IMPLEMENTATION OF WTO RULES AND PROCEDURES GOVERNING SAFEGURAD MEASURES

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ABSTRACT

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The Safeguard Agreement (SA) is one of the most significant outcomes of the Uruguay Round. The substantive and procedural rules governing safeguard measures are clarified and specified, the grey-area measures are expressly prohibited, and safeguards disputes are settled by the legally binding mechanism of the Dispute Settlement Understanding (DSU). Nevertheless, WTO rules and procedures governing safeguard measures still contain some critical legal and systematic drawbacks to be improved.

In this regard, this paper reviews panel's and the Appellate Body's interpretation of safeguards rules and procedures that are frequently issued in disputes, and examines actual implementation of those rules with a view to suggest improvements for the current safeguard mechanism.

For the purpose, this paper involves comprehensive case studies on WTO safeguards disputes and carries out some statistical analyses on WTO Members' application of safeguard measures and their utilization of the WTO dispute settlement system for safeguards disputes.

ACKNOWLEDGEMENT

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I. INTRODUCTION

In March 2002, the United States (hereinafter "the US") decided to impose tariff of as much as 30 percent on steel imports as a safeguard measure and this triggered a chain reaction of moves by other countries to protect their steel industries. In response to the US decision, 96 emergency safeguards investigations into steel and metal imports were notified to the World Trade Organization (hereinafter "WTO") in the first nine months of 2002.[1] During the period, the number of all such investigations totaled 116, which was more than twice last year's total and more than the total during the previous seven years. (See Table I-1)

Table I-1 **Number of Investigation Notified**[2]

1995	1996	1997	1998	1999	2000	2001	Sep. 30, 2002
3	6	4	13	18	24	33	116

Despite the increasing popularity of safeguard measures, the Agreement on Safeguards (hereinafter "the SA") seems rather a rudimentary safeguards discipline. Although it is more detailed and improved than Article XIX of the General Agreement on Tariffs and Trade (hereinafter "the GATT"), the SA still contains certain degree of ambiguities and deficiencies in its interpretation and application as well as some systematic problems that call for urgent redress.

In this respect, this paper reviews important issues in interpretation and

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[1] Mayer, Brown, Rowe & May. *Global Trade Protection Report*, 2002

[2] Report of the Committee on Safeguards to the Council for Trade in Goods: G/L/409, G/L/494; and Document Online Search Facility: <http://www.wto.org/english/info_e/search_e.htm> (visited on October 15, 2002).

application of the SA and discusses some aspects of the safeguard mechanism that needs improvement. Chapter II of this paper is devoted to explaining a brief history of safeguard rules. In Chapter III, the structure of safeguard mechanism is reviewed and chapter IV lays out the current situation in which safeguard measures are applied. In Chapter V, this paper concentrates on important issues in interpreting safeguards provisions. Findings and recommendations of the panels and the Appellate Body are important sources for this purpose. Then in Chapter VI, this paper thoroughly discusses the critical issues of "facilitation of structural adjustment" and a systematic deficiency of the current dispute settlement system for safeguard cases.

II. AN OVERVIEW OF SAFEGUARDS RULES

II.1. Nature of Safeguard Measures

Safeguard Measures, which are emergency trade remedy measures taken only for temporary, have a significant role in the current world trade system under the World Trade Organization (hereinafter "the WTO") because they are only import restriction measures which the WTO Members can rely on unilaterally to remedy or prevent serious injury or threat of serious injury to their domestic industry. Unlike antidumping actions and subsidy countervailing measures, safeguard measures do not require the presence of trading partners' unfair trade practice. Therefore, it is likely that safeguard measures are easily abused in their interpretation and application unless an effective discipline is provided.

II.2. A Historical Overview

The origin of the GATT escape clause is closely intertwined with the drafting of a Charter for the proposed International Trade Organization (ITO). In preparation of meetings for the Charter of the ITO to be held in London in 1946, the United States submitted a working proposal for a Charter that included an escape clause mechanism and negotiators to the Charter agreed in principle on the need for an escape clause.[3]

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[3] Terence P. Steward. *The GATT Uruguay Round : A Negotiating History.* Vol.II. Boston: Kluwer Law and Taxation Publishers, 1999:p.1745. This proposal was closely patterned after the escape clause

In early 1947, a decision was also made to include an escape clause in the GATT and the changes made to the clause in the GATT talks were incorporated into the GATT.[4] Since then, additional changes were made to the clause, but these changes were not incorporated into the GATT article since the changes were made after the signing of the GATT and ultimately the ITO never came into existence. Thus, five paragraphs of Article XIX of the GATT 1947 were the only rules for safeguard measures until the establishment of the WTO in 1995.

In invoking Article XIX, many countries argued that the GATT provision was difficult to apply and did not meet their needs. Consequently, in the Tokyo Round, the major issue was devoted to safeguard measures.[5] Concerned with the increasing imports from Japan and other Asian developing countries, developed countries stressed the importance of improving safeguard system. Noting the high percentage of safeguard measures in effect during 1970-1975 against their exports to developed countries, developing countries also strongly demanded to precisely define the criteria for invocation of the safeguard clause.

As a result, the Tokyo Declaration, adopted in 1973, stated that it would examine the adequacy of Article XIX and Article XIX's application, but the safeguard negotiations progressed very slowly.[6] At the end of the Tokyo Round in 1979, the delegations could not reach a common safeguard agreement and failed to enact it as a "Code." Many considered the failure of the negotiations to reach an agreement on safeguards in the Tokyo Round as threatening the credibility of GATT.[7]

Accordingly, one of the important issues in the Uruguay Round has been to clarify implementation guidance of the Article XIX. In particular, the developing

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provision contained in the U.S.-Mexico Agreement.

[4] Ibid.

[5] Ibid., p. 1745.

[6] Ibid., p. 1752.

[7] Ibid., p. 1718.

countries and the Pacific Rim countries (Australia, Hong-Kong, Korea, New Zealand, and Singapore) had increasing concern about the growing number of the so-called protective measures and the possible erosion of their gains in their export markets.[8] In consequence, a variety of issues were raised: explicit adoption of MFN principle, special and differential treatment for Least Developed Countries (LDCs), duration and degressivity, the definition of serious injury, structural adjustment assistance, transparency and safeguard procedures and the form of relief as well as issues remained from the Tokyo Round negotiation.

Finally, the Dunkel Draft largely succeeded in addressing all these issues and accomplishing the objectives set out in the Ministerial Declaration by the Safeguard Group. Especially, the Dunkel Draft Final Act of December 1991 provided the gist of the final Agreement on Safeguards. No further substantive discussions were held or substantive changes were made to the safeguards text after the Dunkel Draft. The only difference between the Dunkel Draft Act on Safeguards and the Final Act concluded at Marrakesh were certain grammatical changes and technical changes to conform the text to the other parts of the WTO Agreement.[9]

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[8] Ibid.

[9] Ibid. For example, the Dunkel Draft uses the terms "Contracting Party" and "GATT" while the Safeguards Agreement refers to "Members" and "GATT 1994." Organizationally, the Dunkel Safeguards shaper consists of nine articles. These were reorganized into fourteen articles in the Safeguards Agreement. In particular, Article II of the Dunkel Draft, which set forth the conditions for imposing safeguards, was divided in the Safeguards Agreement into six articles.

III. FRAMEWORK OF WTO RULES GOVERNING SAFEGUARDS

Under the GATT trade system, five paragraphs of Article XIX of GATT 1947 were the main legal text governing the application of safeguard measures. During the Uruguay Round Negotiation, the role of this provision was largely taken over by detailed and improved provisions of the 'Agreement on Safeguards', which entered into force in 1995. The list of fourteen articles governing safeguard measures is reproduced in Table III-1.

Table III-1 Provisions of Safeguards Agreement

AGREEMENT ON SAFEGUARDS
("Safeguards Agreement")

Article 1: General Provision
Article 2: Conditions
Article 3: Investigation
Article 4: Determination of Serious Injury or Threat Thereof
Article 5: Application of Safeguard Measures
Article 6: Provisional Safeguard Measures
Article 7: Duration and Review of Safeguard Measures
Article 8: Level of Concessions and Other Obligations
Article 9: Developing Country Members
Article 10: Pre-existing Article XIX Measures
Article 11: Prohibition and Elimination of Certain Measures
Article 12: Notification and Consultation
Article 13: Surveillance
Article 14: Dispute Settlement
ANNEX: EXCEPTION REFERRED TO IN PARAGRAPH 2 OF ARTICLE

In this Chapter, WTO rules governing safeguard measures are divided into two parts: a part of substantive requirements and a part of procedural requirements.[10] Although the distinction between substantive rules and procedural rules is not clear-cut, this paper categorizes Article 2.1 and 4 as belonging to substantive requirements, whereas Article 2.2, 3, 5, 6, 7, 8, and 12 as procedural requirements. (See Figure III-1)

Under the SA, a Member proposing to apply a safeguard measure is obliged to satisfy conditions set out in Article 2.1 and determine serious injury or threat thereof as well as the causal link as provided for in Article 4. These substantive rules in Article 2.1 and Article 4 should be satisfied in investigation as prerequisites for the actual application of safeguard measures. (See ① in Figure III-1.) After completing the first procedural step of investigation stipulated in Article 3 and before taking any step further to levy a safeguard measure, a Member is, then, obliged to provide a certain period of time for consultation concerning not only its proposed safeguard measure but compensation in return for any adverse effect of the measure. (See ② in Figure III-1.) After the prior consultation phase, the Member can apply a safeguard measure but only in conformity with rules in Articles 5, 6 and 7, and strictly based on the MFN principle in Article 2.2[11]. (See ③ in Figure III-1.) Meanwhile, as a result of the prior consultation, the Member must also provide compensation in return for any adverse effect of the proposed measure in the future. For this purpose, the Member should act

