CHAPTER 8

SAFEGUARDS

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.

(a) Requisites of safeguard measures

The Agreement on Safeguards, as mentioned previously, has provisions defining "serious injury",

[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 U,S. 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 U,S., particularly the need for continuous attention to the possibility of modification of the Section 201 by the U,S. 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. Similarly, temporary safeguard measures by product based on the WTO Accession Protocol of China also existed, but lapsed on December 10, 2013.

"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).

Figure II-8-1 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).
"Serious Injury" 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 in public hearings or other appropriate means; 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 (Articles 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).

(b) 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).

(c) 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.

i. Restrictions against the implementation of rebalancing measures[3]

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 still be implemented even without such a meeting being held, but in such cases, the exporting country is allowed to implement rebalancing measures, such as increasing tariffs to counter the measures, against a "substantially equivalent level" of trade from the country imposing the safeguard (Article XIX:3). It was understood that the importing country would need to provide compensation, tariff decreases, etc., to the exporting country involving products other than those subject to the safeguard measure in order to avoid implementation of rebalancing measures.

However, the provision of such compensation would 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 was considered as a factor in leading countries to rely on "grey-area" measures.

Therefore, while the Agreement on Safeguards has clarified procedures for providing an opportunity for compensation consultation (Article 8.1 and Article 12.3) and for implementing a rebalancing measure by the exporting country (Article 8.2) in the cases where compensation consultation does not reach an agreement, it also set a limit on rebalancing measures by exporting countries. Thus, in case the safeguard measure is 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 rebalancing measure within the first three years after the implementation of the safeguard measure (Article 8.3).

ii. 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

[3] The suspension of "the application ... of substantially equivalent concessions" of exporting countries under Article XIX of the GATT is often referred to as "Countermeasures". In this report, this measure is referred to as "rebalancing measures" to distinguish it from a suspension of concession after approval by the DSB under Article 222-2 of DSU (see Part II, Chapter 17, 1 (7)).

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.[4]

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)).

(d) 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 problem of agreement compliance has emerged.

3. THE IMPOSITION STATUS OF SAFEGUARD MEASURES[5]

From January 1, 1995, when the Marrakesh Agreement Establishing the WTO came into effect,

[4] 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.

[5] See page 244 in the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA, for the imposition of safeguard measures in the GATT era.

until December 31, 2017, there were 331 cases in which the investigation of safeguard measures initiated, with 166 cases in which the measures were imposed (based on WTO reports). Since the Agreement on Safeguards came into effect, countries that impose safeguard measures and the number of imposition have 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).

In recent years, the number of imposition by some emerging countries, such as India, Indonesia and Turkey, etc. 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.[6]

However, ever since 2017, Safeguard investigations/measures have become more frequent in some industries, regardless of whether the countries are developed or emerging. Among developed countries, the United States is outstanding. Although the United States has shied away from imposing safeguard measures for a long time since it abolished the one on steel and steel products in 2003, after the inauguration of the Trump administration, the United States commenced a couple of safeguard investigations: one on photovoltaic cells and modules in May 2017, and another on large residential washers in June of the same year. In February 2018, it actually applied safeguard measures on these products (see page 52). Furthermore, there are indications that even the U.S. Article 232 measures (see page 60) against steel and aluminum products are regarded as Safeguard measures with the objective of substantially protecting the industry within the United States. Close attention should be paid to future movements of the United States.

Also, regarding the steel industry, by U.S. imposing the aforementioned Article 232 measures, as a trigger, safeguard investigations were launched in succession by countries such as EU (see page 103), Canada (see page 120), Turkey (see page 143) and Eurasia (EEU) (see page 143). The frequent imposition of these types of safeguard measures in response to protective measures by other countries is not consistent with the original structure of safeguard system, and may depress the world trade, which might then jeopardize the benefits of both export and import countries.

Japan conducted safeguard investigations on three items, namely onions, unprocessed shiitake mushrooms, and tatami omote (December 22, 2000), based on which a temporary measure (imposition of additional tariffs ranging from 106% to 266% depending on the item, on imports exceeding the tariff quotas) was applied for 200 days from April 23, 2001. Japan also conducted a transitional safeguard investigation on towels under the former Agreement on Textiles and Clothing (from April 16, 2001, to April 15, 2004). However, Japan has not yet exercised a definitive measure under the Agreement on Safeguards to this date.

