DISPUTE SETTLEMENT PRACTICE ON SAFEGUARD MEASURES UNDER THE WTO

BY

CHENG HU

THESIS

SUBMITTED TO
KDI SCHOOL OF PUBLIC POLICY AND MANAGEMENT
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF

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ABSTRACT

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The safeguard measure under GATT Article XIX and WTO Safeguard Agreement is an extraordinary trade remedy under emergent situations against fair trade practice. The ultimate objective of safeguard is to gradually broaden trade liberalization. Meanwhile, it is designed to facilitate structural adjustment of domestic industry and to balance the domestic political powers.

Safeguard was not an instrument of choice during the GATT period, in that it should be applied on a non-discriminatory basis and requires compensation. The text of "escape clause" (GATT Article XIX) was fairly ambiguous and difficult to apply. The overwhelming use of various export restraint agreements and antidumping measures paled the significance of safeguard mechanism under the multilateral trade regime.

The Uruguay Round Safeguard Agreement is a great improvement on GATT Article XIX, with strict procedural requirements, clarified substantive standards, a compromise on the issue of selectivity, and prohibition of "grey area measures". It has been applied by an increasing frequency since the WTO came into being. However, it also embodies many unclear concepts and criteria. Several disputes were filed before the WTO Dispute Settlement Body.

This paper focuses on the procedural and substantive issues extensively discussed during the panel and Appellate Body proceeding, such as terms of reference, standard of review, applicability of GATT Article XIX and XIII in the context of Safeguard Agreement, unforeseen developments, increased imports, domestic industry, serious injury and threat thereof, causal link and non-attribution, necessary extent of application, notification and consultation, and so forth. Four remaining issues in the dispute settlement are also discussed in the paper. They are the GATT XXIV defense to the non-discrimination application of safeguard measures, structural adjustment, procedural defect of the dispute settlement regarding safeguard and the contradictory rulings on disputed issues. In general, the panel and Appellate Body made clear many equivocal issues. Nevertheless, some issues remain unclear and some new issues arose.

Special concern is drawn on the transitional product-specific safeguard mechanism embodied in the Protocol on the Accession of the People's Republic of China. Some legal problems exist in the Protocol, which definitely will bring about new challenges before

the DSB. There, the author calls for prudential and objective scrutiny of legal implication of the Protocol and Members' actions by the panel and Appellate Body.
Finally, through the case study, the author makes some suggestions for the improvement of the current safeguard Mechanism.

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I. Introduction

Broadly defined, the term "safeguard protection" refers to a provision in an agreement permitting governments under specified circumstances to withdraw – or cease to apply – their normal obligations in order to protect (safeguard) certain overriding interests.[1] As a matter of fact, all the international trade agreements embody safeguard provision and exceptions.

The safeguard protection under GATT and WTO can be divided into two categories: permanent exceptions and temporary exceptions.[2] The former refers to general exceptions stated in GATT Article XX, GATS Article XIV and renegotiation or modification of schedules allowed by GATT Article XXVIII and GATS Article XXI. Temporary safeguard measures are applicable under predefined conditions for temporary import barriers. Except for the most significant safeguard under GATT Article XIX and the Safeguard Agreement, there are several other mechanisms that also fall under the general rule of safeguard, namely, antidumping measures under GATT Article VI, countervailing measures under GATT Article XVI, trade restrictions due to balance of payment problems under GATT Article XII and XVIII, infant industry protection under GATT Article XVIII.

What I will talk about in this paper is the safeguard protection embodied in GATT Article XIX and Safeguard Agreement, which provides for temporary protection to relevant domestic producers against increased imports that are causing or threatening to cause serious injury to the like or directly competitive domestic industry. The import

1. Bernard M. Hoekman, and Michelm. M. Koestecki, *The Political Economy of the World Trading System: The WTO and Beyond*, 2nd ed. New York: Oxford University Press, 2001, p.303.
2. Ibid.

restraint can take the form of increased tariff, quantitative restrictions or other measures. It is the application of *rebus sic stantibus* in the field of international economic relations. Since the WTO came into existence, safeguard measure, as the one of the main trade remedies under the multilateral trading system, has been invoked by an increasing frequency by WTO Members for protective objectives.

In the following chapter, I will first discuss the rationales for safeguards, followed by historical origin of safeguard and its subsequent development under GATT and the WTO. Then, I will move to the cases filed before Dispute Settlement Body (DSB) and the dispute settlement practice. In particular, I will concentrate on several critical procedural and substantive issues as well as remaining problems arising in dispute. In analysis, I will focus on the approach the panels and Appellate Body used to address the issues and the legal interpretation of the Safeguard Agreement, while not the factual aspects of the case. Some concerns on the challenges before the DSB brought by the transitional product-specific safeguard mechanism towards China will be discussed afterwards. To conclude, I will give some suggestions on the further improvement of the Safeguard Agreement.

II. The Rationales for Safeguard

Unlike antidumping and countervailing measures that deal with unfair or improper trade practice, safeguard provided by GATT Article XIX (See Appendix 1) and Safeguard Agreement (See Appendix 2) is targeted at exporting country's fair trade practice. Evidently, safeguard is incongruous with principle of trade liberalization, which is the fundamental goal of GATT and WTO. The increase of fairly traded imports and the

loss to the domestic import competing industry result from the operation of the economic law of comparative advantage and are thereby economically efficient. What's more, in economic principal, import protection leads to deadweight loss born by domestic consumers. Then, how can a member country despise the market principal? Why should GATT and WTO bow to member country's deviations from its commitments? The following four arguments may support the existence of safeguard: the restoration of competitiveness argument; the orderly contraction argument; the political safety valve argument; and the public choice theory argument.[3]

Firstly, safeguard measures give a domestic industry injured by imports time to adjust to liberalized trade environment. By given certain "buffer period" for adjustment, the ailing domestic producers are expected to gain profits and become efficient enough to compete with foreign exporters in the free market after protection is removed. However, which industry to be protected and whether the protected industry can restore competitiveness are questionable.

Secondly, temporary safeguard help to the contraction of those industries that do not have the potential to regain profits. It relieves the resources from those industries to more potential and competitive industries, and then realizes structural adjustment. During the process, safeguard measure allows the importing countries to transfer some of the adjustment cost from itself to exporting countries, on the one hand, from domestic import competing producers to domestic consumers, on the other hand.

The third argument may be the most well known support for safeguard. In practice, safeguard is a "safety valve" for protectionist. It provides governments with the means to

3. Bhala, Raj, *International Trade Law: Theory and Practice*, 2nd ed., New York: Lexis Publishing, 2000, p. 1118.

renege on the specific liberalization commitments under certain circumstances, thus diminishes the pressures for a more drastic departure from the general principal and increases long-term stability of the multilateral system. Practically, safeguard serves the key function of regulating a trade-off between trade liberalization *ex ante* and opportunities to impose protection *ex post*.[4]

The final argument relates to public choice theory. The theory holds that politicians tend to focus on the concerns of producers adversely affected by trade liberalization rather than consumers beneficially affected by it. The cost of liberalization and the benefits of protection are narrowly concentrated on the small group of producers. Whereas, benefits of liberalization and costs of protection are broadly diffused on the individual consumers. In result, producer group is well organized and therefore politically powerful. The temporary revocable commitments help to mitigate the pressure for protection from the producer group and give the governments more opportunities to concern about the overall social welfare. And the member countries will be more likely to agree to greater liberalization.

III. Historical Origin and Subsequent Development

Safeguard measure pursuant to GATT Article XIX (known as "escape clause") can find its origin in 1943 Reciprocal Trade Agreement between the USA and Mexico.[5] When the text of GATT and ITO was under negotiation in 1947, US executive issued an order requiring the inclusion of escape clause in all trade agreement entered into by the USA.

4. Ibid. p. 1122

The safeguard mechanism of the modern international trading system was first introduced into the GATT in 1947 as Article XIX, titled "Emergency Action on Imports of Particular Products". The language of Article XIX is quite similar to the escape clause in the 1943 Reciprocal Trade Agreement.[6] The prerequisite for the invocation of Article XIX under the GATT 1947 were (a) result of unforeseen developments and GATT obligation, (b) the existence of increased imports, (c) serious injury or threat thereof, and (d) causal link between (b) and (c). Though Article XIX gave certain criteria for invocation of safeguard measures, those critical legal concepts, like "unforeseen developments", "serious injury and threat thereof" and "like or directly competitive products", remain unclear. Therefore, the GATT language of Article XIX as to these variable concepts, as well as to the various criteria, is quite ambiguous, resulting in the difficulty in interpretation and uncertainty in application. In addition, the lack of specific procedural requirements and no provision for the time limits of safeguard measures add to the systemic uncertainties.

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5. The original wording is "If, as a result of unforeseen developments and of the concession granted on any article enumerated and described in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury." See US House of Representative, Committee on Ways and Means, 1945, *Hearings on the Extension of the Reciprocal Trade Act before the House Committee on Ways and Means*, 79th Committee, 1st Session, pp. 277, 280.

6. The Article XIX language reads as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in par or to withdraw or modify the concession".

Due to these inherent defects, safeguard under Article XIX has not been the instrument of choice throughout the GATT era. Only 150 safeguard actions were notified to the GATT secretariat under Article XIX during the 1950-1994 period.[7] Over 80% of those measures were adopted by developed countries, like EC, Australia, US, Canada. Safeguard was therefore used relatively infrequently, especially when compared to 1148 investigations of antidumping and 187 actions of countervailing during 1985-1992 period. Since 1970s, ERAs (export restraint agreements, also known as "grey area measures") [8] have become increasingly common type of safeguard actions as the alternatives to Article XIX. It was estimated that in the early 1980s, ERAs covered some 10 percent of world trade, and that the trade weighted average tariff equivalent of the ERAs was about 15 percent. [9] It has been the subject of criticism from Members and economists as well. One of the problems is their "lack of transparency". ERAs are often arranged and kept in secret. Another problem is their lack of discipline that they are out of the scrutiny or checks of concrete domestic and international proceedings. Besides, the legal status of such arrangements is questionable.[10] Obviously, ERAs are inconsistent with GATT obligations in nature and thus undermine the stability of the multilateral trading system and its objective of liberalization. Then, why do the GATT contracting parties prefer ERAs to Article XIX? Firstly, the conditions for invoking Article XIX are rather stringent. In particular, the non-discrimination and compensation requirement further raise the

7. GATT, *Analytical Index: Guide to GATT Law and Practice*, Volume 1, Updated 6th ed., 1995, p. 539-559.
8. A variety of terms have been used for these export restraint agreements, including orderly marketing agreement (OMA), voluntary export restraint (VER), and voluntary restraint agreement (VRA).
9. Kostecki, M., "Export Restraint Agreements and Trade Liberalization, World Economy, 10: 425-53, 1987.
10. John, H. Jackson, The world Trading System: Law and Policy of International Economic relations, 2nd ed., Cambridge, MA: MIT Press, 1997, p. 203-204

threshold of application. Secondly, the vagueness of the terms and criteria in Article XIX adds to the difficulties of application. Lastly, importing countries can target its restrictions at specific exporting countries while the exporting countries can reap substantial monopoly rents through the process. Therefore, both parties are reluctant to bring the cases before GATT and WTO Panel. In short, through the GATT era, Article XIX has not been a dead letter, but its use pales in comparison to other import relief actions. [11]

With these inherent defects in presence, GATT contracting parties, *inter alia*, safeguard target countries, made extended efforts to reform the safeguard system to discipline the ERAs and other import relief measures, like antidumping, on the one hand; and to reduce the disincentives to use Article XIX, on the other hand. Nevertheless, the objective to develop a new "safeguard code" finally ended in failure in Tokyo Round.

Scene was different in Uruguay Round. The conclusion of Safeguard Agreement was a substantial achievement, with strict procedural requirements, clarified substantive standards, a compromise on the issue of selectivity, and prohibition of grey area measures.

Firstly, the Uruguay Round Safeguard Agreement sets forth specific procedural rules and the requirements of transparency, especially the requirements of investigation and the obligation of notification and consultation.

Secondly, the Agreement gives much more explicit definition on some ambiguous concepts in GATT Article XIX, such as "serious injury", "threat of serious injury", "domestic industry", and so forth.

Thirdly, the Agreement reiterates the MFN principal of application of safeguard

11. Supra note 3, p.1123

measures. However, the Agreement does allow non-MFN application under some special circumstances.

Fourthly, the Agreement prohibits the use of grey area measures and requires the phasing out of those existing measures in certain period.

Fifthly, the Agreement establishes the specific time limits for safeguard measures and requires degressive application.

Lastly, the Agreement relaxes somewhat the compensation requirements under Article XIX, “provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement”.

Overall, the Uruguay Round Safeguard Agreement establishes more clarified rights and obligations on the imposition of safeguard measures. Nevertheless, many issues remain unclear and cause disputes between members. Those issues will be discussed later.

Since then, the use of safeguards has been expanded substantially compared to pre-Uruguay Round period. Developing countries have become the major user of safeguards. To date, there have been 101 safeguard investigations initiated and notified to the WTO, 40 definitive safeguard measures imposed and notified. Out of them, 65 safeguard investigations were imposed by developing countries, accounting for over 64% of total; 27 safeguards were applied by developing countries, accounting for 67.5% of total. Major safeguard users now include India, Chile, Jordan, Bulgaria, Venezuela and Argentina as developing countries, in addition to US, Czech as developed countries. (See Table 1)

Table 1: Notifications of Initiations and Application of Safeguard Measures from WTO Members
(Since 1 January 1995 to 28 October 2002)

Member	Safeguard Investigations Initiated	Member	Definitive Safeguard Measures Imposed
OECD countries	**36**	**OECD countries**	**13**
United States	10	United States	6
Czech Republic	9	Czech Republic	3
Korea	4	Korea	2
Poland	4	EC	1
Slovak Republic	3	Slovak Republic	1
Australia	1		
Canada	1		
EC	1		
Hungary	1		
Japan	1		
Mexico	1		
Developing countries	**65**	**Developing countries**	**27**
India	14	India	7
Chile	9	Chile	5
Jordan	8	Argentina	3
Bulgaria	5	Egypt	3
Venezuela	5	Brazil	2
Argentina	4	Jordan	2
Egypt	3	Ecuador	1
El Salvador	3	Latvia	1
Brazil	2	Lithuania	1
Ecuador	2	Morocco	1
Latvia	2	Philippines	1
Morocco	2		
Philippines	2		
Colombia	1		
Costa Rica	1		
People's Republic of China	1		
Slovenia	1		
Total	**101**	**Total**	**40**

Source: WTO, *Safeguard Committee Annual Report* 2000, G/L/409; 2001, G/L/494; 2002, G/L/583

IV. Safeguard Cases Filed under the DSU to Date

During the GATT period, three cases were filed to the GATT. They are Norway safeguard on certain textile products, US safeguard on dried figs, US safeguard on hatter's fur.