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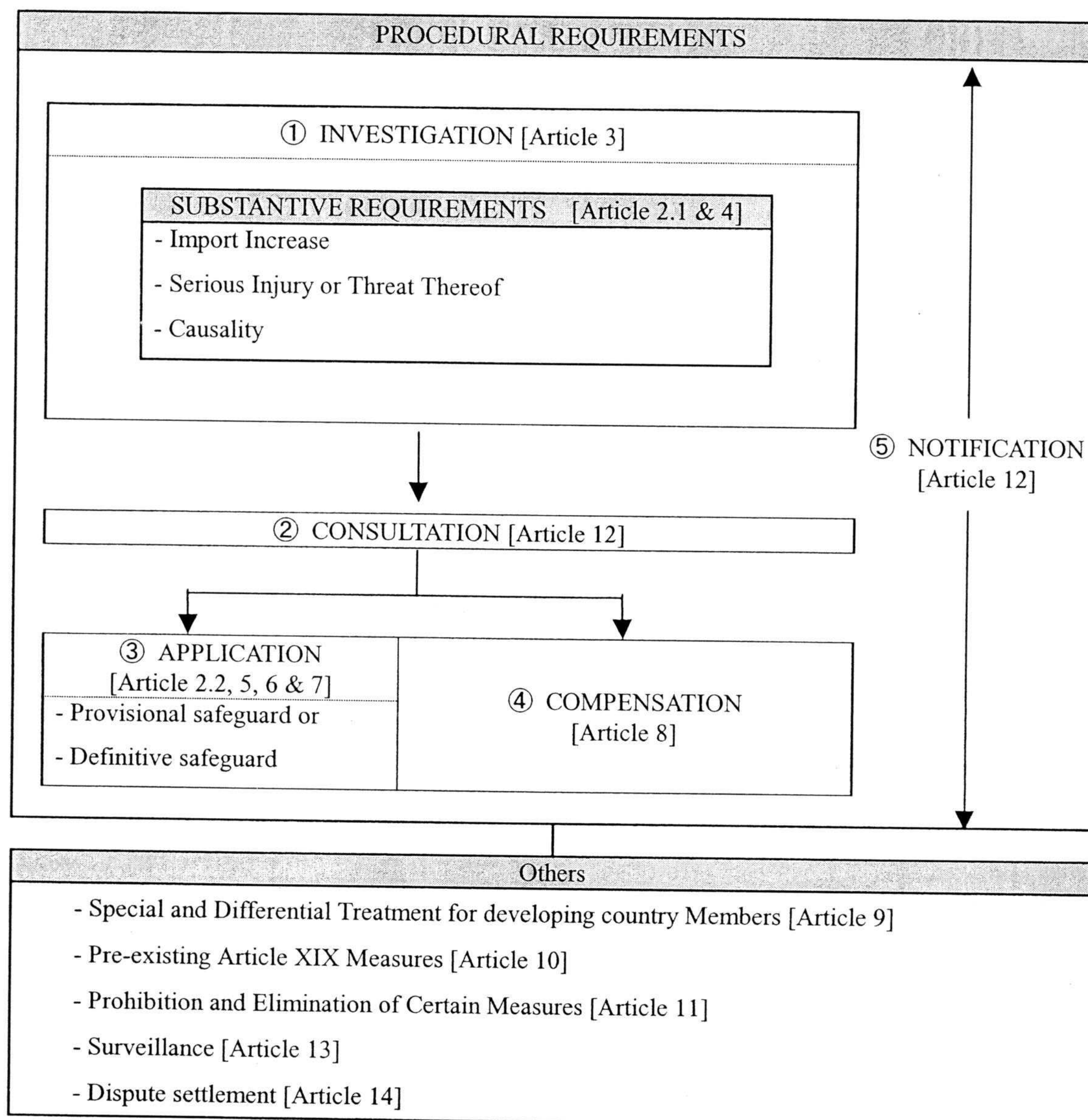
[10] Appellate Body divides the WTO Safeguard mechanism into two parts. The first part is related to a question of whether a Member country has the right to impose a safeguard measure. The latter part involves whether, if the Member country has the right, the safeguard measure is applied in due procedure. More specifically, the AB in US-Line Pipe categorizes Articles 2.1, 3 and 4 as belonging to the first part while requiring a Member country to actually apply a safeguard measure in pursuant to Article 2.2, 5, 7, 8, and 12. Basically following the structure set out by the Appellate Body, this paper made a few changes to it.

[11] It may be arguable whether Article 2.2 is a substantive rule or a procedural rule. However, the category of 'substantive requirements' used in this paper means 'substantive requirements, which should be satisfied before imposing a safeguard measure'. Similarly, 'procedural requirements' termed in this paper indicates 'procedural requirements, which should be fulfilled when actual application of a safeguard measure occurs.' Making the distinction, Article 2.2 is considered to be a procedural requirement because it is about in what principle a safeguard measure is required to be applied.

Figure III-1. Structure of the WTO Safeguard Mechanism

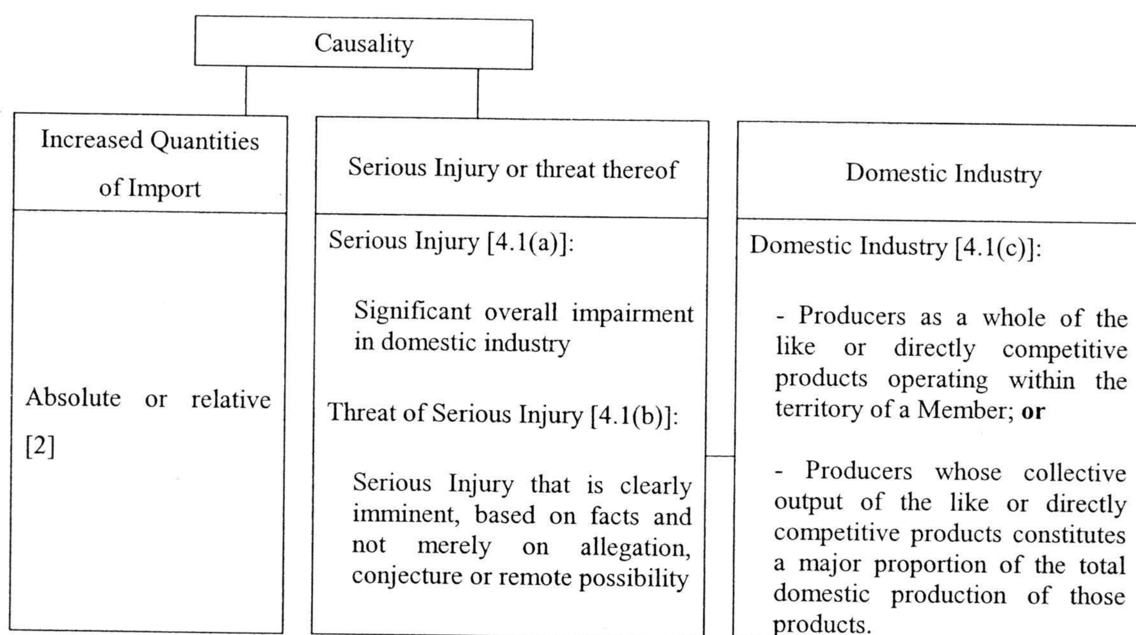


consistently with Article 8. (See ④ in Figure III-1.) Throughout these procedural steps, – that is, investigation, application, and consultation – the Member must properly notify to the Committee on Safeguards initiation of investigation, findings of investigation and application and extension of a safeguard measures as required by Article 12. (See ⑤ Figure III-1.) These substantive requirements and procedural steps will be thoroughly explained beginning with "II.A. Substantive Requirements".

III.1. Substantive Requirements

When a WTO Member proposes to impose a safeguard measure, it has to satisfy basically three elements of substantive requirements: (1) import increase, either in absolute or relative term; (2) serious injury or threat thereof; and (3) the causal link between the import increase and the serious injury or threat thereof. (See Figure III-2)

Figure III-2. Legal Elements for Safeguard Measures



* The number in [ ] indicates article number of the SA.

III.1.1. Increased Imports, Absolute or Relative

According to Article XIX of GATT 1994, when a Member proposes to impose a safeguard measure, it has to confirm as a first substantive requirement that quantities of import concerned increase. Article 2 of the Safeguard Agreement further specifies that such import increase can either be absolute or relative. The conditions for applying a safeguard measure by a WTO member country is as follows:

> A member may apply a safeguard measure to a product only if that Member has determined... 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.(emphasis added)

III.1.2. Serious Injury or Threat Thereof to Domestic Industry

After finding increased quantities of import, a Member proposing to impose a safeguard measure is obliged to find serious injury or threat thereof to its domestic industry of the like or directly competitive products. This obligation is set out both in Article XIX of GATT 1994 and Article 4 of the SA. However, there are two ambiguities in this requirement: (1) what constitutes serious injury and threat thereof ? and (2) what qualifies domestic industry to be subject to a safeguard measure ? These questions will be discussed in depth in Part IV of this paper.

III.1.2.1. Serious injury or threat thereof

The requirement for finding "serious injury or threat thereof" is one of the factors that distinguish Safeguard requirements from those of antidumping and countervailing duties for subsidies, whose imposition is based on the existence of material injury or threat thereof. According to Article 1(a) of the SA, "serious injury" is defined as "a significant overall impairment in the position of a domestic industry." In addition, Article 1(b) of the SA defines "threat of serious injury" as "serious injury that is clearly imminent" and requires the determination of its existence to be "based on facts and not merely on allegation, conjecture or remote possibility."

III.1.2.2 Domestic producers of like or directly competitive product

In general, the extent of producers that can be protected by a safeguard action is more diverse than those considered by an antidumping actions. This is because the SA encompasses the domestic producers of "like or directly competitive products" while the Antidumping Agreement covers the domestic producers of "like or directly competitive or substitutable products." However, what kinds of products are 'like or competitive products' subject to a safeguard measure seems unsettled in practice.

Nevertheless, in Article 4(c) of the SA, the phrase "domestic industry," used in determining injury or threat thereof, is 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."

