence on the determination of injury by an investigation authority.

²⁴ If a safeguard measure has been implemented without there being an agreement on the compensation during the consultation held before the implementation, the exporting country who will be affected by it can execute measures to suspend tariffs against the country implementing the measure (Agreement on Safeguards, Article 8.2). However, if the measure has been taken because of an absolute increase in imports and conforms to the provisions of the Agreement,

proposed items, additional tariff rates, etc., for: (1) immediate countermeasures in case the safeguard measures were not based on an absolute increase in imports (the so-called “short list²⁵”); and (2) measures to be exercised after a decision by the Dispute Settlement Body that the US safeguard measures were in violation of WTO Agreements (the so-called “long list²⁶”). Thereafter, 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 (a wide scope of exemptions from application of the measures) made by the US on August 30, 2002, however, Japan decided not to increase tariffs under the short list until the Dispute Settlement Body made a ruling in the dispute.

On November 26, 2003, based on the WTO Appellate Body report, Japan made a supplemental notification to the WTO Council for Trade of Goods of additional items to be included on the long list and the additional tariffs to be imposed upon them. Thus, Japan secured the right to implement countermeasures from December 26, thirty 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. Therefore, Japan decided not to implement measures on the long list, and abolished the Order for tariff negotiation establishing the short list on December 12, 2003.

(6) US – China Tires (DS399)

As a transitional safeguard measure taken pursuant to Article 16 of China’s WTO Protocol of Accession on September 11, 2009, the US President decided to impose a maximum duty of 35% for a period of 3 years on Chinese-produced passenger vehicles and light truck tires based on a decision by the USITC (United States International Trade Commission). In response, China requested WTO consultations on September 14, and a WTO dispute settlement panel was established in January 2010.²⁷

In this case, the following points were disputed: (1) was there a “rapid increase” of imports as required by Article 16.4 of China’s Accession Protocol; (2) did the finding of causal relationship by the USITC fulfill the significant cause of market disruption requirement of Article 16.4; and (3) did the measure implemented exceed the “degree necessary to prevent and remedy market disruption”, violating Article 16.3? The Panel report, issued on December 13, 2010, approved the US’s claim on all accounts and decided that the measure was consistent with the Protocol. The Appellate Body report, issued on September 5, 2011, affirmed the panel decision (*see* Section 1 “China” for the outline and details of transitional safeguard by product).

the right to suspend tariffs shall not be exercised for the first three years that a safeguard measure is in effect (Article 8.3).

²⁵ The list of products which does not include goods whose concessions have been suspended based on the Agreement on Safeguard Article 8.2 (the suspension of concessions executed within 90 days from the date of imposition of the measures in case the safeguard measure has not been implemented as result of absolute increase) is called a “short list”.

²⁶ The list of products whose concessions will be suspended based on the Agreement on Safeguards Article 8.3 (suspension of concessions that can be exercised to compensate for entire loss after the WTO determines an inconsistency with the WTO Agreement or after three years have elapsed since the imposition of the measure) is called a “long list”.

²⁷ This case has been dubbed “Trade War” and was broadcasted widely by the media, due to China conducting requests for consultation immediately after the US announced the implementation of measures (The Economist, September 19, 2009 issue).

**(7) Dominican Republic - Polythene Bags and Tubular Fabric
(DS415, 416, 417, 418)**

In October 2010, the Dominican Republic imposed safeguard measures on polythene bags and synthetic fibers, and levied an additional 38% duty on imported goods. (However, the measure was not applied to imports from Mexico, Panama, Colombia and Indonesia based on Article 9.1 of the Agreement on Safeguards). In response, in the same month, Costa Rica, Guatemala, Honduras and El Salvador, respectively, requested consultations with the Dominican Republic. A single panel was established for the dispute raised by the four countries. The Panel report, issued on January 31, 2012, was adopted by the DSB at its meeting on February 22, 2012. The report found, firstly, that (1) the Dominican Republic was in violation of Article XIX: 1(a) of the GATT and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards for not providing a reasonable and sufficient explanation as to how the country was not able to foresee China acceding to the WTO and its effect on trade (which the Dominican Republic claimed was an unforeseen development) and how such circumstances affected the increase of import of the concerned products.