[6] 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).

Figure II-8-3 Imposition of Safeguard Measures (Investigation, Provisional and Definitive) after WTO establishment

		1995-2000	2001-2005	2006-2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
USA	Initiation	9	1								2		12
	Definitive	5	1									2	8
EU	Initiation		4	1								1	6
	Definitive		3										3
Canada	Initiation		3									1	4
	Definitive												0
Australia	Initiation	1		1			2						4
	Definitive												0
Japan	Initiation	1											1
	Definitive												0
China	Initiation		1							1			2
	Definitive		1								1		2
Philippines	Initiation		6	3			2					2	13
	Definitive		5	1	1				1				8
India	Initiation	11	4	12	1	1	3	7	2	1	1		43
	Definitive	6	3	3	1	2		4		1		1	22
Indonesia	Initiation		2	10	4	7		3	1			2	29
	Definitive			3	7	1	1	2	3			1	18
Turkey	Initiation		5	10	1		1	3	1		2	2	25
	Definitive		2	10	1			1	1		1		16
Russia	Initiation				1	3						1	5
	Definitive					1	1	1					3
Ukraine	Initiation			8	2		1		1		1		13
	Definitive			2			1	1		1		1	6
Jordan	Initiation	1	9	5		1		1		1			18
	Definitive		5	2			1				1		9
Egypt	Initiation	3		1	1	4		2	2				13
	Definitive	2	1	1		1			1				6
Chile	Initiation	5	5	2		1	2		4			1	20
	Definitive	2	4	1		1				1			9
Viet Nam	Initiation			1		1			2	1	1		6
	Definitive						1			2	1	1	5
Others	Initiation	29	42	22	2	6	7	7	4	7	1	6	133
	Definitive	6	25	9	1		3	2	5		6		57
Total	Initiation	60	82	76	12	24	18	23	17	11	8	16	347
	Definitive	21	50	32	11	6	8	11	11	6	10	7	173

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

(2) AGREEMENT ON AGRICULTURE

See Part II, Chapter 3 “Quantitative Restrictions”

4. ECONOMIC ASPECTS AND SIGNIFICANCE

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

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

First, safeguard measures entail the function of providing a grace period to prevent serious injury to the domestic industry from competitive products being imported into its territory in increased

quantities and to protect the domestic industry (structural adjustment or competitive reinforcement), as an emergency means. Therefore, due to the objective of the system, the implementation of safeguard measures is only be permitted when there exists a development of unforeseen circumstances (GATT Article XIX.1(a)) and 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 labour 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 need to enhance competition in international markets.[7]

Furthermore, with the characteristics of being emergency measures 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 rebalancing measures by the exporting countries.

(b) 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.

(c) 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

[7] 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

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.

5. *PROBLEMS CONCERNING THE INSTITUTIONAL DESIGN AND THE OPERATION OF THE SAFEGUARD SYSTEM*

Although the significance of safeguards has been acknowledged as a system that fulfills the functions mentioned in (4) above, if the measures are abused, 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, a system design that strictly regulates the conditions and scope of safeguard measures is important, and importing countries must make sure to make a decision to impose safeguard measures after confirming the plan of restructuring or revitalizing the related domestic industry. However, in recent years, structural problems regarding system design and operations, such as those listed below, have begun to surface.

(1) · SCOPE OF AGREEMENT ON SAFEGUARDS

As mentioned previously, while various Safeguard regulations exist in GATT Article XIX and the Agreement on Safeguards, the definition and scope of the "safeguards" as a subject to these regulations have not been clearly stipulated. It was the Indonesia Steel Safeguard Case (DS490/DS496) that tackled this issue in WTO dispute resolution procedures (see Major Cases (8) of this chapter 2).

According to this Appellate Body report, measures to which the Agreement on Safeguards is applied must (i) suspend obligations in GATT or withdraw or modify concessions, (ii) be taken to remedy injury to domestic industries, and furthermore, (iii) have a demonstrable connection between the suspension of obligation and the remedy for injury.