III.1.3. Casual Link

After a Member finds the existence of absolute or relative import increase and the existence of serious injury or threat thereof to its domestic industry, the next important task is to determine the causal link between them. Through investigation, the Member is required to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry.[12] In this process, if factors other than increased imports are causing injury to the domestic industry at the same time, the Member is prohibited to attribute such injury to increased imports.[13]

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[12] SA, Article 4.2(b), first sentence.

[13] SA, Article 4.2(b), second sentence.

III.2. Procedural Requirements

III.2.1. Investigation

When a Member believes that application of a safeguard measure is essential to impose a safeguard measure to remedy or prevent serious injury or to facilitate adjustment, its competent authority has to launch an objective and fact-based investigation and examine whether the situation at issue satisfies the elements of substantive requirements discussed in "III.1. Substantive Requirements" of this paper. After fulfilling this step, the Member proposing to impose a safeguard measure acquires the right to impose a safeguard measure. (See Figure III-3)

III.2.1.1. Requirements of investigation

Article 3 of the SA provides, "[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." The investigating authority has to immediately notify the Committee on Safeguards upon initiating an investigatory process relating to serious injury or threat thereof and the reasons for it.[14]

While carrying out an investigation, the competent authority is required to include reasonable public notice to all interested parties and public hearings or other appropriate means so that importers and exporters and other interested parties could present evidence and exchange their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authority shall publish a report setting forth their findings and reasoned conclusions

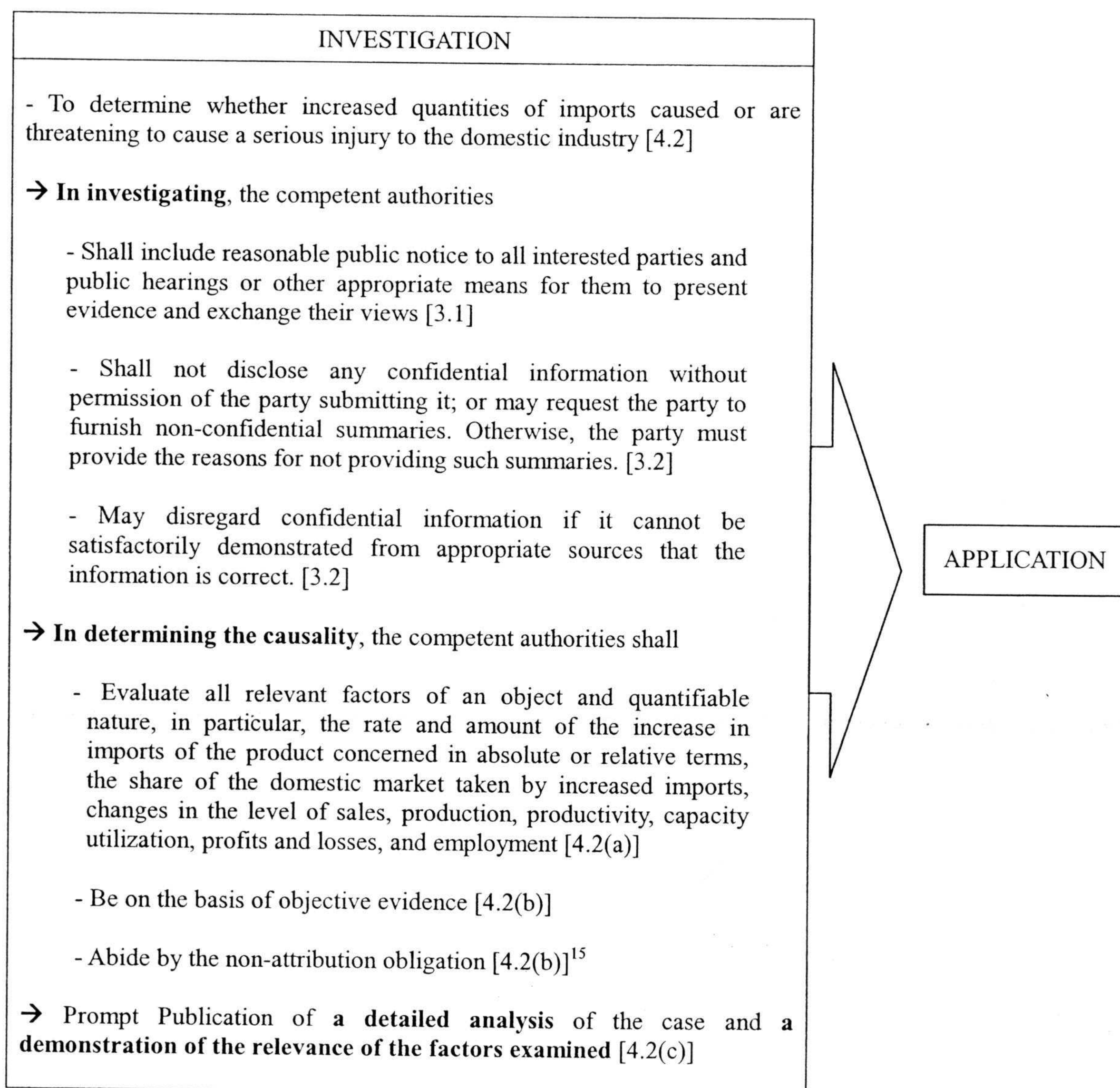
[14] SA, Article 12.1(a).

reached on all pertinent issues of fact and law.

III.2.1.2. Handling of confidential information

Article 3.2 of the SA sets out rules for handling confidential information. According to the provision, the investigating authority is forbidden to disclose any confidential information without permission of the party submitting it. However, if

Figure III-3. Investigation



[15] Article 4.2(b) second paragraph: "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.

the competing 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.

III.2.1.3. Evaluation of all relevant factors

According to Article 4.2(a), investigation to determine the causal link between increased imports and serious injury and threat thereof must contain "all relevant factors of an objective and quantifiable nature." The Article particularly lists examples of the factors: 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 increase imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

Article 4.2(b) of the SA requires the competent authority to determine the causal link based on objective evidence. It also requires obligation of non-attribution by stipulating "[w]hen 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."

III.2.1.4. Prompt publication and notification of the result of investigation

Article 4.2(c) provides that the competent authorities must publish promptly a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. The competent authority must immediately notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports.[16]

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[16] SA, Article 12.1(b).

III.2.2. Consultation and Suspension of Concession

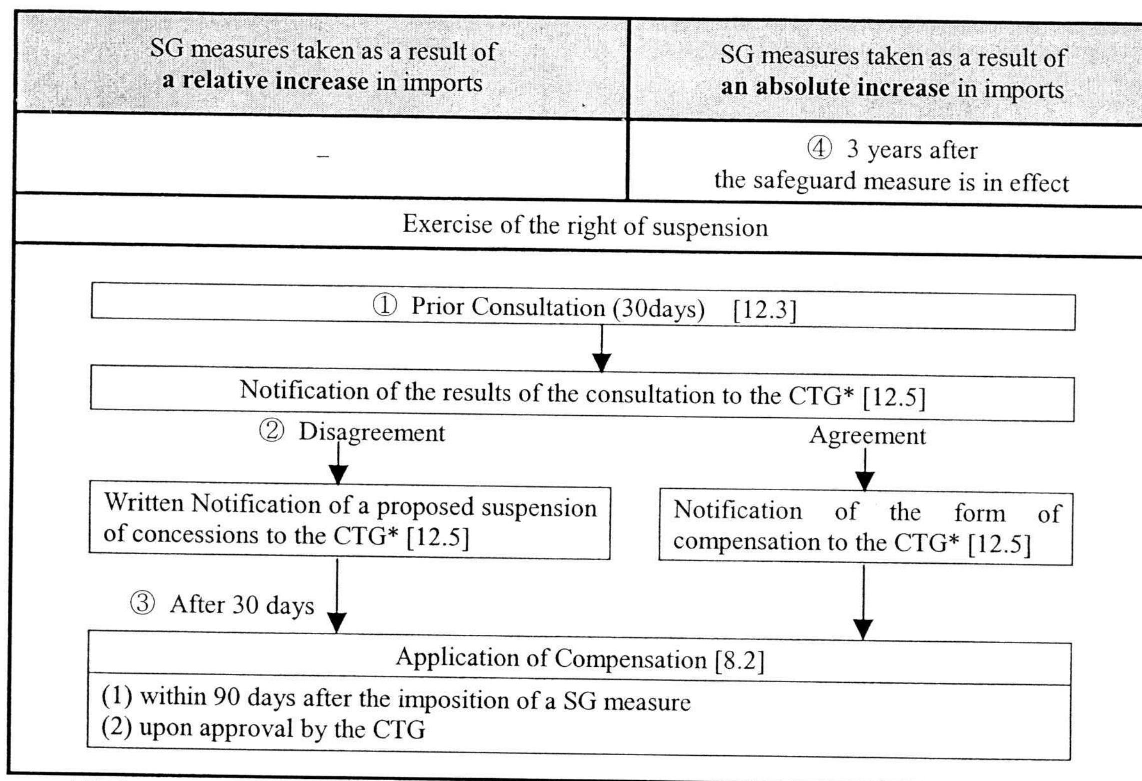
When the competent authority of a Member proposing to apply a safeguard measure decides to apply a measure after having determined that import increase, absolute or relative, has caused or is threatening to cause serious injury or threat thereof to its domestic industry, it has to, first of all, notify the Committee on Safeguards of taking a decision to apply a safeguard measure. In addition, Article 12.2 requires the Member to provide "all pertinent information, which shall include evidence or 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." At the same time, the Member has to provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned.[17] In consultation, Members, in particular, review the information provided by the Member proposing to apply a safeguard measure, exchange views on the measure and try to reach an understanding on ways to provide compensation for the measure.[18]

The SA requires a Member applying a safeguard measure to 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.[19] To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effect of the measure on their trade.[20] It is mandatory to Members concerned to notify the Council

[17] SA, Article 12.3
[18] Ibid.
[19] SA, Article 8.1, first sentence.
[20] SA, Article 8.1, second sentence.

for Trade in Goods upon results of the consultations, and any form of compensation.[21] The process of applying a trade compensation is summarized in Figure III-4.