Amongst the 63 cases addressed by DSB since the WTO came into being in 1 January 1995, 7 cases concerned the application of safeguard measures taken under Safeguard Agreement.[12] (See Table 2). 3 of them were complained by EC. 3 were targeted at US. 5 cases concern agricultural products, while 1 concerns steel products and 1 concerns footwear. 6 cases were appealed before the Appellate Body and the other one has been addressed by the Panel recently.[13] The proceedings resulted in the fact that none of the disputed safeguard measures was consistent with the relevant WTO rules. The most frequently disputed issues are "serious injury and threat thereof" (Article 2 and 4 of Safeguard Agreement), "causation and non-attribution" (Article 2, 4.2 of Safeguard Agreement), "unforeseen developments" (GATT Article XIX 1(a)) and "selectivity" (Article 2.2 of Safeguard Agreement). (See Table 3)

Table 2: Completed Disputes before DSB regarding Safeguard

	Dispute Number	Complainant	Defendant	Subject Products	Remark
1	WT/DS/98[14]	EC	Korea	Dairy	
2	WT/DS/121[15]	EC	Argentina	Footwear	
3	WT/DS/166[16]	EC	US	Wheat Gluten	
4	WT/DS/177, 178[17]	New Zealand, Australia	US	Lamb Meat	
5	WT/DS/202[18]	Korea	US	Line Pipe	
6	WT/DS/207[19]	Argentina	Chile	Agriculture Products	
7	WT/DS/238[20]	Chile	Argentina	Preserved Peaches	Panel proceeding just finished

Source: WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/9, 29 October 2002

Apart from these 7 cases, there are 6 cases under consultation pursuant to Article 4 of DSU. Another 3 cases is under the DSB Panel proceeding. (See Table 4) 1 led to a mutually agreed solution as a result of consultation between parties in the first stage of the dispute settlement procedures. 1 was replaced by a new dispute on the same matter. (See Table 5)

Out of 16 completed or pending cases, 5 are initiated by EC, followed by Argentina and Colombia, who initiated 2 cases respectively. In contrast, US is the most frequently target country in the dispute, acting as defendant in 6 cases. Chile is the second frequently target countries, involved in 4 cases as defendant. Argentina was challenged in 3 cases. One half of these cases involved South American developing countries, either as complainant or as defendant. In terms of subject products, 9 safeguard measures in dispute concerned agricultural products, 6 of which were complained by

12. WTO, Update of WTO Dispute Settlement Cases, WT/DS/OV/9, 29 October 2002.
13. After the adoption of Panel and Appellate Body Reports in the US-Line Pipe case, Korea resorted to arbitration under DSU Article 21.3© for the determination of "reasonable period of time" of implementation. On July 24, 2002, the parties reached agreement on the matter at issue.
14. WTO documents WT/DS/98/R, Panel Report of Korea Definitive Safeguard Measure on Imports of Certain Dairy Products, 21 June 1999; WT/DS98/AB/R, Appellate Body Report, 14 December 1999.
15. WTO documents WT/DS/121/R, Panel Report of Argentina – Safeguard Measures on Imports of Footwear, 25 June 1999; WT/DS121/AB/R, Appellate Body Report, 14 December 1999.
16. WTO documents WT/DS/166/R, Panel Report of US-Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, 31 July 2000; WT/DS166/AB/R, Appellate Body Report, 22 December 2000.
17. WTO documents WT/DS/177,178/R, Panel Report of US-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, 21 December 2000; WT/DS177, 178/AB/R, Appellate Body Report, 16 May 2001.
18. WTO documents WT/DS/202/R, Panel Report of US-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, 29 October 2001; WT/DS/202/AB/R, Appellate Body Report, 8 March 2002.
19. WTO documents WT/DS/207/R, Panel Report of Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products, 3 May 2002; WT/DS/207/AB/R, Appellate Body Report, 23 October 2002.
20. WTO documents WT/DS/238/R, Panel Report of Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches, 14 February 2003.

Table 3: Issues in the Dispute Settlement of Safeguard Measures

Issues	Relevant Articles	Argentina-Footwear		Korea-Dairy		US-Wheat Gluten		US-Lamb Meat		US-Line Pipe		Chile-Agriculture Products		Argentina-Peaches	Frequency of Invocation
		Panel	AB	Panel	AB	Panel	AB	Panel	AB	Panel	AB	Panel	AB	Panel	
Procedural issues:															
Term of Reference	DSU Art.6.2, 7	×	×	×	×			×		×		×	×		8
Standard of Review	DSU Art.11	×	×	×		×	×	×	×						7
Evidentiary Scope of Review	DSU Art.11				×	×				×		×			4
Substantive issues:															
Serious Injury & Threat Thereof	SA Art. 2.1, 4.1, 4.2	×	×	×		×	×	×	×	×	×	×		×	11
Causation & Non-attribution	SA Art.2.1, 4.2	×	×	×		×	×	×	×	×	×	×			10
Unforeseen Developments	GATT Art. XIX 1	×	×	×	×			×	×	×		×		×	9
Notification & Consultation	SA Art.8, 12	×		×	×	×	×			×	×				7
Selectivity	SA Art.2.2	×	×			×	×			×	×				6
FTA & Customs Union	SA Art.2.2 GATT Art. XXIV	×	×			×	×			×	×				6
Increased Imports	SA Art.2.1, 4.2(a)	×	×			×				×		×		×	6
Necessary Extent of Application	SA Art.5.1			×	×					×	×	×			5
Domestic Industry	SA Art. 4.1(c)							×	×						2
Applicability of GATT Article XIII	GATT Art. XIII SA Art. 5									×					1

Note: The issue of “Evidentiary Scope of Review” is incorporated into the issue of “Standard of Review” in discussion.

Table 4: Pending Disputes before DSB regarding Safeguard

	Dispute Number	Complainant	Defendant	Subject Products	Pending Proceeding
1	WT/DS78	Colombia	US	Broom corn brooms	Consultation
2	WT/DS123	Indonesia	Argentina	Footwear	Consultation
3	WT/DS159	Czech	Hungary	Steel products from Czech	Consultation
4	WT/DS220	Guatemala	Chile	Certain agricultural products	Consultation
5	WT/DS226	Argentina	Chile	Mixtures of edible oils	Consultation
6	WT/DS230	Colombia	Chile	Sugar	Consultation
7	WT/DS214	EC	US	Wire rod and line pipe	Panel
8	WT/DS 248 - 249, 251-254, 258	EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil	US	Certain steel products	Panel
9	WT/DS260	US	EC	Certain steel products	Panel

Source: WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/9, 29 October 2002

Table 5: Other Disputes before DSB regarding Safeguard

	Dispute Number	Complainant	Defendant	Subject Products	Result
1	WT/DS235	Poland	Slovakia	Sugar	Mutually agreed solution
2	WT/DS228	Colombia	Chile	Sugar	Replaced by WT/DS 230 in dispute

Source: WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/9, 29 October 2002

developing countries and 4 were targeted at developed countries. It shows the significance of the agricultural sector both in developed and developing countries. In addition to agricultural products, declining steel industry in developed countries is also heavily involved in dispute. All the 5 cases concerning steel products are against developed countries, *inter alia*, 3 against US.

Compared with the fact that only 2 percent antidumping measures were ever disputed in the WTO panel proceedings, the frequency of dispute of safeguard measures is much higher. About a quarter of all safeguard measures ever imposed were formerly disputed under the DSU and subsequently found inconsistency with WTO rules.[21] The high possibility of disputes and the successful challenge is fairly worrisome, showing the incapability for Members to comply with the current rule, on the one hand, and the confusion incurred by the equivocal language of agreement *per se* and the misleading interpretations, on the other hand. Many loopholes and ambiguities in the current Safeguard Agreement should be further clarified and some disciplines should be further strengthened.

V. Dispute Settlement Practice on Safeguard Measures under the WTO

V.1 Procedural issues

V.1.1 Panel Request and Terms of Reference

The Panel's terms of reference is drawn up from the panel request, which provides a factual and legal basis for the establishment of panel and the ambit of its function. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint. Under the DSU, Article 6.2 states that the panel request "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem

21. Yong-Shik Lee, *Safeguard Measure: Why Are They Not Applied Consistently With the Rule?* Journal of World Trade, vol. 36(4), Netherlands: Kluwer Law International, 641-673, 2002.

clearly". Article 7 further states the standard terms of reference of the panel.[22]

The issue of terms of reference in the safeguard disputes to date covered 4 problems regarding the panel request, namely, modification or amendment to measures, reference to articles other than that stated in the panel request, legal basis for complaint, measures no longer in effect and the extended safeguard measures.

As for the modification or amendment to the measures after panel request, the Panel in the Argentina-Footwear referred to the past WTO dispute settlement precedent, e.g., EC-Bananas, Japan-Films and Australia-Leather. There, the Panels held that measures not listed in the panel request or legal acts that occur subsequent to the listed measure may properly fall within a panel's terms of reference if they are "directly related" to a measure listed in the panel request. The Panel thought that the failure to cover the subsequent modification within terms of reference would allow Members to keep "one step ahead of any WTO dispute settlement proceeding", and thereby escape review. The Panel further made clear that the subsequent modifications at issue "do not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint".[23] Therefore, the Panel concluded that the Argentina's modification of its provisional and definitive safeguard measures fell within its terms of reference.[24] This methodology was agreed by the Appellate Body in Chile-Agricultural Products. There, the Appellate Body held that amendment made after the panel was established did not

22. See WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1994
23. Supra note 15, Panel Report, paras. 24-41.
24. Ibid, paras. 45-46.

change the essence of the measure under challenge and concluded that the measure included the amendment at issue "because it amends Chile's price band system without changing its essence".[25] Furthermore, it is appropriate to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance".[26] In my view, the Panel and Appellate Body rules out some uncertainties incurred by Member's practice in "bad faith" to the integrity of the multilateral safeguard system.

In addition, in Argentina-Footwear case, the Panel reached a decision under Article 4.2(c) by relying upon the obligations under Safeguard Article 3, which was not stated in the panel request. On appeal, Argentina challenged Panel's approach and argued the Panel had exceeded its terms of reference under DUS Article 7. The Appellate Body noted that the Panel's reference to Article 3 was in conjunction with its findings under Article 4.2(c) and it did not come out with a legal finding regarding Article 3. Since Article 4.2(c) expressly incorporates the provisions of Article 3, the Appellate Body then ruled that the Panel did not exceed its terms of reference, in that it could reach a "objective assessment of the matter" only if it could refer to Article 3 other than those specifically stated in the Panel request. [27]

The issue of legal basis for complaint drew much attention from the disputing parties and DSB in the Korea-Diary and US-Lamb Meat. In both cases, the complainants only listed the articles involved in the dispute without elaboration, e.g., failed to state the specific sub-paragraph. By reference to the EC-Bananas, the Panel in Korea-Diary ruled

25. Supra note 19, Appellate Body Report, paras. 136-139.
26. Ibid, para. 143.
27. Supra note 15, Appellate Body Report, paras. 73-74.

that the panel request sufficiently identified the measures and thereby is "sufficiently detailed".[28] On appeal, the Appellate body reversed the Panel's ruling. By examining the text of DSU Article 6.2, the Appellate Body stated that "mere summarily identifying" the legal basis of complaint is not enough; rather, the identification must "present the problem clearly".[29] The Appellate Body pointed out that situation deviated case by case. "There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2".[30] Referring to EC-Computer Equipment case, the Appellate Body stated that "whether the ability of the respondent to defend itself was prejudiced" should be taken into account, if the panel request simply listed the provisions claimed to have been violated.[31] Considering the particular situation in this case, the Appellate Body denied Korea's appeal for its failure to demonstrate its ability to defend itself has been prejudiced.[32] The Panel in US-Lamb Meat followed this approach. There, the Panel further indicated that four different "attendant circumstances" demonstrated that the complainants had complied with the minimum requirement of DSU 6.2, albeit they had only listed the relevant articles instead of specific sub-paragraphs.[33]

28. Supra note 14, Panel Report, paras. 7.4-7.7.
29. Supra note 14, Appellate Body Report, para. 120.
30. Ibid, para. 124.
31. Supra note 14, Appellate Body Report, para. 126-127.
32. Ibid, para. 131.

Regarding the measures no longer in effect, the Panel in Chile-Agricultural Products referred to DSU Article 19.1 and found that it could make findings regarding the consistency of an expired provisional safeguard measure, if it considers that the making of such findings is necessary "to secure a positive solution" to the dispute.[34] As for the extended safeguard measures, the Panel concluded that "the extensions are not distinct measures, but merely continuations in time of the definitive safeguard measures", and thereby found that the definitive measure at issue were not terminated. In conclusion, the Panel ruled that both the provisional measures no longer in effect and the extension of the definitive safeguard measure were in its terms of reference, even though the extension is not a subject of consultation.[35]

V.1.2 Standard of Review

In the dispute concerning trade remedy measures, the standard of review for the Panel refers to the degree of scrutiny applied by the Panel to the findings and conclusions of the national investigation authorities. In other words, it means the level of deference that Panel shall give to the national authority investigations. Unlike the Antidumping Agreement, which embodies a specific provision setting out a special standard of review provision for disputes arising under the Agreement,[36] the Safeguard Agreement is silent as to the appropriate standard of review. The Appellate Body clarified it in the Korea-Diary, Argentina-Footwear and further elaborated it in the US-Lamb Meat.

Noting the absence of the specific provision on standard of review in the Safeguard Agreement, the Panel referred to DSU Article 11, which provides:

33. Supra note 17, Panel Report, paras. 5.32-5.47.
34. Supra note 19, Panel Report, paras. 7.112
35. Ibid, paras. 7.116-7.119.

"a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[37]

The Panel properly stated that it should neither conduct a *de novo* review of, nor fully defer to the national authority investigation. The standard of review of the Panel is somewhere in between. In order to make an "objective assessment", the Panel must conduct "an examination of whether the national authority had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards…whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea".[38] The Panel and Appellate Body in Argentina-Footwear and US-Wheat Gluten case shared a similar view.[39] Later, the standard of review was elaborated by the Appellate Body in the US-Lamb Meat. The Appellate Body explained, "the Panel's objective assessment under

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36. Article 17.6 of Antidumping Agreement states:
In examining the matter referred to in paragraph 5:
(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

37. WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, 1994.

38. Supra note 14, Panel Report, para. 7.30.

39. Supra note 15, Appellate Report, paras. 116-121; and supra note 16, Panel Report, para. 8.4.

Article 4.2(a) of the Safeguards Agreement involves a formal aspect and a substantive aspect. The formal aspect is whether the competent authorities have evaluated all relevant factors. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination…. including an evaluation of the 'bearing', or the 'influence' or 'effect' or 'impact' that the relevant factors have on the 'situation of the domestic industry'".[40] It stated further that a panel can assess the adequacy of a competent authorities' explanation "only if the panel critically examines that explanation, in depth, and in the light of the facts before the Panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."[41] It seems that the national authority has to examine all the alternative reasoning and prove the appropriateness of its own. In addition, all of these reasoning and evaluation should be embodied in the investigation report.

Generally, disputed issues consist of legal issues and factual issues. Panel review legal issues *de novo*. For example, Panel interprets the WTO rules at its full discretion regardless of the determination made by the national authority of Members. As to the factual issue, Panel accords greater deference to the national authority determination. In this sense, the Panel will examine the adequacy of reasoning and the scope of the facts in the domestic investigation.