Subsequently, (2) concerning the determination of the scope of “domestic industry”, the Panel stated that domestic industry should be demarcated based on the “like or directly competitive products”, as stated on Article 4.1(c) of the Agreement. The Panel did not allow determining the scope of domestic industry by picking out just a segment of such products. Thereafter, the investigation authority limited the scope to products competing directly with “polythene bags created from plastic”. Since the Dominican Republic demarcated the scope of the domestic industry based on a portion of like and directly competing products and excluded other like and directly competing products (in particular polythene bags created from synthetic fibers”), the Panel decided that this violated Article XIX: 1(a) of the GATT and Articles 4.1(c) and 2.1 of the Agreement on Safeguards.

Concerning (3) “significant injury”, the Panel first stated the necessity of making its judgment based on the overall situation of the domestic industry, by examining all factors that showed the condition of the domestic industry in the country in question. Of the related factors that the investigation authority examined, there were only four factors that indicated a negative condition of the domestic industry (cash flow, cost, loss and stock status), while seven factors (output, gross revenue, installed capacity, factory operating ratio and shares of domestic consumption volume) indicated a positive condition. Since the Dominican Republic did not provide a reasonable and sufficient explanation that established “significant injury”, the Panel found the country to violate Articles 2.1, 3.1, 4.1(a), and 4.2 (a) and (c), as well as Article XIX:1(a) of the GATT.²⁸

With respect to (4) the relationship of parallelism and exclusion of developing countries from the measure based on Article 9.1 of the Agreement on Safeguards, the Panel stated that the clause contains the obligation to exempt from the measure imports from developing countries that fulfill the conditions set out in the Article, even if imports from the country are included in the investigation. Therefore, since it creates an exception to the principle of parallelism, the Panel rejected the claim that including imports from the countries that were exempted from measure violated the principle of parallelism.

Concerning (5), “increase in exports”, while the applicants claimed that the period of

²⁸ Concerning the “causal relationship”, the panel stated since the existence of a “great loss” was not proven; the investigating authority cannot indicate the existence of a causal relationship between an increase in imports and a great loss. That being said, as an issue of fact-finding, the panel stated that the investigating authority has not analyzed the explanation that validates the acknowledgement of a causal relationship or the fact that imports increased the loss arising from other factors besides increased imports was not legally held responsible.

investigation included a period in which imports decreased, the Panel stated that the claims did not indicate whether the decrease was an enduring and long-term change. Furthermore, the investigation authority considers the import data for each year of the investigation period as well as the trend of import volume during the period. In addition, Article XIX:1(a) of the GATT does not require a constant import increase. Therefore, the Panel rejected the claim that Article 2.1 of the Agreement was violated.

(8) Ukraine - Passenger Cars (DS 468)

<Outline of the measure>

In July 2011, pursuant to a decision by the Interdepartmental Commission on International Trade (hereinafter referred to as the “Commission”), the Ministry of Economic Development and Trade of Ukraine (hereinafter referred to as the “Ministry”) initiated a safeguard investigation on imported passenger cars with engine displacement of 1000cc–1500cc and 1500cc–2200cc. The investigation period was 2008 to 2010. After holding a public hearing for interested parties, in April 2012, the Ministry sent the interested parties the main conclusions of the investigation report, which included findings of the relative increase in imported cars and the threat of serious injury to the domestic industry, and suggested that the Commission impose additional tariffs through special safeguard measures. In response, the Commission decided to impose safeguard measures on April 30 of the same year. In March 2013, the Commission announced the safeguard measures, which would be effective for three years and imposed an additional tariff of 6.46% on passenger cars with 1000–1500cc engine displacement and 12.95% on those with 1500–2000cc displacement. The measures took effect in April of the same year. Furthermore, a decision was made in February 2014 to progressively reduce the tariff rates 12 months and 24 months after the decision.

<Problems under international rules>

No increase in imports of passenger cars at issue was seen in Ukraine during the investigation period of 2008–2010. In fact, the import level in 2010 was significantly lower than that in 2008. In addition, the measures were imposed in April 2013, more than two years after the completion of the investigation at the end of 2010, but no data on exports during this period was provided. In this regard, Ukraine did not comply with the requirements for imposing safeguard measures set out in Article 2.1 of the Agreement on Safeguards because there was no increase in imports that was “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury,” which is the test set out by the Appellate Body in the past.²⁹ Also, there was not sufficient explanation from Ukraine regarding the “unforeseen developments” stipulated in GATT Article XIX. In addition, sufficient explanation was not provided regarding other requirements for imposing safeguard measures, such as “serious injury to domestic industry or threat thereof” and “causation.” In other words, the difficult situation that domestic producers faced might have not been caused by the increased imports but might have been a result of the economic crisis of 2008. However, no detailed explanations were given in the main conclusions of the investigation report published by Ukraine on whether genuine or substantial relationships existed between the increased imports and the serious injury or the threat thereof.