Figure III-4. Compensation



*CTG: Council for Trade in Goods

If no agreement is reached within 30 days in the consultation (See ① in Figure III-4), then the affected exporting Members is free to suspend the application of substantially equivalent concessions or other obligations under GATT 1994 to the trade of the Member applying the safeguard measure. (See ② in Figure III-4) However, the affected exporting Members' suspension should be made not later than 90 days after the safeguard measure is applied, upon the expiration of 30 days from the day of the Council for Trade in Goods' receipt of written notice of such suspension, and only upon the Council's approval.[22] (See ③ in Figure III-4) GATT 1947 article XIX

21 SA, Article 12.5.
22 SA, Article 8.2.

authorized retaliation by members adversely affected by the measure when appropriate compensations was not forthcoming. In a departure from this rule, the SA provides that the right of suspension should not be exercised for the first three years after the safeguard measure takes effect if the measure is taken as a result of an absolute increase in imports.[23] (See ④ in Figure III-4) The exporting Member must immediately notify the Council for Trade in Goods of proposed suspension of concessions and other obligations.[24]

III.2.3. Application

When a Member applies a safeguard measure, it should apply it only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[25] However, the form of a safeguard measure is up to the Member's discretion. Nevertheless, the SA limits it to a certain degree.

III.2.3.1. MFN principle

In principle, when a WTO Member country proposes to impose a safeguard measure, it must do so on the basis of MFN principle.[26] In other words, the country proposing to impose a safeguard measure is obliged to apply the measure to all imports regardless of their origin.

III.2.3.2. Application of definitive safeguard measures

When a Member takes a decision to apply a definitive safeguard measure, it has

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[23] SA, Article 8.3.
[24] SA, Article 12.5.
[25] SA, Article 5.1.
[26] SA, Article 2.2.

to immediately notify it to the Committee on Safeguards.[27] Article XIX of the GATT 1994 stipulates that the GATT obligation "in whole or in part" may be suspended or modified in respect to the product in question and 'to the extent and for such time as may be necessary to prevent or remedy such injury.'

If a Member proposes to apply a quantitative restriction, the measure should not reduce the quantity of imports below the average of imports in the last three representative years.[28] Otherwise, the Member should give clear justification why a different level is necessary.[29] Members may choose measures most suitable for the achievement of these objectives.[30]

If a Member allocates a quota among supplying countries, it may seek agreement about the allocation of shares in the quota with all other Members with substantial interest.[31] If this is not reasonably practicable, the Member should allocate the shares based on the proportion of the total quantity or value of imports, with due account being taken on any special factors affecting the trade.[32] (See Figure III-5)

If a Member seeks a departure from the rules above, it should first consult with other Members with substantial interest under the auspice of the Committee on Safeguard; and clear demonstrate to the Committee on Safeguards that (i)imports from certain Members have increased in disproportionate percentage to the total increase, (ii) the reasons are justified, and (iii) the conditions of such departure are equitable to all suppliers concerned.[33] However, the departure is not allowed in the case of threat of serious injury.[34] (See Figure III-5)

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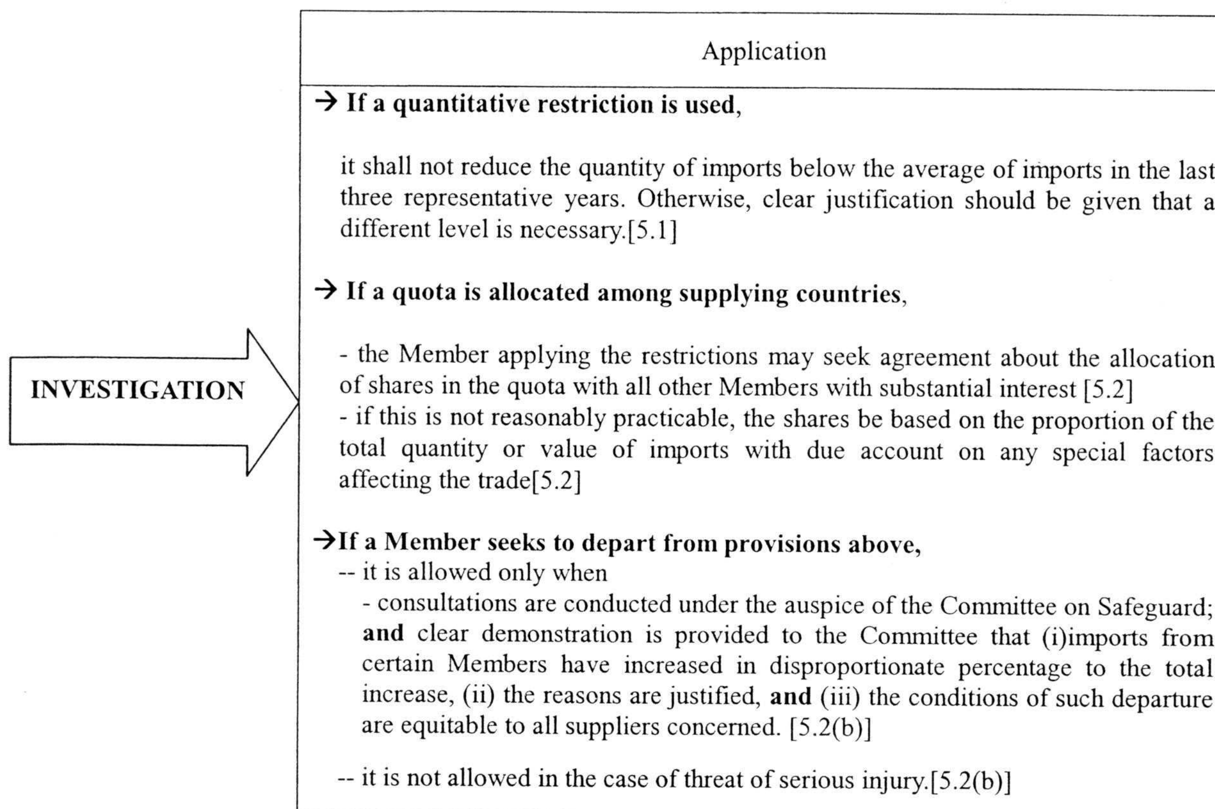
[27] SA, Article 12.1(c).
[28] SA, Article 5.1, second sentence.
[29] Ibid.
[30] SA, Article 5.1, third sentence.
[31] SA, Article 5.2(a), first sentence.
[32] SA, Article 5.2(a), second sentence.
[33] SA, Article 5.2(b), first sentence.
[34] SA, Article 5.2(b), second sentence.

Figure III-5. Application



III.2.3.3. Application of provisional safeguard measures

A Member is allowed to impose a provisional safeguard measure only in critical circumstances where delay would cause damage, which it would be difficult to repair.[35] The application of a provisional safeguard measure, however, must be in pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury.[36] A Member should notify it to the Committee on Safeguards before taking a provisional safeguard measure.[37] Such measure should take the form of tariff increase to be promptly refunded if the subsequent investigation does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry.[38]

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[35] SA, Article 6, first sentence
[36] Ibid.
[37] SA, Article 12.4.
[38] SA, Article 6, third sentence.

III.2.3.4. Duration of safeguard measures

A safeguard measure must be applied only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment.[39] The maximum allowed duration is four years.[40] The duration of the provisional measure must not exceed 200 days.[41] The duration of any such provisional measure must be counted as a part of the initial period and any extension.[42] Thus, 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. Referred to the more detailed rules for duration of a safeguard measure presented in Figure III-6.

III.2.3.5. Extension of application and re-application

If the imposition period needs to be extended, the competent authority must determine that the measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting.[43] A member should notify the Council for Trade in Goods before it extends the measure.[44]

No safeguard measure should be applied again to the import of a product which has been subject to such a measure 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.[45] Nevertheless, a safeguard measure with a duration of 180 days or less may be applied again under certain conditions. In this case, there is no required period of non-application. (See Figure III-6)

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[39] SA, Article 7.1, first sentence.
[40] SA, Article 7.1, second sentence.
[41] SA, Article 6, second sentence.
[42] SA, Article 6, fourth sentence.
[43] SA, Article 7.2.
[44] SA, Article 12.1(c).
[45] SA, Article 7.5.

Figure III-6. Duration of Application

Application			Re- application
Provisional SG (6)	**Definitive SG**	**Extension of SG**	Only when such extension is "necessary to prevent or remedy serious injury or to facilitate adjustment." - Proposed duration of re-application > 180 days (7.5): If the previous measure lasted 2 years or longer: only after non-application period, which equals to the duration of the previous application. If the previous measure lasted less than 2 years: only after non-application period of 2 year - Proposed duration of re-application ≤ 180 days (7.6): - At least one year has elapsed since the date of introduction of the previous SG measure **(and)** - Such a SG 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.
-In critical circumstances where delay would cause damage which would be difficult to repair - in the form of tariff -promptly refunded if the subsequent investigation does not determine increased imports caused serious injury	Only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment (7.1) - Duration of a SG measure ≥ over 1 year (7.4): The Member applying the measure shall "**progressively liberalize it at regular intervals** during the period of application." - Duration of a SG measure ≥ 3 years (7.4): The Member applying the measure shall "**review the situation not later than the mid-term of the measure.**" => Judged from the result of the review, if appropriate, the Member shall withdraw it or increase the pace of liberalization.	Only if the SG measure continues to be necessary to prevent or remedy serious injury and that there is evidence that industry is adjusting (7.2)	
Max. 200days	Maximum 4 years (7.1)		
Maximum 8 years (7.3)			

III.3. Special and Differential Treatment for Developing Countries

Safeguard measures must not be applied against a product originating in a developing country member as long as its share of imports of product concerned in the importing member does not exceed three per cent provided that imports from those countries collectively account for not more than nine per cent of total imports of the product concerned.[46] Also, under the WTO agreement, a developing country has the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period of 8 years provided in 7.3 of the Safeguard Agreement.[47]

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[46] SA, Article 9.1.