40. Supra note 17, Appellate Body Report, paras. 103-104.
41. Supra note 17, Appellate Body Report, para. 106.

Nevertheless, what are appropriate criteria for evaluation of the level of adequacy? Though the Appellate Body's ruling in US-Lamb Meat gives some reference, it is still not clear enough. The evaluation of adequacy reasoning is a matter of subjectivity. The different reasoning can be drawn from the different perspective. Some of them may support the determination, while some may not. Which reasoning is sounder? It will be difficult both for the national authority and for the Panel.

With regard to the scope of facts, Panel in Korea-Diary case stated that Panels should base their examination on the investigating authority's determination and all the evidence that the investigating authority gathered and reflected in the investigating report of the final determination.[42] It was upheld by the Appellate Body. However, shall the national authority examine the evidence not presented to it by interested parties in the investigation? The Panel in the US-Wheat Gluten case ruled it is not national authority's obligation.[43] The Appellate Body reversed the Panel's ruling and stated authority was precluded from "remaining passive in the face of possible shortcomings in the evidence submitted" and must actively seek out pertinent information.[44] The problem of information seeking thereby arose. What if the pertinent data is not available? In some instances, out of question, such a requirement would be both impractical and unrealistic. According to the Appellate Body ruling in US-Lamb Meat, the data before the competent authorities must be sufficiently representative. What is sufficient in any given case will depend on the particularities of the situation at issue.[45]

Moreover, the degree of deference to the domestic investigation is consistent with

42. Supra note 14, Panel Report, para. 7.30.
43. Supra note 16, Panel Report, para. 8.6.
44. Supra note 16, Appellate Body Report, para. 55
45. Supra note 17, Appellate Body Report, para. 132.

Members' stance towards the safeguard measure. If Members regard that safeguard measure should be further disciplined, less deference will be given to the domestic investigation. By contrast, If Members think that more incentives should be provided to encourage the use of the safeguards, greater deference seems necessary. Since the WTO Members themselves are facing the dilemma of the choice between "tightening the discipline" and "relaxing the discipline", a specific and strict standard of review may cause problems as well.

V.2. Substantive issues

V.2.1 Relationship between GATT Article XIX and Safeguard Agreement

The continuing applicability of GATT Article XIX was challenged by Uruguay Round Safeguard Agreement since its coming into force. The Safeguard Agreement states in its preamble that Members recognize "the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX….".[46] Then, Article 1 provides that "the Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994".[47] In addition, Article 10 requires Members to terminate all existing safeguard measures taken pursuant to Article XIX of GATT 1947 no later than eight years after their application or five years after the WTO agreement takes effect, which ever comes later.[48] Article 11.1(a) emphasizes that Members "shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this

46. WTO, *Safeguard Agreement*, 1994.
47. Ibid.
48. Ibid.

Agreement".[49] Practically, no language in Safeguard Agreement defines the legal relationship between GATT Article XIX and Safeguard Agreement.

The issue was raised in three WTO safeguard cases, i.e., Argentina-Footwear, Korea-Dairy and US-Lamb Meat, and was thereby addressed by Appellate Body. In both the Argentina-Footwear and Korea-Dairy, the Panels concluded that safeguard measures that meet the requirements of the Safeguard Agreement are necessarily consistent with the requirements GATT Article XIX, therefore, GATT Article XIX does not add any independent obligation to Members.[50] However, the Appellate Body overruled the Panels' decision. In reaching the conclusion, the Appellate Body first referred to Article II of Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement), which provides the agreements and associated legal instruments included in Annexes 1, 2 and 3…. are integral parts of this Agreement, binding on all Members".[51] By this provision, the Article XIX of GATT 1994 and the Safeguard Agreement are "integral parts" of the WTO Agreement and "binding on all Members". "And, an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to all the relevant provisions of these two equally binding agreements".[52] Then, the Appellate Bodies moved to Article 1 and Article 11.1(a) of the Safeguard Agreement and found that the literal language thereof suggests "any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the

49. Ibid.
50. Supra note 15, Panel Report paras.8.50-57, 8.69.
51. WTO, Marrakesh Agreement Establishing the World Trade Organization, 1994.
52. Supra note 15, Appellate Body Report, paras.79-81; and supra note 14, Appellate Body Report, paras.74-77.

GATT 1994".[53] Later in the US-Lamb Meat case, the Panel followed the Appellate Body decision in the Argentina-Footwear and Korea-Dairy cases.[54]

It is clear now that the Safeguard Agreement does not entirely replace GATT Article XIX. Instead, the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions.

V.2.2 Unforeseen Developments

The "unforeseen developments" requirement stated in GATT Article XIX has always been a critical controversy since its existence. The issue was first raised in the US-Hatter's Fur in the early GATT period and its legal implication was reviewed several times by WTO Panels and Appellate Bodies.

With reference to the GATT Article XIX 1(a), [55]

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)"

53. Supra note 15, Appellate Body Report, paras.82-84; and supra note 14, Appellate Body Report, para.78.
54. See supra note 17, Panel Report para.7.11.

55. WTO, *Safeguard Agreement*, 1994

Also as Article 2.1 of the Safeguard Agreement states:[56]

"A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted)"

In comparing the language in these two paragraphs, the requirement of "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions", embodied by GATT Article XIX 1(a), was omitted from the text of Safeguard Agreement. Does it mean that the "unforeseen developments" requirement would not have legal effect since the entry into force of WTO Agreement? Alternatively, if it is still applicable, what does it imply? How will it be applied and influence the safeguard system?

Based on the conclusion that the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively and all the relevant provisions should be given the meaning, the Appellate Body in Argentina-Footwear and Korea-Dairy cases ruled that "unforeseen developments" does have meaning. In their view, if the negotiators "had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Safeguard Agreement. They did not."[57]

By virtue of this inference, the Appellate Body began to interpret the meaning of "unforeseen developments". Having noted that the dictionary meaning for "unforeseen" is synonymous with "unexpected", the Appellate Body concluded that the ordinary

56. Ibid.

57. Supra note 15, Appellate Body Report, para. 88; and supra note 14, Appellate Body Report, para. 82.

meaning of the phrase "as a result of unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected".[58] While the Appellate Body does not view the first clause of GATT Article XIX "as independent conditions for the application of a safeguard measure additional to the conditions set forth in the second clause of that paragraph",[59] it does believe that "the first clause describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994".[60]

However, it remains unclear that how the "independent condition" distinct from "factual circumstances". The Panel in US-Lamb Meat cases regarded the latter implied a lesser threshold than the former. Based on the previous Appellate Body decisions, the Panel further made a distinction between "unforeseen" and "unforeseeable", such that the safeguard determination must be specific to the factual circumstances of the particular case, that is, what was and was not actually "foreseen", rather than what might or might not have been theoretically "foreseeable".[61] As to the coverage of "unforeseen developments", the Panel refers to the GATT US-Hatter's Fur case, in which the Working Party focused on the scale of the particular change in fashion and its duration as well as the degree of its impact on the competitive situation. With respect to when and where the "unforeseen development" should be demonstrated, the Appellate Body see a

58. Supra note 15, Appellate Body Report, para. 91; and supra note 14, Appellate Body Report, para. 84.
59. Supra note 15, Appellate Body Report, para. 92; and supra note 14, Appellate Body Report, para. 85.
60. Ibid.

61. Supra note 17, Panel Report, paras. 7.21-7.22.

logical connection between the conditions set forth in Article XIX and the "circumstances", such as "unforeseen developments". The Appellate Body then ruled that the "logical connection" "dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities".[62] Consequently, the "unforeseen development" as a "factual circumstances" must be demonstrated in the published report before the safeguard measure is applied. In finding the US failed to meet the demonstration requirement, the Appellate Body executed judicial economy and did not examine what is the standard to establish and how to evaluate "unforeseen developments".

The Panel in Argentina-Peaches further clarified that the factual demonstration of the existence of "unforeseen developments" was a "prerequisite" for and should be made in the competent authorities' report before application of a safeguard measure.[63] Yet, It does not agree with the Appellate Body's interpretation in Argentina-Footwear that the increased quantities of imports should have been "unforeseen" or "unexpected". It held that the link between "imports in such increased quantities and under such conditions" and the "unforeseen developments", under which the former was resulted from the latter, meant that they were two distinct things and must not be equated. Based on the above ruling, the Panel later stated that the increase in imports, or the way in which they were being imported, was unforeseen does not constitute a demonstration of the existence of "unforeseen developments."[64] As to the factors constituting "unforeseen developments", the Panel said the supporting reasoning should be provided first, and then the specific developments should be "unforeseen" at time the relevant obligation was negotiated,

62. Supra note 17, Appellate Body Report, para. 72.
63. Supra note 20, Panel Report, paras. 7.13-7.14.

64. Supra note 20, Panel Report, paras. 7.17-7.24.

which were required to be demonstrated in the report.[65] In my view, the Panel's approach in interpretation of the requirement is based on the original literal meaning of the treaty and thereby acceptable in this sense. But, how the Appellate Body will rule on it remains an unknown question.

The dispute settlement practice regarding safeguards to date suggests that the incorporation of the "unforeseen development" requirement into the current safeguard system is necessary and consistent with the WTO rules. However, the purpose of the Safeguard Agreement is to clarify and reinforce the GATT safeguard disciplines, especially those in Article XIX. Resurrecting the old clause in Article XIX as a legal requirement would undermine the clarity and discourage the use of safeguards.[66]

Firstly, as shown in the dispute settlement, the Panel and Appellate Body interpreted "unforeseen" as "unexpected" and considered the distinction between "unforeseen" and "unforeseeable" is important, in that the former term implies a lesser threshold than the latter one. It implies that even though the relevant development is foreseeable, the Member's failure to foresee it is justifiable. This interpretation opens a very dangerous door to encourage Members' inadvertence in application of safeguard measures. Besides, the Panel and Appellate Body's explanation of the distinction between "unforeseen" and "unforeseeable" does not make much sense. In order to explain the difference, the Panel and Appellate Body refers to the Working Party's ruling in US-Hatter's Fur, which states: "the term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff

65. Supra note 20, Panel Report, paras. 7.24-7.30.

66. Yong-Shik Lee, *Destabilization of the Discipline on Safeguards?: Inherent Problems with the Continuing Application of Article XIX after the Settlement of the Agreement*

of Safeguards, Journal of World Trade, vol. 35(6), 1235-1346, Netherlands: Kluwer Law International, 2001.

concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[67] The interpretation is quite controversial. It seems that the Working Party actually apply the criteria of foreseeability in that case. Here the Working Party interpreted the "unforeseen development" must occur after the negotiation of relevant tariff concession. What if the tariff concession was negotiated in Kennedy Round? Based on this interpretation, it may be justifiable for Members to claim any development as "unforeseen" after a lapse of 35 years since the conclusion of the negotiation. What's more, as a matter of subjective requirement, it is very difficult to judge the degree and adequacy of the "unforeseen developments" on an objective basis, especially when the standard of which remain unknown in the dispute settlement practice. In general, the equivocal wording of "unforeseen developments" and the ambiguous interpretation leads to confusion, resulting in the fact that this requirement has been one of the most frequently disputed issues under the WTO DSU.

Secondly, the Appellate Body's reasoning is questionable. In their view, if the negotiators "had intended to expressly omit this clause, the Uruguay Round negotiators would and could have said so in the Safeguard Agreement. They did not."[68] Insofar as I can see, if the negotiators had intended to keep "unforeseen developments" in effect, they would and could have said so in the Safeguard Agreement, as they did in the Antidumping Agreement.[69] But they did not. The approach may be not so sound. However, if we look into the negotiation history of the Safeguard Agreement, the earlier

67. GATT documents, *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff*

Concession under the Terms of Article XIX, ("Hatters' Fur"), GATT/CP/106, 22 October 1951.

68. Supra note 57.

draft of the Safeguard Agreement containing the clause of "unforeseen developments" was rejected by major trading Members.[70] It reveals the fact that the omission of the clause was intentional. In this sense, the Panel interpretation in Argentina-Footwear and Korea-Diary cases is consistent with the negotiating history.

Thirdly, going back to the most fundamental question, why is safeguard necessary in the multilateral trading system? As explained in the earlier section, for one thing, safeguard is emergency protection against fair trade practice for restoration of competitiveness and orderly contraction; for another thing, it serves as a safety valve. As emergency protection against fair trade practice, it must be strictly disciplined. As safety valve, Members shall encourage its use in alternative for unilateral protective practices, such as ERAs and antidumping, to further trade liberalization. Is the revival of the "unforeseen developments" clause helpful to these two requirements? The facts suggest that deeper ambiguity incurred by this clause causes destructive confusions, which would undermine the integrity and development of the safeguard system.

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69. Article 1 of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement" states: An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. See WTO, Antidumping Agreement, 1994.

70. Indeed, the inclusion of an "unforeseen" test in the June 1989 negotiating draft of the Safeguard Agreement was rejected in the July 1990 negotiating draft. Ironically, the Members rejected the 1989 draft included EC, the complainant arguing for the effectiveness of "unforeseen developments" in both Argentina-Footwear and Korea-Diary cases. See Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, vol. 2: Commentary, Table 6, p.1791, Boston: Kluwer Law.

V.2.3 Applicability of Article XIII of GATT 1994

Article XIII (See Appendix 3) of GATT 1994 provides the non-discriminatory administration of quantitative restrictions.[71] Safeguard Agreement Article 5 also deals with some of the issues regarding quantitative restrictions that are found in Article XIII of GATT 1994, i.e., level of quantitative restriction[72] and methodologies of quota allocation[73]. However, Safeguard Agreement Article 5 does not cover the administration of tariff quota, which falls within the ambit of Article XIII: 5 of GATT 1994. Can Article XIII: 5 of GATT 1994 apply to Safeguard Agreement? This issue became prominent in US-Line Pipe case.