With regard to the measures, there also were failures to follow the procedures set forth in the WTO Agreements. More concretely, Article 12 of the Agreement on Safeguards requires WTO members imposing safeguard measures to immediately notify the WTO Safeguards Committee at each stage of the investigation -- initiation, determination of serious injury, and decision to impose

²⁹ Such as Appellate Body in *Argentina – Footwear*, para 131.

the measures. However, the Ukrainian government did not notify the WTO until March 21, 2013, which was almost a year after the determination of injury and decision to impose the measures were made in April 2012. The content of the notification was not sufficient either, as a timetable for progressive liberalization and evidence of serious injury to some domestic industries, etc. were not provided. In addition, the Ukrainian government did not provide relevant countries with an opportunity for prior consultations as required by Article 12.3 of the Agreement on Safeguards.

For the reasons given above, the safeguard measures did not meet both the substantive and procedural requirements for imposition, and were therefore GATT Article XIX and the Agreement on Safeguards.

<Japan's action>

Japan has been observing the trends on Ukraine's safeguards measures since the investigation was initiated in July 2011 and expressed concerns, along with the EU, in October of the same year and in April 2012 at the WTO Safeguards Committee meetings. At the same time, Japan has expressed concerns about the safeguard investigation and measures and requested Ukraine not to impose the measures through participating in the public hearing, holding bilateral consultations, and sending letters to the Minister of Economic Development and Trade. In March 2013, upon the announcement by the Ukrainian government of imposing the measures, Japan jointly requested an immediate withdrawal of the decision with the EU and other member countries at the WTO Council for Trade in Goods.

However, the measures were imposed in April 2013. Subsequently, Japan urged the withdrawal of the measures at the bilateral foreign ministers' meeting in August and requested Ukraine to withdraw the measures through every possible channel, including multilateral consultations at the WTO Council for Trade in Goods and Safeguards Committee meetings, etc. However, no improvements were made. Acting on requests from the affected industries, in October 2013 Japan requested bilateral consultations pursuant to the WTO Dispute Settlement Understanding and held consultations in November 2013 and in January 2014. However, a satisfactory resolution was not achieved. Japan then requested the establishment of a panel in February 2014; it was established at the DSB meeting in March of the same year. In June 2015, a Panel Report determining that Ukraine's safeguard measures were inconsistent with the WTO Agreements and suggesting revocation of the measures was issued, and the report was adopted in July. It is rare for a Panel to make a specific suggestion concerning compliance. The Panel is likely to have taken into consideration that, given the seriousness of the illegality of the measures, Ukraine should not be allowed to maintain the measures and to conduct the determination process once again.

According to this recommendation, in an official gazette published on September 12, 2015, Ukraine abolished the safeguard measures on September 30, 2015.

(Key points of the Panel Report)

- (1) The two elements of the first clause of GATT Article XIX:1(a) -- "unforeseen developments" and "the effect of the obligations incurred under GATT" -- constitute *circumstances*, distinct from the *conditions* established under the second clause of that Article and Article 2.1 of the Agreement on Safeguards, which are legal requirements that must be demonstrated by the investigating authority. Therefore, before a safeguard measure is imposed, the investigating authority must demonstrate these two elements in the published report while providing reasoned and adequate explanations.
- (2) Since "unforeseen developments" and "increased imports" are in a cause and effect relationship, the investigating authority needs to demonstrate them while distinguishing between the former

and the latter. However, the Ukrainian authority found that the occurrence of “unforeseen developments” was explained by the relative increase in imports, without distinguishing between the two, which is inconsistent with GATT Article XIX: 1(a).