[47] SA, Article 9.2.

IV. IMPLEMENTATION OF SAFEGUARDS MECHANISM

IV.1. Application of safeguard measures

The rising number of application of safeguard measures can be much expected from the increasing number of notification of investigation that a Member initiates with a view to impose a safeguard measure. As of July 2002, 27 countries have notified initiation of investigation on 83 products. Table IV-1 presents number of safeguard legislative notified at the stage of investigation initiation along with the industries on which Members propose to impose a safeguard measure. As shown in the Table IV-1, India, the US, Czech Republic and Chile are the most active users of safeguard measures. India proposes to impose or has already imposed 12 safeguard measures while the US, Czech Republic and Chile initiated an investigation on or have already imposed 10, 9 and 8 measures, respectively. Other remaining countries have initiated investigation or have imposed safeguard measures on less than 5 industries. As to the products, 33 products on which an investigation was initiated or a safeguard measure was applied are food products such as agricultural, meat or dairy products.

Table IV-1. Number of Safeguard Legislative Notified

(Initiation of Investigation Counted)[48] (As of July 31, 2002)

REPORTING MEMBER	FOOD PRODUCTS	NON-FOOD PRODUCTS	NUMBER
Argentina	-Peaches	-Motorcycles, -Footwear, -Toys	4
Australia	-Swine meat		1

[48] WTO Document, G/L/409, G/L/494; and Document Online Search Facility: <http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm.>

Brazil	-Coconuts	-Toys	2
Bulgaria	-Crown corks	-Non-aqueous ammonium nitrate, -Ammonium Nitrate	3
Canada		-Steel products	1
Chile	-Wheat, wheat flour, cane/beet sugar, edible vegetable oils -Glucose and glucose syrup, -Liquid & powdered milk	-Lighters -Mixed oils -Hot-rolled coils, -Tyres -Socks(synthetic and cotton)	8
China		Certain steel products	1
Colombia		Taxis	1
Costa Rica	Rice		1
Czech Republic	-Cane/beet sugar, -Isoglucose, -Cocoa powder	-Certain welded tubes and pipes, -Stranded wire, ropes and cables, -Citric acid, -Certain steel products, -Ammonia nitrate, -Footwear	9
Ecuador		-Matches -Sandals	2
Egypt	-Powdered milk	-Safety matches, -Common fluorescent lamps,	3
El Salvador	-Pork, -Rice,	-Fertilizers	3
European Communities		-Steel products	1
Hungary			1
India	-Vegetable Oil (Edible Grade),	-White/yellow phosphorus, -Gamma ferric oxide/magnetic iron oxide, -Methylene chloride(11) -Acetylene black, -Carbon black, -Salbstock polyol, -Propylene glycol, -Hardboard, -Styrene butadiene, -Phenol acetone, -Certain steel products, -Epichlorohydrin (ECH) -Phenol	12
Japan	-Shiitake mushrooms -Welsh onion,	-Tatami-omote,	3
Jordan	-Biscuits/ chocolates, -Pasta,	-Tiles, cubes and similar articles -Prepared unrecorded media -Cooking appliances and plate warmers, -Electric accumulators, -Ceramic sinks, wash basins, wash basin pedestals, baths, bidets, water closet pans, flushing cisterns, urinals and similar sanitary fixtures of porcelain and others	2
Korea	-Soybean oil, -Dairy products, -Garlic	-Bicycles and parts,	4
Latvia	-Swine meat, -Pork meat		1
Mexico		-Plywood panels	
Morocco	-Bananas		2

Philippines		-Ceramic tiles, -Cement	2
Poland		-Potassium nitrate, -Instantaneous gas water heaters,	2
Slovak Republic	-Swine meat, -Sugar		3
Slovenia	-Swine meat		1
United Sates	-Tomatoes, -Crabmeat, -Tomatoes & peppers, -Wheat gluten, -Lamb meat,	-Line pipe, -Extruded rubber threat, -Steel -Brooms, -Steel wire rod,	10
Venezuela		-U sections of iron or steel -Cold-rolled steel, -Hot-rolled steel	5
Total			83

IV.2. Disputes on Safeguard Measures

IV.2.1. Safeguards cases

During 48 years of the GATT trading system, there were only 3 cases concerning safeguard measures. (See Table IV-2) In contrast, the number of safeguard disputes during the 7-year-period of the WTO trade system has substantially increased. Since 1995 and as of July 31 2002, total of 18 disputes have been brought to the WTO dispute settlement system. (See Table IV-3) Among the 18 cases, two disputes were settled during consultation phase. One case was mutually resolved by consultation, and the other dispute came into inactiveness as it was replaced by another case.[49] Of the remaining 16 disputes, the WTO Panels were established under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") for nine disputes concerning application of safeguard measures. Six of these disputes were appealed to the Appellate Body, five of which are currently at the phase of implementation.

[49] See Table II-2: *Chile – Safeguard Measures on Sugar* was replaced by *Chile – Safeguard Measures and Modification of Schedules regarding Sugar.*

Table IV-2. Safeguard Issues Addressed by GATT Panels

Dispute Name	Adoption	Document Number
Norway Restriction on Imports of Certain Textile Products	Adopted June 18, 1980	L/4959
Increase in the United States Duty on Dried Figs	Decision of November 8, 1952	SR.7/15
Report on the Withdrawal by the United States of a Tariff Concession under Article XIX ("HATTER'S FUR")	Adopted October 22, 1951	CP/106

Table IV-3. Safeguards Disputes under the WTO System

Dispute Name	Case Number	Dispute Settlement Stage	Adoption Date
United States – Safeguard Measure Against Imports of Broom Corn Brooms.	WT/DS78	Consultation	-
Argentina - Safeguard Measures on Imports of Footwear	WT/DS123 (replacing WT/DS121)	Consultation	-
Hungary - Safeguard Measure on Imports of Steel Products from the Czech Republic	WT/DS159	Consultation	-
Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products	WT/DS220	Consultation	-
Chile – Provisional Safeguard Measure on Mixtures of Edible Oils	WT/DS226	Consultation	-
Chile – Safeguard Measures and Modification of Schedules regarding Sugar	WT/DS230 replacing WT/DS228	Consultation	-
European Communities - Provisional Safeguard Measures on Imports of Certain Steel Products	WT/DS260	Consultation	-
United-States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe	WT/DS214	Panel procedure	-
Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches	WT/DS238	Panel procedure	-
US – Definitive Safeguard Measures on Imports of Certain Steel Products	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	Panel procedure	-
Chile - Price Band System and Safeguard Measures relating to Certain Agricultural Products	WT/DS207	Appellate Body Report circulated	(Circulation of AB Report: Sep. 23, 2002)
Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products	WT/DS98	Implementation	12 Jan 2000
Argentina – Safeguard Measures on Imports of Footwear	WT/DS121	Implementation	12 Jan 2000
United Sates – Definitive Safeguards Measure on Imports of Wheat Gluten from the European Communities	WT/DS166	Implementation	Jan. 19, 2001
United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand	WT/DS177, WT/DS178	Implementation	May 16, 2001
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe	WT/DS202	Implementation	Mar. 8, 2002
Slovakia – Safeguard Measure on Imports of Sugar	WT/DS235	Mutually resolved	-
Chile – Safeguard Measures on Sugar	WT/DS228	Replaced	-

All these disputes have raised important issues in interpretation and application of the SA. The Panel reports provided certain guidelines for resolution of these issues, some of which were reversed by the Appellate Body. Therefore, it is worthwhile analyzing what were the rulings and findings of the Panels and Appellate Body over the rules on safeguard measures in order to better understand the implementation of safeguard measures under the WTO system. In Chapter V, some selected legal issues are reviewed and commented.

VI.2.2. Major Participants in Safeguards Disputes

Out of the 144 WTO Members, 35 countries have so far involved in a safeguard case either as a party to a safeguard dispute – that is, either as a complainant or as a defendant, or as a third party.[50] Among 35, there were 9 developed countries, 21 developing countries, and 5 transitional economic countries. From this it can be safely said that developing countries are the most active participants in safeguards dispute settlement. None of the least-developed countries has participated in any of the safeguard dispute settlement. None of the EC Members has individually participated in a safeguard case.

As to who were major complainants and defendants involved, Table IV-4 shows the number of each major participants' involvement in a dispute either as a

[50] Officially, there is no all-agreed classification of WTO Members for developed, developing, least developed or transitional economic countries. For the analysis, however, the classification standard of Members in this paper is mainly taken form the format used in WTO Dispute Settlement 1995-2000: A Statistical Analysis (Park:2001). The authors of the article divided 140 WTO Members, which were the number of WTO Members as of January 2001, into five categories: (1) developed countries (DCs), (2) newly industrialized countries (NICs), (3) traditional developing countries (TLDCs), (4) least-developed countries (LLDCs), and (5) transitional economic countries (TECs). For simplicity, this paper combines NICs and TLDCs and names the group Developing Countries, thus considering only four groups. As of September 2002, there are 144 WTO Members because, four countries have acceded to WTO since January 2001. These additional four countries - Lithuania, Moldova, China, and Chinese Taipei - are also taken into consideration for the analysis.

complainant or a defendant, or a third party.[51]

Table IV-4. Actors involved in WTO Safeguard Disputes

Countries	As complainant	As defendant	Participation ratio as complainant or defendant
USA	1/25	6/17	7/43
EC	5/25	1/17	6/43
Chile	1/25	4/17	5/43
Argentina	2/25	3/17	5/43
Korea	2/25	1/17	3/43
Developed Countries	12/25	7/17	-
Developing Countries	10/25	8/17	-
NICs	5/25	4/17	-
TLDCs	5/25	4/17	-
Least Developed Countries	-	-	-
Transitional Economy Countries	3/25	2/17	-

As shown in the Table IV-4, the US is the most frequent target for safeguard disputes while the EC is the most active complainant. As a group, 12 cases were brought to the WTO by developed countries, 10 cases were raised by developing countries, and 3 cases were complained by transitional economy countries. (See Figure IV-1) As a defending group, developing countries the most frequent defendants, closely followed by developed countries. (See Figure IV-2)

[51] See Appendix 2 for all participants' involvement in safeguards disputes.