There, Korea argued that the safeguard measure of the US, as a tariff quota, was subject to the requirement of GATT Article XIII, while the US opposed. The US referred to Appellate Body Report in Argentina-Footwear and argued that Safeguard Agreement incorporates Article XIX, not Article XIII.[74] The Panel first made clear that the safeguard measure applied by the US was in the form of tariff quota an Article XIII "expressly applies to tariff quota by virtue of Article XIII: 5".[75] Examining the Appellate Body's

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71. See WTO, General Agreement on Tariffs and Trade, 1994.
72. Safeguard Agreement Article 5.1 provides, "A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives".
73. Safeguard Agreement Article 5.2(a) provides, "In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product".
74. Supra note 18, Panel Report, paras. 7.25-7.27.

approach in Argentina-Footwear, the Panel noted that the Appellate Body found the GATT and Safeguard Agreement are integral part of the WTO Agreement and nothing in its report suggests that Article XIX applies in the context of safeguard measures to the exclusion of other GATT provisions. Besides, by reference to the Appellate Body statement in EC-Bananas, the panel found that nothing in the Safeguard Agreement authorizes nullity of Article XIII.[76] As for the argument of express omission of provision governing tariff quota in the text of Safeguard Agreement, the Panel applied the same logic in Argentina-Footwear Appellate Body proceeding, holding that all of the relevant terms of the WTO Agreement should be given the meaning.[77] The Panel also ruled that the effectiveness of Article XIII is not eroded by some duplication in Article XIII and Safeguard Agreement.[78] Furthermore, the Panel rebutted the policy-based argument of the US. The Panel said, as a matter of policy, "non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement". In consequence, the Panel concluded that the GATT Article XIII is applicable to safeguard measure.[79]

Under the Panel's ruling, Members must ensure that their safeguard measures taken in the form of quantitative restriction, either quota or tariff quota, must comply with the requirement of GATT Article XIII. This ruling has not been appealed until now. Whether it will be upheld by the panel and the Appellate Body in the future disputes remains to be seen. In economic sense, however, tariff quota has less adverse effects to

75. Ibid, para. 7.30.
76. Ibid, paras. 7.31-7.38.
77. Ibid, paras. 7.41-7.44.
78. Ibid, paras. 7.45-7.47.
79. Ibid, para. 7.49.

international trade and the total social welfare, compared with strict quantitative restrictions. In addition, taking into account the facts of the overwhelming application of ERAs and antidumping measures during the pre-Uruguay period, the Uruguay Round negotiators seemed to intentionally create the incentive for the use of tariff quota as safeguard instead of strict quantitative restriction and ERAs, with a view to reducing the social welfare loss and mitigating the instability. Therefore, putting the tariff quota under more stringent discipline actually undermines the Uruguay Round negotiation results.

V.2.4 Increased Imports

For a safeguard measure to be imposed, Members must demonstrate the existence of increased imports first. Article 2.1 of the Safeguard Agreement states, a safeguard measure can be applied only if "such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products". Article 4.2(a) also incorporates "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" into the relevant factors that should be evaluated in the investigation.[80]

Since it is one of the prerequisites for imposition of a safeguard measure, the issue of "increased imports" has several opportunities to be scrutinized by the panels and Appellate Body.

The issue first arose in the dispute of Argentina-Footwear, the Panel found and the Appellate Body affirmed that Argentina's "end-point-to-end-point comparison"

80. WTO, *Safeguard Agreement*, 1994.

ignoring the intervening declining trend over the investigation period is inconsistent with Article 2.1. "The competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a)".[81] In interpreting "products is being imported…. in such increased quantities", however, the Appellate Body opined that the Panel's interpretation is "somewhat lacking". In this respect, the Appellate Body did not think Argentina's examination of the import trend in five-year historical period was reasonable. Instead, they believe that "recent imports" should be examined, and not simply trends in imports during several-year period or just any increased quantities of imports would suffice. "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".[82] This ruling was adopted by the panels in the subsequent cases. Later, the Appellate Body in US-Lamb Meat further indicated "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period". "The period of investigation must, of course, be sufficiently long to allow appropriate conclusions to be drawn regarding the state of the domestic industry".[83] The Panel in Argentina-Peaches also thought that "a recent and sharp increase in imports is a necessary, but not a sufficient, condition to satisfy Article 2.1 and Article XIX:1(a)," and "this increase must be qualitative as well as quantitative".[84] "The increased import in the most recent past should not be considered separately from the overall trends during the

81. Supra note 15, Panel Report, paras.153-159; Appellate Body Report para. 129.
82. Supra note 15, Appellate Body Report, paras. 130-131.
83. Supra note 17, Appellate Body Report, para. 138.
84. Supra note 20, Panel Report, paras. 7.53-7.55.

period of analysis."[85] As for the period for the investigation, the Panel said that there was no provision establishing a minimum period or any required "based period" for the determination of the import increase.[86]

In respect of the methodology the national authority applied in investigation, noting the relevant WTO provisions contain no requirement as to how long the period of investigation should be, nor do they suggest how a period should be broken down, the Panel in US-Line Pipe gave national authority the discretion. Particularly in this case, the USITC compared the first-half 1999 data with first-half 1998 data, rather than to the second semester of 1998. This methodology was questioned by Korea in the Panel proceeding. However, Panel thought, "the word 'recent' – which was used by the Appellate Body in interpreting the phrase 'is being imported' – implies some form of retrospective analysis. It does not imply an analysis of the conditions immediately preceding the authority's decision. Nor does it imply that the analysis must focus exclusively on conditions at the very end of the period of investigation". Therefore, in Panel's view, USITC's methodology of comparing the data of the first-half of both years is unbiased and objective.[87] Reviewing the existence of absolute or relative import increase, the Panel noted the wording of "increased imports" instead of "increasing imports" in Article 2.1. The Panel considered the use of the word "increased" implied that "there is no need for a determination that imports are presently still increasing. Rather, imports could have 'increased' in the recent past, but not necessarily be increasing up to the end of the period of investigation or immediately preceding the

85. Supra note 20, Panel Report, paras. 7.64-7.65.
86. Supra note 20, Panel Report, paras. 7.50.
87. Supra note 18, Panel Report, paras. 7.204-7.205.

determination". "There can still be a 'recent' increase even if that increase has ceased prior to the date of the determination, provided imports remain at a sharply increased level."[88]

The Panel's ruling in US-Line Pipe gives much deference to the national authority's investigation. Under this ruling, Members may adopt their own methodology in investigation, as long as their application permits an adequate, reasoned and reasonable support for the determination with respect to increased imports. Whether it is adequate or reasoned is still up to the subjective judgment. Furthermore, there is no provision regarding the length and timing of the period under investigation, nor the way in which the period can be broken down. Must the period selected be continuous? Can it be discrete? These may leave Members room for data manipulation. For example, if the national authority just arbitrarily selects so called "representative period" which is not reasonably long enough for an objective assessment, in which import increases due to some big projects and it also happens to increase "recently". Albeit for the fact that import generally shows a decreasing trend over a longer period, safeguard may be justifiable under this ruling.

According to Panel's conclusion in US-Line Pipe, though the imports cease increase or even decrease before the determination, the Members may still be qualified to apply safeguard measure, so long as they can demonstrated recent import increase and serious injury or threat thereof caused by the import increase. The question is how recent it should be. Should an import increase stops 6 months before the determination be considered as "recent"? Then how about one year, or one month? What's more, the cease

88. Ibid, paras. 7.207-7.208.

of import increase may be attributed to a long-term economic recession, and imports may continue decreasing during a long period in the future. In that case, it may be not necessary to impose safeguard.

V.2.5 Domestic Industry

Domestic industry is a critical issue in the determination of the serious injury and threat thereof. The Safeguard Agreement Article 4.1(c) states, "in determining injury or threat thereof, a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".[89] So far, only one case concerning the definition of "domestic industry" has been under the scrutiny of the WTO Appellate Body, that is, US-Lamb Meat.

In US-Lamb Meat, the US investigation authority, USITC, included packers and breakers of lamb meat and growers and feeders of live lambs in the investigation, in that there is "a continuous line of production from the raw to the processed products", and "a substantial coincidence of economic interest between the growers and the processors". Australia and New Zealand challenged this definition before the DSB.[90] By examining the ordinary meaning of Article 4.1(c), the Panel found that "a given enterprise can be considered as a producer of only those goods that it actually makes. By this logic, a producer that makes primary or intermediate goods used in the production of further processed goods must be considered a producer of the primary or intermediate good,

89. WTO, *Safeguard Agreement*, 1994.
90. Supra note 17, Panel Report, paras. 7.48-7.49.

rather than of the processed good that it does not itself ever produce".[91] It then pointed out that the phrase "producers as a whole" provides "a quantitative benchmark for the proportion of producers….which a safeguards investigation has to cover", while not broadens the scope of domestic industry by including upstream products.[92] Given the similarity in the definitions of "domestic industry", the Panel referred to the previous GATT cases in the antidumping and countervailing context, namely, US-Wine and Grape, Canada-Beef and New Zealand-Transformers, and then rejected the US's reasoning for a broader definition of domestic industry.[93] As to US argument that there is value added at different stage of processing, the Panel found that the benefit of safeguard measure in respect of finished products can also be passed back to the input producers, if the serious injury caused by increased imports can be felt by the input producers.[94] Reviewing the negotiating history, the Panel also found that provision remained unchanged in the Uruguay negotiation, in that the negotiating parties opposed a try to broaden the meaning of domestic industry.[95] In light of the above reasoning, the Panel ruled that USITC acted inconsistently with the Article 4.1(c) by improperly broadening the definition of domestic industry. On appeal, the Appellate Body upheld most of the Panel's decision[96] and considered, "under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products. If an

91. Ibid, para. 7.70.
92. Ibid, para. 7.74.
93. Ibid, paras. 7.101-7.104.
94. Ibid, paras. 7.105-7.108.
95. Ibid, paras. 7.110-7.114.
96. In the panel proceeding, by reference to the GATT Canada-Beef case, the panel regarded separability of production processes as a key factor in identifying the domestic producers of a like product and then examined this factor. The Appellate Body cautioned the Panel against the examination and stressed that the focus should be on the identification of products. See supra note 17, Panel Report, para. 100; and Appellate Body Report, paras. 92-94.

input product and an end-product are not 'like' or 'directly competitive', then it is irrelevant, under the Agreement on Safeguards, that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products".[97] The Appellate Body concluded further that the "focus must…. be on the identification of the products, and their 'like or directly competitive' relationship, and not on the processes by which those products are produced".[98] In the later dispute of Chile-Agricultural Products, the Panel followed this Approach.

The Appellate Body in this case ruled out the input producer and the processors from the scope of the domestic industry of the like and directly competitive products. This ruling successfully reduces some uncertainties in Members' injury investigation. Nonetheless, there are still some ambiguities existing in the Article 4.1(c). According to the text, domestic industry can mean those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. First, how much proportion can be regarded as "major proportion"? So far, there is no clear answer. It may be also a matter of subjective judgment. Second, does "like or directly competitive products" mean the relation of "either one or the other" or "either one or the other or both"? By the conclusion the Appellate Body made in US-Line Pipe with respect to injury test, both interpretations make sense. Moving one step further on that ruling, the situation of the "like" or "directly competitive products" indicates

97. Supra note 17, Appellate Body Report, para. 90.
98. Ibid, para. 94.

different levels of injury, hence the different extent of safeguard measures. As such, national investigating authority has the discretion to choose the scope of investigation. If so, uncertainties thereby incurred will seriously undermine the current safeguard system.

V.2.6 Serious Injury and Threat Thereof

Safeguard measures are applied to remedy the serious injury and threat thereof that increased imports bring about to the domestic industry. Therefore, the injury test, i.e., the investigation and determination of serious injury and threat thereof, is a core step for imposing safeguard measure. Correspondingly, the issue of serious injury and threat thereof has been the most acrimonious and frequently disputed topic throughout the GATT and WTO era. All the 6 disputes addressed by WTO DSB cover this issue.

Article 2.1 in Safeguard Agreement mandates an injury test for safeguard measure. Article 4.1(a) and (b) give the definition of serious injury and threat of serious injury respectively. There, “serious injury” is understood to mean a significant overall impairment in the position of a domestic industry, while “threat of serious injury” is defined as serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. The determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. Further, Article 4.2(a) sets forth the factors that should be investigated in the injury determination It provides, “In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the

rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment".[99]

Four legal aspects concerning injury test were discussed in the panel and Appellate Body proceeding, namely, examination of all relevant factors, requirement of serious injury and threat thereof, methodology applied in domestic injury investigation, representativeness of data.

As to the examination of the relevant factors, the Panel in Korea-Diary opined that it is mandatory for Members to evaluate the relevance of all of the listed factors in Article 4.2(a), although some factors may be dismissed later as irrelevant to the serious injury under investigation.[100] The Panel and Appellate Body in Argentina-Footwear adopted the same interpretation. The Appellate Body there further stated, "Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned".[101] The Panel in Argentina-Peaches followed the same methodology.[102] In US-Wheat Gluten, the Appellate Body indicated that national authorities should actively seek out pertinent information and must fully investigate other relevant factors, not only those clearly raised before them as relevant by the interested parties in the investigation. Yet, the national authorities do not have an "open-ended and unlimited" duty to investigate all available facts.[103]

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99. WTO, Safeguard Agreement, 1994.
100. See supra note 14, Panel Report, para. 7.55.
101. Supra note 15, Appellate Body Report, para. 136.

The Appellate Body in Argentina-Footwear had the first chance to elaborate the requirement of serious injury. Under Safeguard Agreement Article 4.1(a), the Appellate Body asserted that "it is only when the overall position of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is 'a significant overall impairment' in the position of that industry".[104] In US-Wheat Gluten, the Panel considered that "any determination of serious injury must pertain to the recent past". "It is essential that current serious injury is found to exist, up to and including the very end of the period of investigation". It further clarified that "although certain factors were not declining, the overall picture could nonetheless still demonstrate 'significant overall impairment' of the industry".[105] Later the Appellate Body in US-Lamb Meat noted that the standard of serious injury is a very high one in contrast with the standard in antidumping and countervailing case.[106] Also in that case, regarding threat of serious injury, the Appellate Body noted that it is the "serious injury" which as not yet occurred, but "remains a future event whose actual materialization cannot, in fact, be assured with certainty". "There must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future". "As a matter of fact, it must manifest that the domestic industry is one the brink of suffering serious injury".[107] Therefore, the determination of threat of serious injury is "future oriented' but "fact-based". "Evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry".

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102. Supra note 20, Panel Report, para. 7.96.
103. Supra note 16, Appellate Body Report, paras. 52-55. Also see discussion in the "Standard of Review", Part V.1.2 of this Article.
104. Supra note 15, Appellate Body Report, para. 139.
105. Supra note 16, Panel Report, paras. 8.81-8.85.
106. Supra note17, Appellate Body Report, para. 124.
107. Ibid, para. 125.

However, it should be considered in the context of entire investigating period, as Appellate Body stated, "the real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation".[108] The Appellate Body in US-Line Pipe furthered this interpretation. There, they noted that the two notions are different and distinct. Present serious injury is often preceded in time by and is something beyond a threat thereof. "Threat of serious injury" serves as a lower threshold for establishing the right to apply a safeguard measure, meaning that a safeguard measure may be applied so long as there is a determination of at least an existence of "threat".[109] The Panel in Argentina-Peaches further established two standards for the determination of a threat of serious injury: one regarding the "capacity" of the imports to cause injury and the other regarding the "sensitivity" of the domestic market. Besides, the Panel's finding also showes the significance of the requirement for the investigating authorities to address the alternative explanations in their reasoning, especially when the data are ambiguous and an alternative explanation has been offered.[110]

Two types of methodology applied by the national authority in investigation has fallen under the scrutiny of the Panel. In Korea-Diary, the Panel stated that an appropriate market segment analysis has two options. One is that the national authority considers each factor for all segments. Otherwise, if it decides to examine it for only one or some segment(s), it must provide an explanation of how the segment(s) chosen is (are)

108. Ibid, paras. 136-138.
109. Supra note 18, Appellate Report, paras. 165-170.
110. Supra note 20, Panel Report, para. 7.105-7.116.

objectively representative of the whole industry.[111] In Argentina-Footwear, the Panel reviewed the end-point-to-end-point comparisons of the changes in the situation of the industry applied by Argentina, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors as required.[112]

Representativeness of the data collected and evaluated determines the accuracy of the injury investigation. In US-Wheat Gluten, the Panel recognized that complete data coverage may not always be possible and is not required, in that there may be circumstances in a particular case that do not allow an investigating authority to obtain such coverage.[113] Noting that Article 4.2(a) mandates Members to evaluate all relevant factors of an "objective and quantifiable" nature, the Appellate Body in US-Lamb Meat ruled that "the data evaluated by the competent authorities must be 'sufficiently representative' of the 'domestic industry' to allow determinations to be made about that industry". How sufficient? It depends on the particularities of the "domestic industry" at issue in each case.[114]

Although the Panel and Appellate Body has clarified many ambiguities existing in the Safeguard Agreement, some problems remain unclear and some become even more confusing.