- (3) With regard to “the effect of the obligations incurred under GATT,” unless the relevant obligation is identified, it may be unclear which of several applicable obligations the member country considers to be constraining its freedom of action. Thus, the investigating authority needs to identify the relevant obligation and the effect of the obligation (for example, if the obligation is tariff concessions, the effect of the obligation would be the bound tariff rates applicable). In this regard, the Ukrainian authority failed to identify “the effect of the obligations incurred under GATT,” which is inconsistent with GATT Article XIX: 1(a).
- (4) The Panel did not determine Japan’s claim that the investigating authority should demonstrate a logical connection between the “unforeseen developments”/“the effect of the obligations incurred under GATT” and the increase in imports, in consideration of judicial economy.
- (5) With regard to the “increase in imports,” the Ukrainian authority found a relative increase in imports, but (in spite of the fact that the imports had increased in relative and absolute terms in the first half of the investigation period, and decreased in relative and absolute terms in the second half of the period) it failed to analyze the intervening trends in imports. Also, the Ukrainian authority failed to indicate that the increase in imports was sudden enough, sharp enough, significant enough, and recent enough, because the time of finding injury and deciding to impose the measures differed considerably from the time when the facts underlying the decision occurred, and to other reasons. These findings are inconsistent with Article 2.1 of the Agreement on Safeguards.
- (6) When determining injury, the investigating authority needs to evaluate all relevant factors having a bearing on the situation of the domestic industry, including the factors mentioned in Article 4.2(a) of the Agreement on Safeguards. However, the authority’s determination of “threat of serious injury” in this case was inconsistent with Article 4.2(a) of the Agreement in that it failed to conduct an appropriate evaluation and give a reasoned explanation on the possible future developments of the respective injury factors and the effects that the injury factors may have on the situation of the domestic industry in the immediate future.
- (7) The Ukrainian authority failed to provide reasoned and adequate explanations concerning the causal link between the increase in imports and the threat of serious injury, which is inconsistent with Article 4.2(b) of the Agreement on Safeguards.
- (8) The fact that notification of the initiation of the investigation was made 11 days after the publication of the initiation decision and the fact that the notification of the finding of injury was made more than ten months after the decision of such finding are inconsistent with Article 12.1(a) and (b) of the Agreement on Safeguards. Moreover, the fact that Ukraine failed to provide information on the progressive tariff reduction before the consultations held in April 2012 and at the time of making the notification is inconsistent with Article 12.3 of the Agreement, which stipulates that an adequate opportunity for reviewing the information set forth in Article 12.2 should be provided in prior consultations.
- (9) Japan’s claims that Ukraine failed to present a timetable for progressive tariff reduction before imposing the measures and that Ukraine had not reduced tariffs at the time Japan requested the establishment of a panel are inconsistent with Article 7.4 of the Agreement on Safeguards were dismissed because that Article does not provide for the timing of progressive liberalization. Also, Japan’s claim that the Ukrainian authority failed to provide an appropriate means for interested parties to present views, which is inconsistent with the second sentence of Article 3.1

of the Agreement on Safeguards, was dismissed because Ukraine held a public hearing and its national law has provisions on the submission of views by interested parties, among other reasons.

- (10) “Revocation of the measures” is suggested as a means of compliance, based on Article 19.1 of the WTO’s Dispute Settlement Understanding (DSU).

(Reference) Safeguard Measures on Welsh Onions, Shiitake Mushrooms, and Tatami-omote

Japan initiated safeguard investigation on welsh onions, shiitake mushrooms, and tatami-omote on December 22, 2000, and started to impose provisional measure on these three items on April 23, 2001.³⁰ In response to this provisional measure, China, the main export market for these items, requested Japan to terminate the imposition of provisional measure and on June 22 in the same year, started to apply and collect special duty of 100% on top of ordinary import duty on automobiles, mobile and vehicle-onboard telephones, and air conditioner originating from Japan.

China asserted that Japan imposed safeguard measure in a discriminatory manner against China. In response, Japan requested China to revoke the Chinese measure by claiming that (i) safeguard measure is a permissible measure to be used under the relevant WTO agreement, (ii) imposition of special duty solely targeting items from Japan is in violation of Article 1.1 of Japan-China Trade Agreement, and, (iii) China’s measures could not be justified under the relevant WTO agreement upon China’s accession to the WTO.³¹

Following the inter-governmental discussion between Japan and China, on December 21, 2000, both governments reached an agreement on the following points: (i) Japan will not impose definitive safeguard measure on these three items; (ii) China will revoke special duty on the aforementioned items from Japan; and, (iii) establish the Japan-China trade scheme that include the institutionalization of “Japan-China Agricultural Trade Conference” concerning Shiitake mushrooms and other items.

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³⁰ Provisional measure was imposed for the period of 200 days (until November 8, 2000). The Measure includes the imposition of additional duty, which is equivalent to between 106% and 266% of tariff rate, for those items being imported in excess of tariff rate quota.

³¹ China acceded to the WTO on December 11, 2000.

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aforementioned items from Japan; and, (iii) establish the Japan-China trade scheme that include the institutionalization of “Japan-China Agricultural Trade Conference” concerning Shiitake mushrooms and other items.