Figure IV-1 Number of Cases Major Participants Involved as Complainants

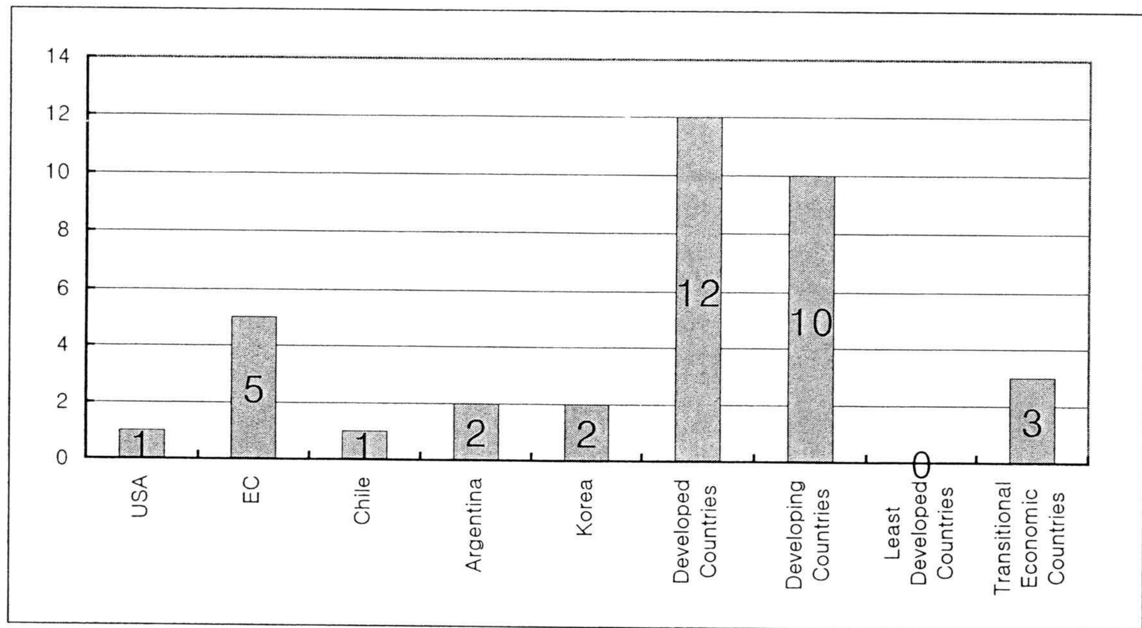
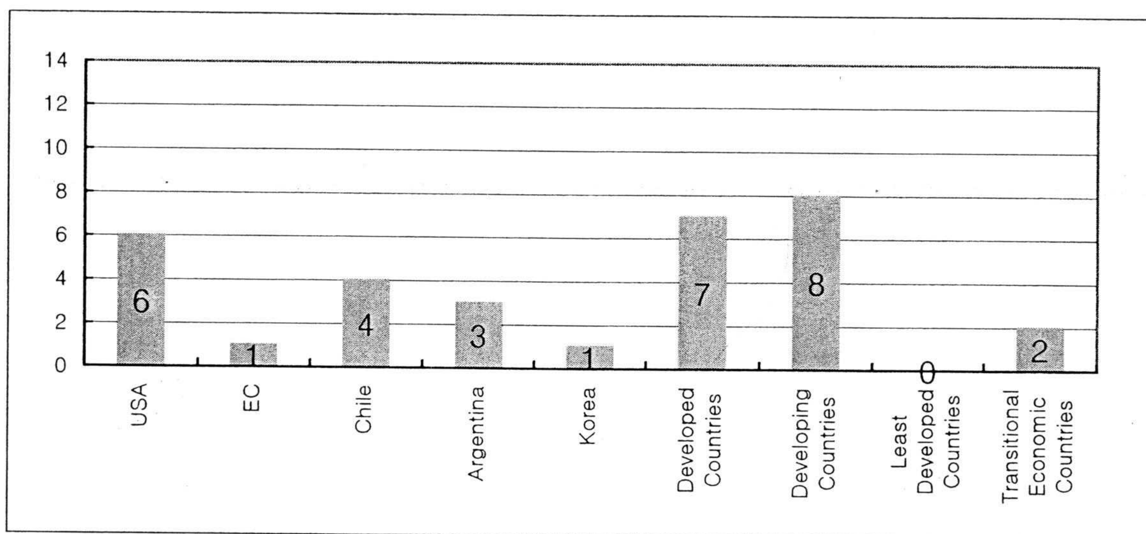


Figure IV-2 Number of Cases Major Participants Involved as Defendants



V. LEGAL ISSUES IN INTERPRETING SAFEGUARD RULES

V.1. Unforeseen Development

The requirement of "unforeseen development" provided for in Article XIX of GATT 1994 is not present in provisions of the SA (Safeguard Agreement). For this reason, it is important to clarify the relationship between Article XIX of GATT 1994 and the Safeguard Agreement in order to determine which one supersedes the other.

In Korea-Dairy case,[52] Korea argues that there is a conflict between Article XIX of GATT and provisions of the SA and that such conflict should be resolved by exclusively applying of the SA. On the contrary, the EC submits that Article XIX is still fully applicable because there is no conflict between the two.

Recalling the two basic principles of treaty interpretation, that is, the principle of "ordinary meaning" and the principle of "effective interpretation", the Panel notes the following:

> ...it is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are *generally cumulative* and Members must comply with all of them simultaneously unless there is a formal "conflict" between them. Therefore, we consider that the terms and prescriptions of Article XIX:1 of GATT are still generally applicable.[53] (emphasis added)

The panel's ruling is supported by the Appellate Body(AB). The AB notes Article 1 Article 11.1 of SA. According to Article 1 of the SA, the purpose of the

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[52] WTO document WT/DS98/R, para. 7.33. In this case, the EC claimed that Korea failed to examine whether the import trends of the products under investigation were the result of "unforeseen developments" as provided for in Article XIX:1(a). Korea responds that the text of the Agreement on Safeguards is "now the sole articulation of the rules that must be followed in application of a safeguard measure.", Panel Report in Korea-Dairy case, Paragraph 7.33.

[53] WTO document WT/DS98/R, paras. 7.38-9.

Agreement on Safeguards is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994'[54]. Also, the AB notes that the ordinary meaning of Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement'- is that any safeguard action must conform with Article XIX of the GATT 1994 as well as the provisions of the SA.[55] Thus, the AB rules that the requirements of the SA and GATT Article XIX must apply on "a cumulative basis".

Thus, the Appellate body explicitly rejects the idea that the requirements of GATT Article XIX is superseded by the requirements of the SA and stresses that all of the relevant provisions of the Safeguards Agreement and Article XIX of the GATT 1994 must be given meaning and effect.[56] In Argentina-Footwear case, the Appellate body made a similar ruling regarding the issue.[57]

Then, there arises a question whether GATT Article XIX implies a "two-step" or "one step" causation approach. In the US-Lamb case, New Zealand and Australia describe the requirement "unforeseen development" in GATT Article XIX.1(a) as implying a "two-step causation approach". They claim that "there need to exist (a) unforeseen developments that (b) lead to a surge in imports under such conditions as in turn to (c) cause (a threat of) serious injury"[58].

In the US-Lamb, panel rejects this idea of "two-step" approach because, on textual basis, the phrase "unforeseen development" is grammatically linked to both "in such increased quantities and "under such conditions."[59] The Appellate Body in Korea-Dairy also concludes that the ordinary meaning of the phrase "as a result of unforeseen

[54] WTO document WT/DS98/AB/R, para. 77.
[55] Ibid.
[56] WTO document WT/DS177, 178/R, para. 7.11.
[57] WTO document WT/DS98/AB/R, paras. 68-92.
[58] WTO document WT/DS177, 178/R, para. 7.14.
[59] WTO document WT/DS177, 178/R, para. 7.16.

development" requires "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.[60]

As to the content of the obligation to examine the existence of "unforeseen developments", the Appellate Body in Korea-Dairy and Argentina-Footwear referred to this concept as a factual circumstance which has to be "demonstrated as a matter of fact."[61] However, the Appellate Body's statement does not elucidate the difference between an "independent condition" and a "factual circumstance." With regard to this matter, the Panel in US-Lamb Safeguard views that the latter term could be read to imply a lesser threshold than the former.[62]

In Korea-Dairy, the Appellate Body addressed the question of what makes "developments" "unforeseen." It distinguishes the dictionary definition of 'unforeseen' from that of "unforeseeable."[63] This distinction is later noted by the Panel in US-Lamb. In the Panel's view, the term "unforeseen" implies a lesser threshold than the term "unforeseeable". In other words, what may be unforeseen within the meaning of "unexpected" may nonetheless be foreseeable or predictable in the theoretical sense – that is, capable of being anticipated from "a general, scientific perspective". Then, the Panel concludes that it must consider what was and was not actually "foreseen", rather than what might or might not have been theoretically "foreseeable".[64]

As regards the type of facts or events that may be considered as "unforeseen developments," the members of the Working Party in *Hatters' Fur* agreed that "the fact that hat styles had changed did not constitute an 'unforeseen development' within the meaning of Article XIX"[65] but the effects of the special circumstances of this case, and

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[60] WTO document WT/DS98/AB/R, para. 84.
[61] WTO document WT/DS177, 178/R, para. 7.18.
[62] WTO document WT/DS177, 178/R, para. 7.19.
[63] WTO document WT/DS98/AB/R, para. 84.
[64] WTO document WT/DS121/AB/R, para. 92.
[65] WTO document WT/DS98/AB/R, para. 11.