Firstly, it is clear now that Members are obliged to evaluate all the relevant factors, no matter it is listed in the Article 4.2(a) or not. The investigating authorities have to seek out the relevant information. But, it's not an "open-ended and unlimited" duty to investigating authorities. Then, what is the extent for the investigating authorities to meet

111. Supra note 14, Panel Report, para. 8.217.
112. Supra note 15, Panel Report, para. 7.58.
113. Supra note 16, Panel Report, para. 8.54.
114. Supra note 17, Appellate Report, paras. 128-132.

this duty? Merely declaring the obligation without elaboration or explanation can only add to the confusion.

Secondly, it is questionable that Members is justified to impose a safeguard measure without distinguishing the effect of serious injury and threat thereof, so long as threat of serious injury exists. “Serious injury” and “threat of serious injury” represent different level of injury and different factual situation of the domestic industry. According to Article 3.1 and Article 4.2(c), findings and reasoned conclusions reached on all pertinent issues of fact and law, including detailed analysis, should be shown in the published report. In this sense, is it sound to impose safeguard measure without identifying the factual situation of the domestic industry? On the other hand, I also agree that existence of threat of serious injury gives Members lower threshold for the application of safeguard measures. However, the relevant factors examined may have different effect. Some may cause serious injury, while some may lead to threat of serious injury. Can threat of serious injury caused by factor A be attributed to factor B that actually leads to serious injury? If it can, then how to guarantee the appropriateness of the safeguard measure? If it cannot, the distinction of the effect of “serious injury” and “threat of serious injury” should be demonstrated.

Thirdly, in Korea-Diary, the Panel considered justifiable Korea’s practice of excluding certain products from the scope of application of the measure that were nevertheless included in the calculation of the increase in imports, in that excluded products account for a very minor portion of the subject imports. The exclusion may be justifiable, but lack of legal basis. There is no provision authorizes Member to exclude certain products from application of safeguard measure while include them in the imports

calculation. In this sense, a standard of "*de miminis*" level of importation and a provision authorizing this kind of exclusion may be necessary in Safeguard Agreement.

The selective time period of investigation is also troublesome. Like in the investigation of increased imports, it may also lead to data manipulation. Members may choose the time period that can be easy for them to impose a safeguard measure.

Data collection is another problem. Panel and Appellate Body have recognized this problem and only required "sufficient representative" data. In order to let Members have a reference on the issue of "sufficiency", a standard should be established as well.

Lastly, even though it has been noted that the serious injury is 'a significant overall impairment' in the position of that industry, and the injury level is higher than "material injury", how to measure the "overall impairment" and how much difference between "serious injury" and "material injury" remain unclear. Maybe it cannot be quantified, but there must be some practical standard at least.

V.2.7 Causal Link and Non-Attribution

Article 4.2(b) sets forth the requirement of causal link and non-attribution in the injury investigation. It states, "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports".[115] Similar requirement can be found in the Article 2.1, which

115. WTO, Safeguard Agreement, 1994

provides, "….such products is being imported….and under such conditions as to cause or threaten to cause serious injury to domestic industry….".[116]

Three requirements are embodied in the abovementioned provisions, namely, causal link, condition of competition and non-attribution, and were considered by the WTO Panels and Appellate Body.

The Panel in Argentina-Footwear had the first chance to review these requirements. The Panel developed and later affirmed by Appellate Body a three-step approach in the analysis of causation. As the Panel stated, it would consider the adequacy of Argentina's causation analysis on the basis of "(a) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (b) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analyzed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (c) whether other relevant factors have been analyzed and whether it is established that injury caused by factors other than imports has not been attributed to imports".[117] This approach has been followed by the subsequent Panels and Appellate Body in dispute settlement.

As regards the requirement of causation, the Panel and the Appellate Body in Argentina-Footwear considered the relationship between the movements in imports and injury factors as central to a causation analysis and determination.[118] In US-Wheat Gluten, the Panel came out with the statement that increased imports alone cause serious injury.[119] Yet, the Appellate Body reversed this ruling and interpreted "causal link" as "a

116. WTO, General Agreement on Tariffs and Trade, 1994.
117. Supra note 15, Panel Report, para. 8.229.
118. Supra note 15, Panel Report, para. 8.237; Appellate Body Report, para. 144.

relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury". "The 'causal link' between increased imports and serious injury may exist, even though other factors are also contributing, at the same time, to the situation of the domestic industry". The Appellate Body also said that increased imports were not necessary to be "sufficient" to cause, or threaten to cause serious injury. It emphasized that "the effects of increased imports, as separated and distinguished from the effects of other factors, must be examined to determine whether the effects of those imports establish a 'genuine and substantial relationship' of cause and effect between the increased imports and serious injury".[120] The Appellate Body in US-Lamb Meat adopted this holding.

The condition of competition is derived from the "under such condition" requirement in Article 2.1. Both of the Panels in Korea-Diary and Argentina-Footwear found that the phrase of "under such condition" indicates the need to analyze "the conditions of competition between the imported product and the domestic like or directly competitive products in the importing country's market. It requires national authorities to address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. It does not necessarily require a price analysis *per se*. The relevance of price must be considered on a case-specific basis.[121] The Panel in US-Wheat Gluten also had the same view.

Non-attribution requirement has been a vexing issue for the panels and Appellate Body. In Argentina-Footwear, the Panel simply stated that a sufficient consideration of "other factors" other than imports and an analysis separating the effects of those "other

119. Supra note 16, Panel Report, para. 8.138.
120. Supra note 16, Appellate Report, paras. 67-70.
121. Supra note 15, Panel Report, para. 252.

factors" from the effects of the imports are necessary.[122] Later, the Appellate Body in US-Wheat Gluten deemed it important to "separate or distinguish the effects caused by the different factors in bring about the injury" and further developed a three-stage analysis for the domestic authority's causation analysis. First, the effects caused to the domestic industry by increased imports are distinguished from those caused by other factors. Second, injury caused by all different factors, including increased imports, should be attributed to increase imports and other relevant factors respectively. Third, a "genuine and substantial relationship" of cause and effect between increased imports and serious injury is required.[123] In US-Lamb Meat, the Appellate Body clarified the legal status of this method and its primary objective. It stressed that "the final determination about the existence of 'the causal link' between increased imports and serious injury can only be made after the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors".[124] By reference to its ruling in US-Hot Rolled Steel, the Appellate Body in US-Line Pipe considered Article 4.2(b) of Safeguard Agreement also requires an "identification" of "the nature and extent of the injurious effects of the other known factors" as well as "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the increased imports", like Article 3.5 of the Antidumping Agreement. To fulfill this requirement, "the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely

122. Ibid., paras. 8.265-8.267.
123. Supra note 16, Appellate Body Report, paras. 68-69.
124. Supra note 17, Appellate Body Report, paras. 178-179.

imply or suggest an explanation. It must be a straightforward explanation in express terms".[125]

Notwithstanding the clarification that the panels and Appellate Body has made to the Safeguard Agreement, it seems to me that the Appellate Body's interpretation of "serious injury" derogates from the text of the agreement itself. According to the Appellate Body's ruling in US-Wheat Gluten and US-Lamb Meat, increased imports need not be sufficient to cause serious injury or threat thereof. Rather, there should be a "genuine and substantial relationship" of cause and effect between the increased imports and serious injury. In contrast with that, Article 4.2(a) of Safeguard Agreement states, "In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement…." Article 4.2(b) has the similar language, "…. the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof". The literal language in these articles suggest clearly that increased imports must cause serious injury or threat thereof, meaning that increased imports alone should be sufficient to cause serious injury or threat thereof, even other factors may also contribute to the injury of the domestic industry. Moreover, taking into account the objective of the Safeguard agreement, we can find inconsistencies as well. As states in the preamble of the Safeguard Agreement, the purpose and objective of this agreement is to "clarify and reinforce the disciplines of GATT 1994…. And to re-establish multilateral control over the safeguard…" Safeguard measure is an extraordinary remedy against fair trade practice. It can only be applied under emergent situation. However, based on the

125. Supra note 18, Appellate Body Report, paras. 212-217.

Appellate Body's ruling, Members may impose safeguard measures even when increased import has a minor impact on domestic industry. It actually loosens the multilateral rule of safeguards. Besides, As the Appellate Body explained in the US-Line Pipe, Safeguard Agreement deals only with imports, such that safeguard measures should be applied so as to address only the consequences of imports.[126] As such, safeguard measure should be targeted at the serious injury or threat thereof by increased imports rather than injurious effects caused by other factors. Therefore, it is necessary for increased imports to be sufficient to cause injury and threat thereof for the application of safeguard measures. Lastly, even though the Appellate Body's ruling is reasonable, it seems not practical for its lacking of clear standard. What is "genuine and substantial relationship"? How to evaluate it? The Appellate Body has never elaborated this concept since it was raised. If Appellate Body still sticks to this ruling in the future, a practical standard should be developed. In this case, the standard applied by USITC in the domestic investigation seems plausible. This standard requires increased imports to be "substantial cause, which is important and not less than any other causes". If the competent authority can distinguish and separate the effects caused by increased imports and other factors, and provides adequate and reasoned explanation and assessment, this standard and the competent authority's determination may meet the Appellate Body's requirement.

Another critical question is how one disaggregates causes. As John H. Jackson pointed out, if a general economic recession takes place at the same time with the import increase, it will be very difficult for the effects of increased imports to surpass the effect of the economic recession as a whole; yet, if the effect of general economic recession has

126. Supra note 10, p.190.

been disaggregated into many factors, increased imports may be a “substantial cause” for the injury.[127] Since the method applied by the Members to separate the effects of increased imports and other factors is not specified in the Safeguard Agreement, Members thereby have the discretion to adopt their own methods. This situation will add to the instability of the safeguard system.

The Appellate Body in US-Lamb Meat stated that the three-step approach developed in US-Wheat Gluten is not legal "tests" mandated by the text of the Safeguard Agreement. Instead, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b). Is it sound for national authorities, panels and Appellate Body to apply a test that is not based on the text of the Agreement, let alone a test of little feasibility?

V.2.8 Selectivity

Selectivity has been a long-time troublesome and controversial issue in the evolution and reform of the GATT and WTO safeguard system. During the Tokyo Round, the GATT Contracting Parties discussed extensively on this issue. Due to EC’s persistence, Parties failed to make a compromise on this issue. Later, WTO Members eventually succeeded in bringing about a new agreement, Safeguard Agreement, generally in favor of non-discrimination, but with some flexibility and certain preferential treatment for developing countries. Article 2.2 stipulates that the safeguard measure shall be applied to a product being imported irrespective of its origin, that is, non-discrimination application. The footnote thereof offers two options for a customs union to

127. Supra note 18, Appellate Report, para. 258.

impose safeguard measures. By contrast, Article 5.2(b) and Article 9 set forth certain selective application in specific circumstances. [128]

The approach the panels and Appellate Body adopted to resolve this issue is "parallelism". The Panel in Argentina-Footwear considered that a "parallelism" between the scope of the investigation and the scope of the applied measure is required under Article 2.1 and 2.2. The Appellate Body affirmed that safeguard measures taking imports from all sources into investigation could only be applied on imports from all sources.[129] Later in US-Wheat Gluten, the Appellate Body affirmed the principle of "parallelism" by recognizing the phrase of "being…. being imported" in Article 2.1 and 2.2 have the same meaning. It pointed out that including certain products in investigation but excluding them from application would give different meaning to the phrase aforementioned. The USITC improperly excluded the imports from Canada from application by merely finding the imports from Canada did not contribute importantly to the serious injury caused by imports. For justifying its practice, USITC should have demonstrated explicit finding that all imports other than those from Canada cause or threaten to cause serious injury.[130] In US-Line Pipe, the Appellate Body further clarified the standard to establish a prima facie case of a violation of the "parallelism" requirement. If a gap between the imports covered under the investigation and imports falling within the scope of the measure can be demonstrated, a prima facie case of the absence of the "parallelism" of safeguard measure is established.[131]

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128. Article 5.2(b) allows Members not to allocate the quota based on a historical formula, provided that they demonstrate disproportionate import increase from particular Members for a application of safeguard measure no longer than 4 years and the condition of departure from Article 2.2 is equitable to all relevant suppliers. In addition, Article 9 provides the de minimis exemption for the imports from developing countries. See WTO, Safeguard Agreement, 1994.

129. Supra note 15, Panel Report, paras. 84-87; and Appellate Body Report, para. 113.

The complainant in Argentina-Footwear invoked footnote 1 of Safeguard Agreement Article 2.1 to defend its selective safeguard measure. In Appellate Body's view, "the footnote only applies when a customs union applies a safeguard measure as 'a single unit or on behalf of a member State'". In this case, the safeguard measure was applied by Argentina instead of MERCOSUR. Therefore, the Appellate Body concluded that footnote 1 does not apply to this case.[132] This ruling clarify the situation that footnote 1 applies to.

One case involved the issue of the selective safeguard measure allowed by the Safeguard Agreement under Article 9. Article 9 allows the imports from a developing country to be exempted from safeguard measure as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Member with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned. This clause gives developing countries special and differential treatment, which might be a reward from developed countries for developing countries to accept the Uruguay Round Safeguard Agreement. But, theoretically, developed countries may well use this clause to block the imports from developing countries. In US-Line Pipe, by setting certain tariff quota applied to all non-NAFTA Members without exemption to developing countries allowed under Article 9, the US's practice was found to be in violation of Article 9. The USITC argued that developing countries were actually exempted from the measure because the level of the tariff quota exemption was consummated with the 3 per cent *de minimis* level. However, the Appellate Body found it only represents 2.7 per cent of total imports and

130. Supra note 16, Appellate Body Report, paras. 96-98.
131. Supra note 18, Appellate Body Report, paras. 186-187.
132. Supra note 15, Appellate Body Report, paras. 106-108.

thereby rejected USITC's argument.[133] In addition to problems arising in the application, loopholes existed in the text of Article 9 itself. Suppose total imports of certain product only accounts for 10% of the domestic market share of a Member, and only 1 per cent of the domestic market occupied by imports from developing countries, with 0.2 per cent from Members A, B, C, D and E respectively. Thus, even though the individual market share of A, B, C, D, E is 0.2 per cent and the individual import share is 2 per cent, the importing Member still can impose safeguard measure against the imports from these developing Member countries, in that their collective imports accounts for 10 % of the total imports, exceeding the threshold of 9%. In fact, both the market share and import share of the imports from developing countries are very small and may be of little market influence, yet they are still subject to the safeguard measure. In principle, safeguard is based on the relationship between increased imports and domestic industry, and is to remedy the injury suffered by domestic industry. As such, it may be more justifiable to change the indicator of reference to the market share of the product imported.