This judgment can be understood to be based on the text of GATT Article XIX, but on the other hand, it caused legal instability regarding whether a measure is subject to the Agreement on Safeguards. In particular, this case is a little unusual in that the panel and Appellate Body found that the measures at issue were not safeguards, although the country taking the measures (Indonesia) properly completed the WTO notification, and the complainants (Vietnam and Taiwan) did not dispute that the measures were safeguard measures.

Regarding Section 232 measures imposed by the U.S. in March 2018 (see page 60) , a similar problem may arise as many exporting countries insist that they are legally safeguard measures while the country taking the measures (U.S.) denies the applicability of the Agreement on Safeguards.

The Japanese government stated in the notification to the WTO Safeguard Committee dated May 2018 that these measures "have the characteristics of measures for which the Agreement on Safeguards is applicable," and that Japan reserves the right of rebalancing under Article 8 of the Agreement on Safeguards. Japan therefore expressed that it had the same position as the measure WTO Members such as the EU in that Section 232 measures are safeguards. Even according to the framework of the Appellate Body Report in the aforementioned Indonesia case, since Section 232 measures are mainly for the purpose of protecting the domestic industry, and consist of the suspension of WTO concessions, they surely can be deemed subject to the Agreement on Safeguards.

(2) · Frequency of Protective Safeguard Measures

The frequent initiation of safeguard investigation on steel products by various countries, since the U.S. Article 232 measures, has reminded us of the difficulties in establishing a proper regulatory framework to avoid the abuse of safeguard measures and to enable its dynamic application.[8]

First, imposing safeguards due to protective measures taken on the same products by other countries is consistent with the purpose of the safeguard process. Furthermore, such imposition of safeguards may cause a sudden increase in imports of the relevant products to another country due to the limited export opportunities, which may further trigger the imposition of safeguards by the other countries. Considerig this "vicious cycle", imposing such retaliatory safeguard measures should not be a feasible option. Also, safeguard measures for such purposes may not be considered to be inconsistent with the condition of GATT Article XIX:1(a) "unforeseen developments," while there is still room for debates on the interpretation of this provision, looking at the precedents in the dispute resolution process.

Rebalancing measures under Article 8 of the Agreement on Safeguards may restrain a country from imposing safeguards. However, paragraph 3 of the same article stipulates that when a safeguard measure is as a result of absolute increase in imports and are consistent with the WTO Agreements, the exporting country cannot impose rebalancing measures for the first three years. In order to comply with this provision, an exporting country cannot impose rebalancing measures unless and until it raises the dispute resolution procedures against the target measures, and the decisions by the panel and the Appellate Body which find the WTO inconsistency of such measures are adopted by the DSB. Considering the prolonged process of dispute resolution procedures in recent years, it is unlikely that rebalancing measures under Article 8 prevent abusive safeguards.

Furthermore, the purpose of dispute settlement procedure is only to oblige a member to prospectively withdraw, etc. the measures at issue, and does not include sanctions for past violations. As a result, importing countries may be structurally motivated to implement and maintain safeguard measures without confirming its WTO consistency.

(3) · Problems with Disciplines On Rebalancing Measures

The U.S. Section 232 measures (against steel and aluminum) highlighted problems related to disciplines on rebalancing measures.

As stated above, against safeguard measures based on the absolute increase of imports, rebalancing measures cannot be taken by exporting countries for the first three years as long as the measures are consistent with the WTO Agreements (Article 8.3). However, when the products targeted by such a safeguard measure include a type of product whose import has not been absolutely increased, some countries (EU, etc.) impose rebalancing measures under Article 8.2 immediately, only at the equivalent level to the import restrictive effects on that type of product (the immediate rebalancing is also called "short list") , and impose another rebalancing measure at the equivalent level to the import restriction on the remaining products, only after three years or the adoption of the decision of WTO inconsistency ("long list").[9]

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[8] Retaliatory rebalancing measures and safeguard measures in response to (and on similar products to) the protectionist measures by the U.S. can be compared to the measures related to the steel safeguards in 2002 (see 2. Main cases (5)).