"particularly the degree to which the change in fashion affected the competitive situation" could not reasonably be expected to have been foreseen by the United States authorities in 1947.[66] In other words, fashion changes in general are *foreseeable* ("change is the law of fashion"[67]), but the extent of the fashion change in the US market relating to women's fur felt hats and hat bodies was unforeseen.

The last issue involves whether the competent national authority has to reach a reasoned conclusion concerning the existence of "unforeseen developments". In US-Lamb Meat, New Zealand and Australia claims that the US did not comply with Article XIX of GATT because there is no explicit consideration of the question of "unforeseen developments" in the report published by the USITC. In response, the Panel notes that a demonstration of the existence of "unforeseen developments" must be on factual evidence which was before the competent authority at the time when the investigation was carried out and considered by that authority before the determination to apply a safeguard measure was made.

As to whether GATT Article XIX contains any explicit publication requirement, the Panel concludes that, although the Article XIX lacks such explicit requirement, it should be considered in the context of SG Article 3.1[68] in particular.

The Panel also notes that the competent authorities' "finding and reasoned conclusions" must be in respect of all pertinent issues of fact and law, not on some or selected issues of fact and law." Thus, the Panel concludes that "it must be clear form the published report that the investigating authorities examined the existence of unforeseen developments and came to a reasoned conclusion in this regard."[69]

The AB admits that the text of Article XIX provides no express guidance on

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[66] WTO document WT/DS98/AB/R, para. 12.
[67] WTO document WT/DS98/AB/R, para. 10.
[68] Article 3.1 provides: "...[T]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."
[69] WTO document WT/DS177, 178/R, para. 7.29.

when, where or how to demonstrate examination of "unforeseen development." Nevertheless, the Appellate Body emphasized that the existence of unforeseen developments is a prerequisite that must be demonstrated and such demonstration must be made before the safeguard measure is applied.

In this respect, the AB notes that while the USITC Report identifies two changes in the imports concerned, it does not discuss or offer any explanation as to why these changes could be regarded as "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994. Based on this reasoning, the AB, in general, upholds the Panel's conclusion that "the US has failed to demonstrate as a matter of fact the existence of unforeseen developments as required by Article XIX:1 of GATT 1994".[70]

V.2. Increased Quantities of an Import

The SG requires an increase in imports as a basic requirement for the application of a safeguard measure. To determine whether imports have increased in "such quantities" for purpose of applying a safeguard measure, Article 2.1 and 4.2(a) of the SA require an analysis of the rate and amount of increase imports, in absolute terms and as a percentage of domestic production.

In Argentina Footwear Safeguards, Argentina compares total imports of footwear and ratio of imports to domestic production in 1991 to those in 1995. With respect to Argentina's "end-point-to-end point comparison," the EC argued that Argentina's analysis failed to satisfy the requirement of increased imports, because it ignores "intervening, declining trends" over the period concerned. The EC specifically noted

[70] WTO document WT/DS177, 178/R, para. 7.45.

that the downturn trend in level and ratio of imports began in 1994 and that this trend continued steadily through 1996. In this regard, the EC claims that there was neither an absolute nor a relative increase in imports, and that Argentina therefore violated Article 2.1 and 4.2(a).[71]

The Panel notes the significance of the choice of base year in adopting an end-point-to-end-point comparison for increased quantity of an import analysis. Furthermore, the Panel puts emphasis on the sensitivity test in such assessment, and concludes that an increase in imports should be evinced by both "end-to-end-point" comparison and an analysis of intervening trend over the period.[72] In case where any decline in imports is present during the period concerned, the Panel also states that the question of whether any decline in imports is "temporary" is relevant in assessing whether the "increased imports" requirement of Article 2.1 has been met.[73]

At the same time, the Panel recalls the restrictive nature of the safeguard remedy[74] and that the Agreement requires not just increase (i.e. "any increase") in imports, but "an increase *in such ... quantities* as to cause or threaten to cause serious injury"[75]

Based on the reasoning, the Panel concludes that "Argentina's investigation did not demonstrate that there were increased imports within the meaning of Articles 2.1 and 4.2(a)." Nevertheless, the Panel rejected the EC's argument "that only a 'sharply increasing' trend in imports at the end of the investigation period can satisfy this

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[71] WTO document WT/DS121/R, para. 5.155. The EC also argues that Argentina's evaluation of "increased imports", because it compared end-points of the investigation period and did no consider intervening trends, violated Article 4.2(c)'s requirement that the "relevance" of those trends be explained.
[72] WTO document WT/DS121/R, para. 8.156-7.
[73] Ibid.
[74] WTO document WT/DS121/R, para. 8.161: It states that the safeguard remedy:

> ...is justified by its purpose, namely to address urgent situation where a domestic industry needs temporary "breathing room" to adjust to altered conditions of competition brought about by increased imports.[74]

[75] SA, Article 4.2(a).

requirement."

The Appellate Body, however, does not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period. In AB's view, the use of the present tense of the verb phrase "is being imported" indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years. The AB believes that the phrase "is being imported" implies that 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"'.[76]

V.3. Serious Injury or Threat Thereof

V.3.1. "Distinction between Serious Injury and Threat Thereof"

Article 2.1 as well as Article XIX of GATT 1994 stipulate a party proposing to impose a safeguard measure must show imports in increased quantities, in absolute or relative terms, "cause or threaten to cause serious injury" to the domestic industry of the like or directly competitive products. Here, the issue is whether, a party proposing to impose a safeguard measure is obliged to make a discrete determination either of serious injury or of threat of serious injury, or both.

In US-Line Pipe, the USITC, in applying the line pipe measure, determined that "circular welded carbon quality line pipe... is being imported into the US in such increased quantities as to be substantial cause of serious injury or threat of serious

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[76] WTO document WT/DS121/AB/R, paras. 132-139.

injury."[77]

With respect to this USITC's determination, the Panel first notes the distinction in the definitions of "serious injury" and "threat of serious injury." Then the Panel concludes that if "serious injury" is present, it cannot at the same time "be clearly imminent", as required to meet the definition of "threat of serious injury". Thus, the Panel saw these definitions as "mutually exclusive". [78]

Also, based on the obligations in Article 5.1, the Panel reasons that "preventing" serious injury presupposes a finding of "threat of serious injury" and "remedying" serious injury presupposes a finding of "serious injury". On this basis, the Panel concludes that Members must clearly determine in advance whether there is either a threat of serious injury to be prevented, or serious injury to be remedied.[79] In conclusion, the Panel rules that the US did not clearly distinguished whether the injury found was "serious injury" or "threat of serious injury" and therefore violated obligations under Article 2 of the SA.

The Appellate Body observes that discrete determination of either "serious injury" or "threat of serious injury" depends on internal decision-making process of each WTO Member.[80] Since the SA does not prescribe this internal decision and, the Appellate Body concludes that the issue is entirely up to WTO Members in exercise of their sovereignty.[81]

Meanwhile, The AB notes that "threat of serious injury" sets a lower threshold for establishing the right to apply a safeguard measure. Therefore, the AB concludes that, in determining whether the right exists, it is irrelevant of whether there is "serious injury" or only "threat of serious injury" so long as there is a determination that there is

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[77] WTO document WT/DS202/R.
[78] WTO document WT/DS202/R, para. 7.264.
[79] WTO document WT/DS202/R, para. 7.267.
[80] WTO document WT/DS202/AB/R, para. 157.
[81] WTO document WT/DS202/AB/R, para. 158.

at least a "threat". [82]

Therefore, the AB concludes that it does not matter whether a domestic authority finds that there is "serious injury", "threat of serious injury", or, as the USITC found in the case, "serious injury or threat of serious injury" because the right to apply a safeguard is, in any of those events, established.

V.3.2. "Threat of Serious Injury"

In interpreting 'threat of serious injury', it is quite questionable as to what kind of legal standard a competent national authority must employ when establishing threat of serious injury. SA Article 4.1(b) contains no explicit guidance on any specific methodology. It merely enumerates it as the following:

> 'threat of serious injury' shall be understood to mean serious injury that is *clearly imminent*, in accordance with the provisions of paragraph2. 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*.(emphasis added)

In the US-Lamb Meat Safeguard, the Panel notes that the ordinary meaning of "imminent" connotes "ready to take place" or "be impending, soon to happen ... event, especially danger or disaster".[83] Reading the provision in line with the emphasis on the imminent nature of threat, the Panel takes one step forward and notes that the Article's second sentence requires that such determination has to be "based on facts and not on allegation, conjecture, or remote possibility." Consequently, the Panel concludes that from these elements of SG Article 4.1(b), some inferences on how to conduct a threat analysis can be drawn. According to the Panel, these elements

[82] WTO document WT/DS202/AB/R, para. 170.
[83] WTO document WT/DS177, 178/R, 7.127.

consists of:

> (a) that a threat determination needs to be based on an analysis which takes objective and verifiable data from the recent past as a starting-point so as to avoid basing a determination on *allegation, conjecture or remote possibility*; (b) that factual information from the recent past complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is *imminent* in the near future; (c) that the analysis needs to determine whether injury of a *serious* degree will actually occur in the near future *unless safeguard action is taken.*[84]

In US-Lamb Meat Safeguard, Australia and New Zealand both claimed that the USITC's determination of a threat of serious injury was inconsistent with Article 4.2(a) of the SG because the USITC did not properly evaluate "all relevant factors", as required by Article 4.2(a).[85]

The Panel sees no conceptual fault with the USITC's analytical approach used in its threat of serious injury determination. In particular, the Panel finds no err with respect to the USITC's prospective analysis and time-period used. Also, the Panel notes that although the USITC did not collect data concerning a particular injury factor with respect to all industry segments, it provided an adequate explanation.[86] Furthermore, the Panel finds no flaw in the USITC's decision to rely on the most recent data (from 1997 and interim 1998) as the basic for reaching its conclusions on threat of serious injury. However, the Panel finds that the data used for USITC's

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[84] WTO document WT/DS177, 178/R, 7.137.