V.2.9 Necessary Extent of Application

With a view to minimizing the welfare loss resulting from the application of safeguard measures, Safeguard Agreement Article 5.1 sets out the necessary extent of application. It states:

"A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a

133. Supra note 18, Appellate Body Report, paras. 125-133.

recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives".[134]

Three issues were raised before the panels and Appellate Body, namely, express justification at time of application, permissible extent of measures and the requirement of adjustment. Here I will discuss the first two issues, while leave the issue of adjustment for later discussion.

Regarding the issue of express justification, In Korea-Diary, the Panel considered that Article 5.1 mandates Members applying safeguard measure to provide a reasoned explanation for the necessary extent of the measure. Appellate Body rejected this interpretation and held that the first sentence of Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1 at the time of application, in that first sentence does not contain an express statement for a "clear justification" like the second sentence does. The Panel and Appellate Body in US-Line Pipe had the same consideration.[135]

As for the substantive requirement of permissible extent of measure, in Korea-Diary, the Panel held and the Appellate Body agreed that the first sentence of Article 5.1 imposes an obligation on a Member applying a safeguard measure "to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment, regardless of the particular form that a safeguard

134. See WTO, *Safeguard Agreement*, 1994.
135. Supra note 14, Panel Report, para. 7.99, Appellate Body Report, para. 96; and supra note 18, Panel Report paras. 7.80-7.81, Appellate Body Report, paras. 228-235.

measure might take".[136] The Appellate Body in US-Line Pipe further elaborated this substantive obligation that "safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports".[137] On top of this elaboration, the Appellate Body found that Korea had established a *prima facie* case that the measure applied by USITC was not limited to the extent necessary under Article 5.1, in that the USITC had violated the non-attribution requirement under Article 4.2(b) and did not rebut the prima facie case. Further, the Appellate Body made clear that a violation of the non-attribution requirement under Article 4.2(b) does not mean an automatic violation of first sentence of Article 5.1, unless the complainant fails to rebut the prima facie case.

There are some problems in Appellate Body's interpretation of the first sentence of Article 5.1. It seems that the Appellate Body faced the dilemma of making choice between tightening and relaxing the discipline. According to the standard of review set forth by the Appellate Body, a Member applying safeguard measure is obligated to provide adequate, reasoned and reasonable explanation for the findings and determination made. As a result, express justification for why the extent of measure is necessary and least trade restrictive is needed. Furthermore, since safeguard is extraordinary remedy against fair trade practice and the objective of Safeguard Agreement is to reinforce the discipline, it may be appropriate to tighten the discipline and thereby require express justification from Members for demonstration of adequate, reasoned and reasonable explanation. To the contrary, in order to avoid giving Members too much burden and encourage the use of safeguard instead of ERAs and other unilateral trade protective measures, it seems better to release the Members from the burden of justification of the

136. Supra note 14, Panel Report, para. 7.99, Appellate Body Report, para. 96.
137. Supra note 18, Appellate Body Report para. 260.

necessary extent of the measure, since the justification requires complicated economic analysis and thereby burdensome. In the cases at hand, it seems to me that the Appellate Body chose to relax the discipline and encourage the use of safeguard.

Though the Appellate Body has ruled that the measure should be applied only to the extent necessary to remedy or prevent serious injury caused by increased imports, how to apply this standard is still unclear. It is even more difficult to determine or examine whether this standard is met without the demonstration of adequate, reasoned and reasonable explanation from the Member applying the safeguard measure.

The period of reference in the determination of the level of quantitative restriction has not been touched in the dispute. However, it does not mean that the text is clear enough. Rather, the implication of the phrase of "the last three representative years" is vague in its nature. What is representative year? How to select the last three representative years? The text *per se* does not give any instruction and thereby leaves Members great discretion to have their own approaches. These questions need further clarifications in future decisions from Appellate Body.

V.2.10 Notification and Consultation

The incorporation of the notification and consultation requirement into the Uruguay Round Safeguard Agreement results from the Members' requests of improving transparency and enhancing surveillance of the safeguard system. Article 12 provides:[138]

"1. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

138. See WTO, *Safeguard Agreement*, 1994.

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken."

According to the Panel in Korea-Diary, Article 12 states five notifications in the course of safeguard investigation and application. Three are under Article 12.1, namely,

notification of initiation, notification of finding of serious injury and threat thereof, and notification of taking decision of application or extension. The fourth is notification of proposal of safeguard measures under Article 12.3. Last is notification of provisional measures under Article 12.4.

Three issues, i.e., contents, timing of negotiation and adequacy of consultation, were discussed by panels and Appellate Body.

The contents of notification is set out in Article 12.2, which requires Members applying safeguard measures to provide "all pertinent information". How to interpret this standard was at issue in Korea-Diary case. There, the complainant argued all the information under Article 3 and 4 should be notified. Both the Panel and Appellate Body rejected its view. The Panel then rendered the "all pertinent information" as a requirement that "the amount of information notified must be sufficient to be useful to Members with a substantial interest in the proposed safeguard measure".[139] The Appellate Body differed from the Panel in the interpretation. It considered the "all pertinent information" standard constitutes "a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12". "a Member must, at a minimum, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation."[140] It is still not clear that how far the injury factors in Article 4.2(b) should be addressed. Future Appellate Body decision will be helpful to the clarification of this issue.

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139. Supra note 14, Panel Report, para. 7.127.
140. Supra note 14, Appellate Body Report, paras. 107-108.

The delays in notification have been a long-time troublesome problem in the investigation and application of safeguard measures. Article 12.1 sets out an "immediate notification" requirement for a Member applying safeguard measure. The Appellate Body in US-Wheat Gluten considered that "immediately" implies "a certain urgency", the degree of which deviates case-by-case depending on the administrative difficulties and the character of the information supplied.[141] However, "the amount of time taken to prepare the notification must, in all cases, be kept to a minimum". The Appellate Body further considered that "immediate" notification allows the Committee on Safeguards, and Members, the fullest possible period to reflect upon and react to an ongoing safeguard investigation". Whether a Member meets this requirement neither depends on evidence as to how the Committee and Members use that notification, nor an *ex post facto* assessment of whether Members suffered actual prejudice through an insufficiency in the notification period.[142] In explaining the notification obligation under Article 12.1(c), the Appellate Body reversed the Panel's interpretation that a notification under Article 12.1(c) must be made before implementation of the "proposed" safeguard measure, holding instead the "immediate notification" requirement governs solely the timing of notification. They clarified that the triggering event for Article 12.1(c) notification is the "taking" of a decision, while not "coming into effect" of the decision.[143]

The Appellate Body in US-Wheat Gluten also considered the issue of "adequacy consultation". They held that sufficient time and sufficiently detailed information on the

141. As the Panels in Korea-Diary recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. See supra note 14, Panel Report, para. 7.128.
142. Supra note 16, Appellate Body Report, paras. 105-106.
143. Ibid, paras. 120-122.

form of the proposed measure needed to enable meaningful consultations to occur, including the nature of the remedy, must be provided in advance of the consultations.[144] In US-Line Pipe, the Appellate Body followed this approach. However, they further noted that the proposed measure setting the foundation for consultation is not necessarily identical to the one eventually applied. In this particular case, since the proposed measure and applied measure "differed substantially", the Appellate Body doubted the meaningfulness of the consultation and moved to examine whether the notification of US met the previously mentioned criteria. Recognizing that a finding on the adequacy of time should be assessed on a case-by-case basis, the Appellate Body found that US failed to provide adequate time for Korea to prepare for consultation and thereby acted inconsistently with Article 12.3.[145] Yet, the Appellate Body did not put forward a standard for assessing the time necessary for preparing for consultations. Then, how much time is adequate, how to evaluate the necessary time? Practical standard needs to be developed by Appellate Body in the future dispute.

Based on the reasoning under Article 12.3, the Appellate Body in both US-Wheat Gluten and US-Line Pipe also ruled that US acted inconsistently with Article 12.3, in that a Member cannot "endeavor to maintain" an adequate balance of concessions unless it has provided an adequate opportunity for prior consultations on a proposed measure.[146]

Another problem in respect to the dispute of notification obligation under Article 12 is how to remedy the nullified or impaired benefits accruing under the WTO Agreement. Suppose a Member applying a safeguard measure does nothing wrong but

144. Ibid, paras. 136-137.
145. Supra note 18, Appellate Body Report, paras. 104-113.
146. Supra note 16, Appellate Body Report, footnote 39, para. 146; and supra note 18, Appellate Body Report, paras. 118-119.

delays in notifying the Safeguard Committee, and thereby nullifies the benefits of the exporting Members. How to remedy this inconsistency? As usual, the Panel will just recommend the Member applying safeguard measure to bring its measure into consistency with the Safeguard Agreement. But how? Shall the Member make notification the second time, or provide compensation? Is it reasonable or sound?

The delay in notification of the safeguard measure caused problem to the integrity of the safeguard system. In both US-Wheat Gluten and US-Line Pipe, the US failed to make timely notification in most the circumstances. The delay may not result from administrative difficulties or the characters of the information. Rather, some may result from the facts that the Member applying the safeguard measure does not act in a "good faith". As the Appellate Body pointed out in US-Line Pipe, "the US appears to have recognized the need for adequate time to prepare for the consultations". However, the US failed to provide adequate opportunity to have a meaningful consultation with Korea.

V.3. Remaining Issues

V.3.1 GATT Article XXIV as Defense to Non-Discrimination Application of Safeguards

The relationship between GATT Article XXIV and the Safeguard Agreement has troubled Members for a long time and still remained unclear. The problem can be traced back to the GATT period, where the Contracting Parties discussed on a number of occasions the modalities of application of Article XIX in relation to agreement under Article XXIV, in particular Article XXIV:8. The focus of the debate is whether a member

of regional trading arrangement (RTA) can be exempted from the application of safeguard measures initiated by another member of the same RTA.

GATT Article XXIV:8 provides: [147]

"(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and, (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

In addition, the last sentence of the footnote to Article 2.1 of Safeguard Agreement states:[148]

"Nothing in the [Safeguards] Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of the Article XXIV of GATT 1994."

In the dispute under the WTO DSB, GATT Article XXIV and the last sentence of

147. WTO, *GATT 1994*.
148. See WTO, *Safeguard Agreement*, 1994.

the footnote to Article 2.1 of Safeguard Agreement were invoked by Argentina and the US to defend their selective non-application of safeguard measure to RTA members. In Argentina-Footwear, by examining the meaning of Article XXIV:8 and the practice, the Panel found that GATT Article XXIV:8 does not preclude Argentina from the obligation of non-discrimination application of safeguard measure.[149] Appellate Body found the Panel analysis in err. In their view, footnote 1 to Article 2.1 of Safeguard Agreement does not apply in the case at hand, in that it is Argentina imposed the safeguard measure instead of MERCOSUR as a custom union. Referring to Turkey–Textile[150] and the fact that Argentina did not raised GATT Article XXIV as a defense, the Appellate Body considered the Panel's analysis under GATT Article XXIV was irrelevant in this case, and then reversed the Panel's legal findings and conclusion.[151] In US-Wheat Gluten, the Panel and Appellate Body also found that GATT Article XXIV irrelevant with the situation at issue.

Later in US-Line Pipe, Korea argued that the US violate the MFN principle under GATT Article I, XIII:1, XIX and Safeguard Agreement 2.2 by excluding Canada and Mexico from the safeguard measure. According to the Panel, the line pipe measure imposed by the US constituted a "duty or other restrictive regulation of commerce" within the meaning of Article XXIV:8(b). It was in principle authorized by Article XXIV,

149. Supra note 15, Panel Report, paras. 8.93-8.100.
150. According to the Appellate Body Report, "Article XXIV may justify a measure which is inconsistent with certain other GATT provisions.… that this defense is available only when it is demonstrated by the Member imposing the measure that "the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" and "that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue." See Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, para. 58.
151. Supra note 15, Appellate Body Report, paras. 108-110.

provided it met certain conditions thereof, i.e., NAFTA must (1) comply with Article XXIV:5(b) and (c), and (2) eliminate duties and other restrictive regulations of commerce on "substantially all" intra-NAFTA trade. Applying the approach in this case, the Panel found that the US is "entitled to rely on an Article XXIV defense against Korea's claims under Articles I, XIII and XIX regarding the exclusion of imports from Canada and Mexico from the scope of the line pipe measure".[152] With respect to Article 2.2 of the Safeguard Agreement, the Panel called that the Appellate Body in Turkey-Textile, which stated the measure justified under Article XXIV must be necessary for the formation of a regional trade agreement.[153] In this case, the Panel found that the measure forms a part of the elimination of "duty or other restrictive regulation of commerce" and thereby needed no more demonstration. Moreover, considering safeguard measures under Safeguard Agreement are also GATT XIX measures that are not stated as exemption under Article XXIV:8, the Panel ruled that GATT Article XXIV provides as a defense against non-discrimination application under Article 2.2 of the Safeguards Agreement.[154] On appeal, the Appellate Body declined to rule on this appeal. Rather than making a ruling on the relationship between GATT Article XXIV, it clarified the situation where GATT Article XXIV becomes relevant to the safeguard measure. It stated there are only two possible circumstances, where the principle of "parallelism" was met. One is when imports excluded in the investigation are also excluded from the measure, or, if not, reasoned and adequate justification showing imports from non-RTA-members alone satisfies the condition of application is provided. Finding neither of the two circumstances applies in this case, the Appellate Body rejected to rule on the appeal and considered the Panel's

152. Supra note 18, Panel Report, paras 7.141-7.146.
153. See supra note 141.
154. Supra note 18, Panel Report, paras 7.147-7.158.

finding "moot and having no legal effect".[155]

This ruling leaves the problem of the availability of the GATT Article XXIV defense to non-discrimination application of safeguard measure unanswered. If either of the two circumstances supposed by the Appellate Body is met, how will the Panel and Appellate Body make the ruling? Should GATT Article XXIV defense be available?

Nevertheless, as the safeguard measure takes the form of tariff or quantitative restriction, both fall within the scope of "duty or other restrictive regulation of commerce" within the meaning of Article XXIV:8(b). Moreover, GATT Article XIX is not listed as exemption in GATT Article XXIV. In this regard, it seems plausible to allow Article XXIV defense, provided certain conditions are met. Especially, it should be provided expressly that the defense cannot be applied to the RTAs under the formation. In other words, the RTAs qualified to apply the defense should fully comply with the requirement stated in Article XXIV:5 and 8. Otherwise, Members can easily apply selective safeguard measures in the name of forming a RTA.