[9] Japan has not imposed a rebalancing measure against Section 232 measures, but in the WTO notification for the reservation of rebalancing right dated May 2018, Japan expressed its view (similar to EU's) that it can immediately impose rebalancing measure against the import restriction for products whose import has not absolutely increased. Upon the U.S. steel safeguard in 2002, both EU and Japan imposed rebalancing measures on the "short list" in a similar manner. (see 2. Major cases (5))

Some other exporting countries imposed rebalancing measures without consideration for the text "conforms to the provisions of this agreement" of Article 8.3, or, by unilaterally declaring the inconsistency of Section 232 measures, without fulfilling the time constraint or conditions stipulated in that paragraph (China, Turkey, etc.). Such measures can be considered to be unilateral actions effectively ignoring the provisions of Article 8.3. However, the WTO consistency of such rebalancing measures can be determined only after the completion of the dispute resolution procedures (the United States has requested consultations regarding all the rebalancing measures; See Chapter 1 Part 2). Also, the effect will be only to prospectively make such rebalancing measures into conformity.[10] The current rules have left space for abuse of rebalancing measures without sufficient consideration for consistency with the WTO Agreements.

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.[11]

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

[10] Although to "review" and "report" whether rebalancing measures are "substantially equivalent" or not at the request of the members is one of the functions of the Committee on Safeguards (Article 13.1(e) of the Agreement on Safeguards), the conclusion of such "review" and "report" does not bind member countries.

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

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 years[12]) 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 U,S. 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 U,S. did not conduct consultations with related exporting countries before the implementation of measures violates Article 12.3.

<Appellate Body Report>

The U,S. 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 was enough for safeguards to be applied. (However, the Appellate Body did find a violation of Article 4.2(b) by the U,S. 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).

[12] 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.

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 years[13]) 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 U,S. 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 U,S. 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 U,S. 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 U,S. 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 U,S. did not sufficiently explain how the 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

[13] 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.

"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 U,S. simply concluded that the "increased imports" were "relatively important" compared to other factors that contributed to the injury. Since the U,S. did not distinguish and separate harmful effects by other factors, the Body found the U,S. in violation of Article 4.2 (b).[14]

(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 years[15]) 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 U,S. in violation of Article XIII: 2(d).

Furthermore, the Panel found that the U,S. violated Article 4.2(b) since (2) the U,S. 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 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 U,S. did not provide any other information on measures except for press releases. Therefore, the Panel found the U,S. in violation of Article 8.1.

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[14] 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 U,S. first had lamb meat, an imported item, and live lambs, which are stock animals that receive injury, are not like products. The U,S. 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.

[15] 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.

In relation to the exclusion of NAFTA members from the measures in question, the panel determined that, (5) the U,S. 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) recommendations[16], 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 U,S., 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 U,S. 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 U,S. (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 U,S. 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 U.S. 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 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 U,S. 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.

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[16] 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.

The Appellate Body overturned the Panel finding that the U,S. had violated Articles 3.1 and 4.2 (c), since the U,S. 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 judgment[17].

(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 bilateral consultations 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 U,S. 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 proceeding[18]). 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 case[19], the main subjects that the Panel and 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 U.S. had violated the Safeguards Agreement. (There were some other items and measures as to which the U,S. was not found to have violated the Agreement, and still other issues where the Panel exercised judicial economy and did not make any judgment)..

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[17] The U.S. terminated the safeguard measures again for life pipes from Republic of Korea in March 2003.

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

[19] 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 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.

The U,S. 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 U,S. 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 injury[20]; 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 "increasing" was necessary, but the finding of "increased imports" was not explained sufficiently. Therefore, the Appellate Body affirmed the Panel's decision that the U,S. 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 U,S. 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.

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[20] 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".

c) Parallelism

Although the U,S. 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 measure[21]; a single-joint examination has to be conducted. Therefore, the Appellate Body affirmed the Panel's decision that found that the U,S. 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 procedures for rebalancing measures that exporting countries are allowed to take under Article 8 of the Agreement on Safeguards. Japan notified the WTO Council for Trade in Goods on May 17, 2002, of the amount, proposed items, additional tariff rates, etc., for: (1) immediate rebalancing measures in case the safeguard measures were not based on an absolute increase in imports (the so-called "short list"); 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 list"). 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 U,S. 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 rebalancing measures from December 26, thirty days after the notification date and after the adoption of the above report.