Based on the Appellate Body ruling in Turkey-Textile, one prerequisite for the justification by Article XXIV of inconsistencies with WTO obligation is that the custom union or FTAs must fully meet the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. However, since there has been no RTA qualified by the Committee on Regional Trading Agreement (CRTA) to date, it is impossible for Members to make effective defense in this regard, and the defense is meaningless. Given the feeble nature of WTO's surveillance on RTAs, allowing Article XXIV defense may cause turbulence to the world trading system. The urgent matter is to strengthen the surveillance of the CRTA.

155. Supra note 18, Appellate Body Report, paras. 198-199.

Another problem is the jurisdiction of WTO. Does WTO have the jurisdiction over RTAs? At first view, since RTAs are subject to Article XXIV of GATT 1994, it seems that WTO has jurisdiction over RTAs. But, WTO Agreement applies to its Members. To date, only EC as a custom union is a Member of WTO. Therefore, if EC as a whole impose a safeguard measure, WTO has the jurisdiction to evaluate its legitimacy. What if NAFTA as a whole takes a safeguard action? Can WTO make any ruling on it?

V.3.2 Structural Adjustment

"Perhaps the most important feature of the Safeguard Agreement, at least in concept, is the link between the objective of preventing or remedying serious injury and the objective of facilitating adjustment by the domestic industry".[156] It is expressly stipulated in Article 5.1. To push ahead with the domestic adjustment of the injured industry, Article 7 further states:[157]

….

2. The period mentioned in paragraph 1 may be extended provided that…. that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting….

….

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application.

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156. Andreas F. Lowenfeld, *International Economic Law*, New York: Oxford University Press, 2002, p.92.
157. See WTO, *Safeguard Agreement*, 1994.

….

However, the adjustment requirement has been ignored by GATT Contracting Parties and WTO Members through the GATT and WTO history. The issue of adjustment was once raised but lightly touched on in the dispute settlement. In Korea-Diary, EC argued that Korea erred by omitting to give any consideration to adjustment plans. The Panel found no specific provision in the Safeguard Agreement requires an adjustment plan. Rather, "the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, the examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment".[158]

Since this ruling was made, no more complaint regarding the issue of adjustment has been brought to the DSB. Therefore, no more judicial clarification and requirements were developed by the Appellate Body. The Panel did not provide explicit reason for its ruling, while just asserted there was no such requirement. It seems that the Panel failed to apply its standard of review in this regard. Is it reliable for this ruling?

Safeguard measures are extraordinary remedies to be taken only in emergent situations. They are temporal remedies that are imposed in the form of import restrictions in the absence of any allegation of an unfair trade practice, with a view to alleviating the injury of domestic industry. One important rationale justifying the existence of safeguard shows the safeguard mechanism is developed for the purpose of structural adjustment,

158. Supra note 14, Panel Report, para. 108.

including restoring competitiveness and facilitating orderly contraction. In my view, both the rationale and the nature of safeguard suggest a requirement of an adjustment plan for application of safeguard measures. Furthermore, as what we have discussed before, Appellate Body holds that every word in the WTO Agreement should be given the meaning. Therefore, the phrase of "to facilitate adjustment", which has been a dead letter since its coming into being, also binds WTO Members and should be given the meaning. How to facilitate adjustment in the term of safeguard measure should be demonstrated, as the requirement the Appellate Body put on the Members to demonstrate "unforeseen development" before application.

To the contrary, problems may occur due to this requirement. Reviewing the negotiating history, we can find that the mandatory language in the original 1989 Draft of Safeguard Agreement was erased later, for Members worried that any mandatory language would encourage heavy government involvement in industry's retrenching.[159] Nevertheless, import-competing industries may be less likely to self-adjust. As discussed in Part IV, among the 16 safeguard cases filed to the DSB, 3 involved the US's steel industry. It shows the industries under safeguard protection tend to be reluctant to self-adjust, especially those political powerful traditional industries in the developed countries. In order to propel the adjustment forward, adjustment plan may be more effective.

In addition to Article 7.1, Article 7.2 also incorporates the notion of "adjustment" into its text. However, under this Article, Members may easily extend the safeguard measures if there is evidence that the industry is adjusting, no matter how much has been adjusted, provided other requirements are met. Besides, how to evaluate the level of

159. See Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History* (1986-1992), vol. 2: Commentary, Table 6, p.1791, Boston: Kluwer Law and Taxation publishers, 1993.

adjustment? What policy instrument can be applied for adjustment? How long should the adjustment period be? All the questions will remain unclear until the Appellate Body makes the judicial clarification.

To "facilitate adjustment", it may be useful to further enhance the multilateral surveillance of the safeguard measure. If Members are obligated to check the progress of adjustment during the interim review and its result will greatly affect the future effectiveness of the safeguard measure, the "structural adjustment" requirement may be better implemented by Members.

V.3.3 Procedural defect of Dispute Settlement of Safeguard Measures

Dispute settlement system is the major pillar of the multilateral trading system and a unique contribution of the WTO to the stability of the global economy. All the disputes arising under the covered agreement of WTO Agreement are subject to the "Understanding on Rules and Procedures Governing the Settlement of Disputes" (DSU). Safeguard Agreement is not an exception. Article 14 thereof obligates Members to resort to DSU for dispute settlement, which states:[160]

"The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement."

However, the normal dispute settlement procedure seems too dilatory for dispute regarding safeguard measures. According to the DSU, the standard dispute settlement procedure takes about one year and three months, starting from consultation and ending

160. See WTO, *Safeguard Agreement*, 1994.

at the adoption of the Appellate Body report. If disputing parties have disagreement as to the reasonable period of time of implementation, they shall resort to arbitration. The reasonable period of time of implementation decided thereby can be 15 months after the adoption of the panel or Appellate Body report at the most. If the parties still question consistency with the measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to arbitration. Thus, additional three-month time is needed for the decision. In practice, the whole procedure dragged on for much longer period of time.

Reviewing the procedure of the dispute settlement of all the 6 cases addressed, we can see that it took the panel and Appellate Body much longer time. (See Table 6) In case of Korea-diary, the DSB took the time twice as stipulated in the DSU, say, 24 months and 4 days calculating from the date of panel request to the date of the adoption of the Appellate Body report. Even the quickest proceeding, the dispute settlement of Argentina-Footwear, took more than 17 months for the same procedure. Ironically, the expiry date of implementation in that case coincided the proposed expiry date of safeguard measure. Also, the implementation period in US-Wheat Gluten expired one day later than the proposed expiry date of the safeguard measure. What's more, in Chile-Agricultural Products, the whole panel and Appellate proceeding started after the expiration of the safeguard measure. It is ridiculous for those Members to bring the case before the DSB and then spend tremendous amount of money and time to win the case, but eventually get nothing. As such, the dispute settlement procedure regarding the safeguard measure is questionable.

Table 6: Timeline of the Safeguard Measures and the Dispute Settlement

Dispute	Dispute Number	Timeline of Dispute Settlement					Timeline of Measure		
		Panel Request (A)	Panel Report Circulated	AB Report Adopted (B)	Duration (From A to B)	Expiration of Implementation	Date of Application	Date of Termination	Duration
Korea - Dairy	WT/DS/98	9 Jan. 1998	21 Jun. 1999	12 Jan. 2000	24 months + 4 days	**20 May 2000**	1 Mar. 1997	**28 Feb. 2001**	3 Years
Argentina - Footwear	WT/DS/121	10 Jun. 1998	25 Jun. 1999	12 Jan. 2000	17 months + 3 days	**25 Feb. 2000**	25 Feb. 1997	**25 Feb. 2000**	3 Years +1 Day
US- Wheat Gluten	WT/DS/166	3 Jun. 1999	31 Jul. 2000	19 Jan. 2001	17 months + 17 days	**2 June 2001**	1 Jun. 1998	**1 Jun. 2001**	3 Years +1 Day
US - Lamb Meat	WT/DS/177, 178	14 Oct. 1999	21Dec. 2000	16 May 2001	17 months + 3 days	**15 Nov. 2001**	22 Jul. 1999	**22 Jul. 2002**	3 Years +1 Day
US - Line Pipe	WT/DS/202	14 Sep. 2000	29 Oct. 2001	8 Mar. 2002	17 months + 23 days	**N/A**	23 Feb. 2000	**24 Feb. 2003**	3 Years +2 Day
Chile - Agriculture Products	WT/DS/207	19 Jan. 2001	3 May 2002	23 Oct. 2002	21 months + 5days	**N/A**	26 Nov. 1999	**26 Nov. 2000**	1 Year +1 Day
Argentina- Peaches	WT/DS/238	6 Dec. 2001	14 Feb. 2003	-	-	-	-	-	-

Source: WTO, *Update of WTO Dispute Settlement Cases,* WT/DS/OV/9, 29 October 2002

Since safeguard is an extraordinary remedy against fair trade practice, in order to minimize the loss it brought about to those exporters doing nothing wrong, and to inhibit Members from abusing the safeguard mechanism, it may be appropriate for DSB to expedite the dispute settlement procedure. In this regard, a fast-track procedure specifically addressing the safeguard dispute, like the special dispute settlement system provided to remedy the impairment caused by the prohibited subsidy, may help to resolve the procedural defect.

V.3.4 Tighten or Relax?

As described above, safeguard serves the key function of regulating a trade-off between trade liberalization *ex ante* and opportunities to impose protection *ex post*. For one thing, safeguard is an effective multilateral mechanism to push forward trade liberalization. It calls for MFN application and is based on the general equilibrium of rights and obligations. Therefore, compared with other contingent protection measures, such as ERAs and antidumping measures, which are deemed to be lack of economic sense, safeguard is more friendly to the stability of development of multilateral trading system. In this sense, its application shall be encouraged. For another thing, it is a trade restrictive measure against fair trade practice and undermines the social welfare. The unclear obligations under the current rules exacerbated the confusion and encouraged abuse among Members, thereby impair the integrity of the multilateral trading system. Hence, it should be seriously disciplined and restricted. The trade-off is reflected in the Uruguay Round Safeguard Agreement as well as the dispute settlement practice on safeguard measures.

Uruguay Round Safeguard Agreement is a successful compromise between these two different directions. Compared with GATT Article XIX, it provides more incentives and guidelines for Members to invoke safeguard while prohibits ERAs. On the other hand, it also calls for reinforcement of the disciplines and re-establishment of the multilateral control of the safeguard action. Examining the text, in general, the agreement seems a little bit tilted to the direction of strengthening the discipline.

As the negotiators in the Uruguay Round multilateral negotiation, the WTO Panel and Appellate Body also face a dilemma of making choice between further strengthening the multilateral discipline over safeguard action and providing incentives for the adoption of safeguard. We can find the track in the discussion of various issues in the dispute. On some issues, the Appellate Body put many obligations and burdens on Members, like the requirement of demonstration of "unforeseen development", application of GATT Article XIII and XIX, all relevant factors examined in the determination of serious injury, though they may not be necessary in my view. On some other issue, the Appellate Body's ruling put a lower level of obligation for Members to impose safeguard, such as the interpretation of serious injury and threat thereof, the requirement of causation and non-attribution, and necessary extent of measures.

Generally speaking, it seems to me that the Appellate Body has been vacillating between these two directions. On the one hand, they have been trying to interpret the Safeguard Agreement in the stricter way. At the same time, they have been trying to make the judicial clarification on the ambiguities existing in the Agreement, with a view to improving the practicality of the measure and thereby providing some incentives for

Members to apply the measure. Evidently, it is difficult to hold the helm while keep the wheel rolling.

VI. Concerns on The Transitional Product-specific Safeguard Mechanism towards China in Relation to Dispute Settlement

China's accession to the WTO in 2001 was at the price of a selective safeguard clause, which is stated in Part I:16 of the Protocol on the Accession of the People's Republic of China (hereinafter "the Protocol", See Appendix 4).

The Protocol provides for a transitional product-specific safeguard mechanism. In fact, this special safeguard mechanism provides for an outright derogation from the basic principle of the WTO as well as of Safeguard Agreement. It is featured by the specificity of product source, no compensation and procedural requirement, lower criteria for application than normal safeguard measure, and bilateral settlement. These will bring about new challenges to the global safeguard system and its dispute settlement.

The transitional product-specific safeguard mechanism permits Members to apply safeguard measure specifically against the product from China in the existence of market disruption, deviating from the MFN-application principle of Safeguard Agreement. Part I:16 of the Protocol provides:[161]

"1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the

161. See WTO, *Protocol on the Accession of the People's Republic of China*, 2001

affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products."

……

First of all, the Protocol does not mention anything about Safeguard Agreement. In consideration of the negotiating history, the reference to the Safeguard Agreement as a

sort of residual normative framework in the early draft was removed from the definitive resolution.[162] Does it mean that the transitional product-specific safeguard mechanism is not subject to the Safeguard Agreement?

Here in this Protocol, the "serious injury" requirement in the Safeguard Agreement is changed to "market disruption". Part I:16.4 confines the market disruption to the importing competing industry, where the imports increase either relatively or absolutely, as a significant cause of material injury or threat thereof. As understood, the requirement of "material injury", which is the same as the injury requirement under the Antidumping Agreement, provides for a lower threshold than "serious injury". But the transitional product-specific safeguard measure only requires increasing imports as "significant cause of material injury or threat thereof". Surprisingly, as an extraordinary remedy against fair trade practice, the criteria for application is even lower than that of antidumping measures against unfair trade practice. Furthermore, how to interpret the requirement of "significant cause of material injury, or threat thereof" is undefined.

Besides, the phrase "increased imports" in Safeguard Agreement is changed to "increasing imports". Considering the present tense of the phase, it may be understood that the imports should keep increasing until the decision of action. Whether it is right, we shall wait for determination of the WTO Panel and Appellate Body in the future dispute.

Though there is no specific procedural requirement, the Protocol still indicates some factors that need to be considered in the determination, in particular, the effect of imports on prices for like or directly competitive articles. To the contrary, as the

162. Fabio Spadi, *Discriminatory Safeguards in the light of the Admission of the People's Republic of China to the World Trade Organization*, Journal of International Economic Law, Oxford University Press, p. 421-443, 2002.

Appellate Body pointed out in the dispute, price is not necessarily relevant to the injury test in the normal safeguard case. Reviewing the evolution of the concept of "market disruption" under the GATT, STA, LTA and MFA, we can find that the price condition is one of the major factors in injury determination, which may explain somewhat the importance of price comparison in the injury test of market disruption.[163] How will the panel and Appellate Body interpret this factor in the context of the transitional product-specific safeguard mechanism? We shall wait and see. Apart from this, the requirement of consideration of factors in the Protocol is much general than that in the Safeguard Agreement. For example, the Protocol requires importing Members applying special safeguard measure to consider "the effect of such imports on the domestic industry producing like or directly competitive products". Safeguard Agreement disaggregates the "effect" into eight specific factors.

As stated in Part I:16.2 of the Protocol, Members applying transitional product-specific safeguard measures may push China to take action to prevent or remedy the market disruption through consultation. However, it does not state what actions can be taken. As there is no reference in the Protocol to the Safeguard Agreement, the action may take the form of ERAs, which are strictly prohibited under the Safeguard Agreement.

Under Part I:12.6 of the Protocol, China is not authorized to suspend equivalent concessions if the term of the measure is no longer then two years in case of relative increase in imports, whereas no longer than three years in case of absolute increase in imports. In addition, provisional safeguard measure is allowed under Part I:12.7, with a duration of no more than 200 days.

It is noteworthy that Part I:12.8 entitles a Member to take safeguard action against

163. Ibid.

trade diversions or threat of the trade diversions into its market, which indirectly result from the special safeguard action by another Member or China. This provision put China into a very instable and unpredictable trade environment. What's the definition of "trade diversion"? What should be demonstrated to justify the existence of "trade direction"? What's the standard of "trade diversion"? How to measure its level? In fact, the threshold to invoke this clause is so low that the possible uncontrolled "falling domino" effect may seriously destroy China's comparative advantage and trade.[164]

There is no clause in the Protocol setting forth the term of the special safeguard measure. It may be understood that the measure taken under this clause may keep effective until 10 December 2013, the expiry date of the transitional product-specific safeguard mechanism, provided it is necessary to prevent or remedy the market disruption. Similarly, the Protocol does not mention whether a measure can be extended or not.

Finally, why the special safeguard measure is deemed easy to apply is not only because its lower threshold, but also because there is no procedural requirement as regards notification, consultation, investigation, determination, interim and sunset review, surveillance, dispute settlement, and so forth. Moreover, Members need not pay compensation for their safeguard actions. Since most of the Members have no domestic legislation of safeguard action, they are more likely to arbitrarily impose special safeguard action against China.

In general, the Protocol not only put China in an instable and unpredictable trade environment, but also leaves the whole world a lot of uncertainties. Their decision will

164. Ibid.

have great impact on the stability of the world trading system and the development of WTO itself.

VII. Suggestions for the Improvement of the Safeguard Agreement

Albeit the Uruguay Round Safeguard Agreement shows a significant improvement on the GATT Article XIX, it still has many loopholes as well as ambiguities. The Appellate Body in its case law has clarified several equivocal concepts and standard. However, some of them remain unclear or unpractical. In this regard, the Safeguard Agreement needs to be modified.

As discussed above, the philosophy of safeguard has its inherent contradictions, which also can be seen in the Safeguard Agreement and its dispute settlement practice. How to improve the current safeguard mechanism? The answer depends on Members' stance of and the approach used to balance these contradictions. Though the WTO dispute settlement practice turned out to vacillating, I think, in the first place, obligations under the Safeguard Agreement should be clarified, henceforth consideration can be accord to give Members necessary policy flexibility. The most problematic is how to measure the level of the legal concepts and standards.

The first ambiguity needs to be clarified is the relationship between GATT Article XIX and the Safeguard Agreement. Albeit the Appellate Body has ruled that GATT Article XIX and the Safeguard Agreement apply cumulatively and thereby requested factual demonstration of "unforeseen developments", as discussed above, the ground for this ruling is questionable. In fact, this ruling does not clarify anything, but leads to more confusion and add more burdens on Members. Moreover, under GATT Article XIX 1(b),

a third Member is authorized to impose safeguard measure against increased imports from a Member that results from the trade diversion effect due to the safeguard action of another Member. There has been no dispute in relation the to third party safeguard action to date. According to Appellate Body's ruling, Article XIX 1(b) shall remain effective. The effect of this permission is dangerous and may put the hard-won multilateral negotiation results at stake. In sum, the Safeguard Agreement should be the sole governing rule of the safeguard measure and the requirement of "unforeseen developments" should be declared null and void, as well as Article XIX 1(b).

Based on the above suggestion, considering that tariff quota is a "less evil" choice compared with other quantitative restrictions, the applicability of GATT Article XIII also needs to be reconsidered. In my view, it is more economically sound to separate the legal binding power of the GATT Article XIX from Safeguard Agreement.

The situation of domestic industry provides for the factual basis for the application of safeguard measures, which determines the accuracy of the measure. To improve the accuracy of the determination of the domestic industry situation, first of all, the concept of domestic industry needs to be specified. Rather than the equivocal wording "major proportion", a specified standard is needed, like in the countervailing case. Secondly, the effects of serious injury and the effects of threat thereof need to be distinguished. According to Safeguard Agreement Article 5.1, safeguard measures should be applied only to the extent necessary to prevent or remedy serious injury and facilitate adjustment. Different level of serious injury causes different effects to the domestic industry and thereby entails different remedies in terms of stringency and time limits. Without distinction between different levels of injury, it is out of the question to apply the measure to the appropriate extent.

Albeit for the statement in the text of Safeguard Agreement showing the prerequisite of the causal link between increased imports and serious injury, the Appellate Body ruled that increased imports does not necessarily be sufficient to cause serious injury. This ruling is evidently inconsistent with the Safeguard Agreement. Therefore, it needs to be clarified that increased imports alone should be sufficient to cause serious injury or threat of serious injury, even though factors other than increased imports also contribute to the serious injury or threat thereof at the same time. In addition, the practical standard of how to disaggregate the causes should be established. At least, the generalized factors like global or domestic economic recession cannot be regarded as a single factor.

Under the Safeguard Agreement, certain selective application of safeguard measures is allowed. Article 9 provides for the exemption of developing countries from application of safeguard measure by developed countries based on the import share. As analyzed, this standard is easily subject to statistical manipulation. To improve it, the *de minimis* criteria shall be based on the domestic market share standard. Besides, whenever thinking of the issue of "selectivity", a question concerning "fairness" arises. Should the Members that have a minor influence on the markets be subjective to the safeguard measure to prevent the injury caused by those principle suppliers? The question is difficult to answer. However, considering the overwhelming use of antidumping measures and ERAs in that they can be applied in a discriminatory way,[165] as a "less-evil" choice, safeguard needs to be encouraged as replacement. To encourage its use,

165. Even though Safeguard Agreement prohibits the use of ERAs, bilateral ERAs still probably occur. It is secret arrangement and discriminatory. Both parties have no incentive to complain it. There also less possibility for the third countries to cross notify ERAs to the WTO. Therefore, it may still stay beyond the Safeguard Agreement.

selective application of safeguard targeted at principle suppliers may be necessary. But, the rule for selective application should be strict and explicit.

The Appellate Body ruled that there is no need to provide express justification for necessary extent of the measure. It is dubious that the safeguard measure is deemed to be applied to the appropriate extent without evidence but mere assertion. To prevent the measure from abuse, express justification is needed in my opinion. As to the adjustment plan, considering the fact that the political powerful declining industry tend to be reluctant to self-adjust, it will be helpful to push forward structural adjustment of the domestic industry, which is one of the basic objectives of safeguard. In doing so, the standard to evaluate the level of adjustment should be established and the multilateral surveillance in this respect should be strengthened.

As regards the obligation of notification and consultation, the time limits permitted for different type of notification should be specified. Since the situation deviates case by case, Members may establish maximum standards for several different circumstances to encourage timely notification and consultation. As to consultation, the standard of the sufficient time and information are needed. However, the Appellate Body did not mention how much difference is allowed between measure under consultation and measure actually applied. It needs further clarification.

Safeguard measures take the form of tariff or quantitative restrictions. Usually a Member cannot predict which form other Members may take to safeguard domestic industry, because it is totally up to Members' discretion. This situation creates somewhat uncertainty. Therefore, also for the sake of the economic efficiency and social welfare, it

is plausible to restrain the form of the safeguard measure to tariff, tariff quota and auctioned quota.

Compensation obligation under Safeguard Article 8.1 does not draw much attention from the panels and Appellate Body. However, the issue of compensation is of great significance in the safeguard system. It is one of the major reasons preventing Members from abusing safeguard mechanism. Situation has been different since the Uruguay Round. The average tariff level of Members has been significantly reduced. Therefore, there is not much room for Members to provide compensation. In the future, this problem will become more prominent with the development of trade liberalization. Hence, the compensation requirement needs to be relaxed. Actually, it has been somewhat relaxed in the Safeguard Agreement, but not so much.

As to the procedural problem of the dispute settlement concerning safeguard measures, suggestion is provided to establish a fast-track dispute settlement procedure, with a view to accelerating the proceedings.

Finally, regarding the future dispute in relation to the transitional product-specific safeguard measure against the imports from China, especially the special safeguard action taken under the trade diversion effect, the WTO panel and Appellate Body should interpret the clause very prudentially, objectively and strictly. Any loose interpretation of the Protocol may result with an uncontrollable disaster to both China and the world trading system; thereby dismantle the results of the multilateral trade liberalization. Members are also called upon to be prudential in application. Arbitrarily application of safeguard measure may be the source of the turbulence.

VIII. Conclusion

Members shall always bear in mind that safeguard is extraordinary trade remedy under emergent situations against fair trade practice. It is regarded as a measure of last resort. As a major trade remedy under the WTO, its fundamental objective is to promote trade liberalization. It also serves the goal of facilitating adjustment.

Even though the Safeguard Agreement is an achievement of Uruguay Round multilateral trade negotiation and shows great improvement on the GATT Article XIX, there are still many uncertainties and undefined criteria, which have caused difficulties in application and vagueness in rule interpretation. The dichotomy nature of safeguard also made the Appellate Body struggle during the dispute settlement proceeding. Its view on some issue deviated from case to case. In its case law, the Appellate Body provided many resolutions to legal and factual issues in interpretation of the rules and application of the measures. However, some ambiguities remain unresolved, some of their decision even made the ambiguities more serious. Those ambiguities need to be addressed to improve the clarity of the rule and the certainty of the safeguard system. The suggestion provided should be considered to further improve the safeguard system and therefore enhance the integrity of the multilateral trading system.

Concerning the transitional product-specific safeguard mechanism targeted at China, the panel and Appellate Body are called upon to be prudential, objective and strict in their findings both of law and facts.

Taking into consideration of the fact that all the disputes in relation to safeguard measures before the DSB resulted in inconsistency with the Safeguard Agreement,

Members shall pay more attention to comply with the multilateral rule. In addition, the multilateral surveillance should be strengthened.

In conclusion, though the current safeguard mechanism shows significant improvement not only in its operation system but also in the respect of increasing invocation by the Members, due to the problems discussed above, it is likely to continue to play a minor role in the multilateral trading system. However, the transitional product-specific safeguard mechanism against China may be an exception. Whether it can help China to be incorporated into the world trade system or bring the world into turmoil, we have to wait and see.

APPENDIX 1

Article XIX: Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

APPENDIX 2

AGREEMENT ON SAFEGUARDS

Members,

Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;

Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;

Recognizing the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and

Recognizing further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;

Hereby *agree* as follows:

Article 1

General Provision

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

Article 2

Conditions

1. A Member[1] may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Article 3

Investigation

[1] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

Article 4

Determination of Serious Injury or Threat Thereof

1. For the purposes of this Agreement:

   (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;

   (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

   (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

   (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

Article 5

Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

Article 6

Provisional Safeguard Measures

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

Article 7

Duration and Review of Safeguard Measures

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.

2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.

4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalize it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid-term of the measure and, if appropriate, withdraw it or increase the pace of liberalization. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalized.

5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least two years.

6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:

(a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and

(b) such a safeguard measure has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

Article 8

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

Article 9

Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.[2]

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

Article 10

Pre-existing Article XIX Measures

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

Article 11

Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.[3],[4] These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

[2] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.
[3] An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.
[4] Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

(c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.

2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member[5], the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.

3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:

(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;

(b) making a finding of serious injury or threat thereof caused by increased imports; and

(c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of

[5] The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 13

Surveillance

1. A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

(a) to monitor, and report annually to the Council for Trade in Goods on, the general implementation of this Agreement and make recommendations towards its improvement;

(b) to find, upon request of an affected Member, whether or not the procedural requirements of this Agreement have been complied with in connection with a safeguard measure, and report its findings to the Council for Trade in Goods;

(c) to assist Members, if they so request, in their consultations under the provisions of this Agreement;

(d) to examine measures covered by Article 10 and paragraph 1 of Article 11, monitor the phase-out of such measures and report as appropriate to the Council for Trade in Goods;

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

(f) to receive and review all notifications provided for in this Agreement and report as appropriate to the Council for Trade in Goods; and

(g) to perform any other function connected with this Agreement that the Council for Trade in Goods may determine.

2. To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it.

Article 14

Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes arising under this Agreement.

ANNEX

EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE 11

Members concerned	Product	Termination
EC/Japan	Passenger cars, off road vehicles, light commercial vehicles, light trucks (up to 5 tonnes), and the same vehicles in wholly knocked-down form (CKD sets).	31 December 1999

APPENDIX 3

Article XIII*: *Non-discriminatory Administration of Quantitative Restrictions*

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in 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 and to this end shall observe the following provisions:

(a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;

(b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with sub-paragraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;

(d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product

concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; Provided that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; Provided that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and Provided further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this sub-paragraph.

(c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the contracting party applying the restriction; Provided that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

APPENDIX 4

Protocol on the Accession of the People's Republic of China

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Part I - General Provisions

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16. Transitional Product-Specific Safeguard Mechanism

1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards.

2. If, in the course of these bilateral consultations, it is agreed that imports of Chinese origin are such a cause and that action is necessary, China shall take such action as to prevent or remedy the market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

3. If consultations do not lead to an agreement between China and the WTO Member concerned within 60 days of the receipt of a request for consultations, the WTO Member affected shall be free, in respect of such products, to withdraw concessions or otherwise to limit imports only to the extent necessary to prevent or remedy such market disruption. Any such action shall be notified immediately to the Committee on Safeguards.

4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.

5. Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest. The WTO Member shall provide written notice of the decision to apply a measure, including the reasons for such measure and its scope and duration.

6. A WTO Member shall apply a measure pursuant to this Section only for such period of time as may be necessary to prevent or remedy the market disruption. If a measure is taken as a result of a relative increase in the level of imports, China has the right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if such measure remains in effect more than two years. However, if a measure is taken as a result of an absolute increase in imports, China has a right to suspend the application of substantially equivalent concessions or obligations under the GATT 1994 to the trade of the WTO Member applying the measure, if

such measure remains in effect more than three years. Any such action by China shall be notified immediately to the Committee on Safeguards.

7. In critical circumstances, where delay would cause damage which it would be difficult to repair, the WTO Member so affected may take a provisional safeguard measure pursuant to a preliminary determination that imports have caused or threatened to cause market disruption. In this case, notification of the measures taken to the Committee on Safeguards and a request for bilateral consultations shall be effected immediately thereafter. The duration of the provisional measure shall not exceed 200 days during which the pertinent requirements of paragraphs 1, 2 and 5 shall be met. The duration of any provisional measure shall be counted toward the period provided for under paragraph 6.

8. If a WTO Member considers that an action taken under paragraphs 2, 3 or 7 causes or threatens to cause significant diversions of trade into its market, it may request consultations with China and/or the WTO Member concerned. Such consultations shall be held within 30 days after the request is notified to the Committee on Safeguards. If such consultations fail to lead to an agreement between China and the WTO Member or Members concerned within 60 days after the notification, the requesting WTO Member shall be free, in respect of such product, to withdraw concessions accorded to or otherwise limit imports from China, to the extent necessary to prevent or remedy such diversions. Such action shall be notified immediately to the Committee on Safeguards.

9. Application of this Section shall be terminated 12 years after the date of accession.

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