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[21] For this case, the U,S. 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 U,S. determined that they do not influence on the determination of injury by an investigation authority.

However, on December 4, 2003, the U,S. officially decided to repeal the safeguard measure effective December 5, 2003. Therefore, Japan decided not to implement rebalancing measures on the long list, and abolished the Order for tariff negotiation establishing the short list on December 12, 2003.

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

Please see pages 250-251 in the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA.

(7) Ukraine - Passenger Cars (DS 468)

Please see pages 251-252 in the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA.

(8) Indonesia - Steel and Steel Products (DS490, 496)

In July 2014, after the investigation, Indonesia imposed special tariffs on imports of Galvalume (aluminum/zinc coated steel sheets), and made a notification to the WTO on the measures as safeguards in the same month. Indonesia's tariff concession under Article II of GATT did not include concessions on Galvalume, and when introducing these special tariffs, the MFN tariff rate was 12.5% (increased to 20% in May 2015). While some preferential tariff rates on Galvalume had been granted under the regional trade agreements, this special tariff was imposed in the same way on imported goods from the countries who have entered such regional trade agreements.

Against this special tariff, Taiwan and Vietnam requested WTO consultation, claiming the violation of the Agreement on Safeguards.

<Panel Report>

The panel report, issued in August 2017, determined that the special tariff did not have the characteristics of safeguard measures, because Indonesia's tariff concessions did not include Galvalume and then there was no withdrawal or suspension of the GATT obligations. All claims under the Agreement on Safeguards by Taiwan and Vietnam were therefore dismissed. However, when imposing special tariffs, Indonesia's exempting 120 developing countries under Article 9 of the Agreement on Safeguards was found to be inconsistent with the obligation for MFN treatment under Article I of the GATT, and the compliance in this regard was recommended.

Taiwan, Vietnam and Indonesia expressed the will to appeal this panel report and the case was sent to the Appellate Body.

<Appellate Body Report>

A summary of the Appellate Body Report that, issued in August 2018, is as follows.

a) Characteristics of Safeguards and Panel's Terms of Reference

Both parites insisted that the Panel Report was inconsistent with Aritcle 11 of the DSU since it found that the relevant measures were not safeguards, in spite of the fact that neither the complainants (Vietnam and Taiwan) nor the country taking the measures (Indonesia) disputed that the special tariffs were safeguards.

However, the panel bears the responsibility for assessing whether or not the provisions referred to by the complainants are applicable to the measure at issue, and such assessment has to logically precede the judgment of consistency with the WTO Agreements, irrespective of whether the parties

dispute the applicability or not.

Therefore, the panel's assessment on whether the special tariffs were safeguard measures was not in violation of the Agreements.

b) Concept of Safeguards

According to GATT Article XIX, Safeguard measures must (i) suspend the obligations in GATT or withdraw or modify the tariff concessions, (ii) be for the purpose of remedying the injury to domestic industries, and (iii) have a verifiable connection between the suspension of obligation and the remedy for injury.

When judging whether or not the measures have the aforementioned characteristics, the design, structure and overall expected effects of the measures should be evaluated.

c) Applicability and Consistency with the Agreement on Safeguards

Although the panel considered that a measure can be a safeguard when it is imposed only to the level and extent necessary to remedy injury, such conditions are not the issue of applicability of the Agreement on Safeguards, but the consistency with it.

However, since these tariff measures did not suspend any of Indonesia's obligations under GATT, they did not fulfill the applicability of Agreement on Safeguards, then the Appellate Body supported the panel's decision that the measures were not safeguards.

d) Violation of MFN Treatment Obligation (Article I of GATT)

Regardless of whether or not the subject measures fall under safeguard measures, the Appellate Body supported the Panel's decision that the inconsistency with Article I of GATT may be a "stand alone" issue. Such special tariffs were in violation of the MFN treatment obligation at the point of exempting 120 countries.