[85] Article 4.2(a) of SA requires the party proposing to apply a safeguard measure to:

> ...[E]valuate *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.

[86] WTO document WT/DS177, 178/R, paras. 7.222~7.226: the Panel considered the USITC's analysis of threat of serious injury to be "sufficiently fact-based and future-oriented, in that it relied on available factual information as to expected future developments, notably projected import increases and the likely price effects of those increase on the domestic industry".

determination were not sufficiently representative of "those producers whose collective output ... constitutes a major proportion of the total domestic production of those products" within the meaning of SG Article 4.1(c).[87] In the light of the consideration above, the Panel concludes that the USITC's threat of serious injury determination in the lamb meat investigation is inconsistent with SG Article 4.1(c) and thus with SG Article 2.1.

In the US-Lamb Meat, the AB reaffirms the Panel's interpretation of "threat of serious injury" by stating that '"threat of serious injury" concerns with "serious injury" not yet occurred, but remains as a future event whose actual materialization cannot, in fact, be assured with certainty'.[88]

In interpreting Article 4.2(a) which, the AB believes, imposes obligation with respect to the *process* by which competent authorities arrive at a determination of serious injury or threat thereof, the AB raises two general interpretive questions: (i) whether the "evaluation" by the competent authorities, under Article 4.2(a), must be based on *data that is sufficiently representative* of the domestic industry and (ii) whether there is an appropriate *temporal focus* for the competent authorities' "evaluation" of the data in determining that there is a "threat" of serious injury in the imminent future.

With respect to the sufficiency of the data, the AB notes that the need for such a sufficient factual basis implies that the data examined must be "representative of the

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[87] WTO document WT/DS177, 178/R, paras. 7.222~7.226.

[88] WTO document WT/DS177, 178/AB/R, para. 125: the Appellate Body confirms the Panel's interpretation of the term as :

> ..."imminent" implies that the anticipated "serious injury" must be on the verge of occurring... The word "clearly" indicates "a high degree of likelihood." The Panel also notes the phrase "not based on... *remote possibility*" in Article 4.1(b) and relates the word "clearly" to the factual demonstration of the existence of the "threat". Thus, the phrase "clearly imminent" indicates that, as a matter of fact, it must be manifest that the domestic industry in on the brink of suffering serious injury.

"domestic industry"". [89] At this point, the AB agrees with the Panel's conclusion. However, the AB does not suggest that competent authorities must, in every case, actually have data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. Rather, the data before the competent authorities must be "sufficiently representative to give a true picture of the domestic industry". Then, the AB concludes that "what is sufficient in any given case will depend on the particularities of the "domestic industry" at issue."[90]

In this regard, the AB, upholds the Panel's finding that the US acted inconsistently with Article 4.2(a) of the SG. Meanwhile the AB noted that Article 4.1(c) contains nothing more than a definition of "domestic industry" and does not impose obligation on WTO member.[91] Therefore, the AB disagreed with the Panel's ultimate conclusion that the US acted inconsistently with Article 4.1(c) alone.

Regarding the question of the temporal focus of the data evaluation, the AB first recalls that, in making a "threat" determination, the competent authorities must find that serious injury is "clearly imminent". Accordingly, the AB agrees with the Panel that a threat determination is "future-oriented". However, Article 4.1(b) requires that a "threat" determination be based on "facts" and not on "conjecture". The AB reasons, therefore that there is a tension between a future-oriented "threat" analysis, which, ultimately, calls for a degree of "conjecture" about the likelihood of a future event, and the need for a fact-based determination. The AB further concludes that "unavoidably, this tension must be resolved through the use of facts from the present to the past to justify the conclusion about the future."[92] Thus, the AB concludes that "fact-based evaluation must provide basis for a projection that there is high degree of

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[89] WTO document WT/DS177, 178/AB/R, para. 131.
[90] WTO document WT/DS177, 178/AB/R, para. 132.
[91] WTO document WT/DS177, 178/AB/R, para. 133.
[92] WTO document WT/DS177, 178/AB/R, para. 136.

likelihood of serious injury to the domestic industry in the very near future."[93]

On the issues of how to make determinations of serious injury or threat thereof the AB agrees with the Panel that the SG provides no particular methodology to be followed. The AB believes that data pertaining to the most recent past will provide competent authorities with an essential, and usually, the most reliable, basis for the determination. Nevertheless, the AB believes that competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The AB states that the real significance of the short-term trends in the most recent data, 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.[94] Thus, the AB believes that, in concluding 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 investigation period.[95]

Upon this reasoning, the AB disagrees with the Panels' interpretation of the temporal aspects of the competent authorities' evaluation, under Article 4.2(a), because it placed too much emphasis on certain data from the most recent past, while neglecting other, even, more recent data.

V.3.3. "Domestic Industry"

In US-Lamb meat, the USITC defined that the domestic industry to include growers and feeders of live lambs, as well as packers and breakers of lamb meat. The USITC defined as such because it considered that there was a "continuous line of production from the raw to the processed product" and that there was a "substantial

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[93] Ibid.
[94] WTO document WT/DS177, 178/AB/R, para. 138.
[95] Ibid.

coincidence of economic interests" between and among the growers and feeders of live lambs, and the packers and breakers of lamb meat. With regards definition of domestic industry, the Panel's review divides into three parts.

First, the Panel examined the definition of the term "domestic industry" in Article 4.1(c).[96] Examining the first part of the definition in the provision - "the producers... of the like or directly competitive products -, the Panel states that it finds "no basis in this text of this phrase for considering that a producer that does not itself make the product at issue, but instead makes a raw material or input that is used to produce the product, can nevertheless be considered a producer of the product."[97] In this regard, the Panel points to the conclusion that growers and feeders are producers of live lambs, whereas packers and breakers of lamb carcasses are producers of lamb meat.[98] In addition, the Panel concluded that the phrase "producers as a whole" is not related to the process of manufacturing or transforming raw material and inputs into final product.

The Panel considers the parallel provisions of the WTO Agreements on Subsidies and Countervailing Measures("SCM") and on Anti-dumping("AD"). The Panel reviews the US-Wine and Grapes cases[99] and the Canada-Beef case[100]. The Panel views that the reading of these past panel reports is consistent with the object and purpose of the SG, in particular, of creating a mechanism effective.

First, the Panel found quite pertinent to the issue the adopted report of the panel on US-Wine and Grapes under the Tokyo Round Subsidies Code. In the case, the

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[96] Article 4.1(c): "... 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."
[97] WTO document WT/DS177, 178/R, para. 7.67.
[98] WTO document WT/DS177, 178/R, para. 7.71.
[99] WTO document WT/DS177, 178/R, paras. 7.78-97. Report of the Panel on United States – Definition of Industry Concerning Wine and Grape Products, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, SCM/71, BISD 39S/436.
[100] WTO document WT/DS177, 178/R, paras. 7.78-97. Panel Report on Canada-Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC, dated 13 October 1987, not adopted, SCN/85

panel examines a US law which mandated specifically that the domestic producers of the principal raw agriculture product (i.e. grapes) were to be included as part of the industry producing wine and grape products if they alleged injury and threat thereof caused by imports of those products. Then, the panel found that the US law was inconsistent with the Code's industry definition. Noting that the US wineries did not usually grow their own grapes, but rather bought them from grape growers, the panel found that "irrespective of ownership, a separate identification of production of wine-grapes from wine... was possible and that therefore in fact two separate industries existed in the US..."[101] Then, the panel took the view that "once such a separate identification was possible, *economic interdependence* between industries producing raw material or components and industries producing the final product" was not relevant for a like product determination.

Thus, the Panel in the current case agrees to the Wine and Grapes panel's finding that the factor of economic interdependence between producers of raw, intermediate and final products is not relevant for the industry definition.

In the light of the foregoing, the Panel considers that the reasoning of the Wines and Grapes panel is directly relevant to its conclusion that the domestic industry in the lamb case should be limited to packers and breakers. The Panel further emphasizes that Like the Wine and Grapes, producers of live lambs cannot be included as producers of lamb meat because live lambs and lamb meat are not like products to one another.

Secondly, the Panel found that the factual and legal issues arising in *Canada-Beef* were also strikingly similar to those of the lamb meat case. In Canada-Beef, the EC challenged a Canadian countervailing duty investigation in which the producers and feeders of live cattle were treated as part of the domestic industry producing

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[101] WTO document WT/DS177, 178/R, paras. 7.78-97.

manufacturing beef.[102]

The Panel agreed that the factors of vertical integration or common ownership are not in themselves determinative or even particularly relevant for the scope of the domestic industry. Rather, the issue is (i) whether the products at various stages of production are *different forms of a single like product* or have become *different products*; and (ii) whether it is possible to *separately identify* the production process for the like product at issue, or whether instead ownership results in such *complete integration* of production processes that separate identification and analysis of different production stages is impossible.[103]

In the present dispute, the parties agree and ITC found that the production process from live lamb to lamb meat has resulted in *separate* products, *not* products that are different forms of a single like product. Likewise, assuming *arguendo* that vertical integration and common ownership were at all relevant for the defining the scope of an industry, there is little vertical integration of growing and feeding operation with packing and breaking operations, and in any case it is clearly possible to *separately identify* the different physical stages of the production process.

The US argues that the reasoning of Canada-Beef and US-Wine and Grapes are irrelevant to the lamb case at hand because these panels applied provisions of the Tokyo Round SCM and Anti-dumping Codes. But in the Panel's view, this difference does not make these past panel reports inapposite because the provisions referred to by the US do not address the question of the definition of the domestic industry, rather primarily deal with the data collection in an investigation.

Based on the foregoing reviews on past panels' findings, the Panel in Lamb-Meat

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[102] The parties were in disagreement that "like" products was manufacturing beef, but differed on whether the domestic industry producing manufacturing beef included the producers and feeders of live cattle. Likewise, in the lamb case, the parties agree that the "like" product is lamb meat, but they disagree as to whether the industry producing lamb meat included the growers and feeders of live lamb.

[103] WTO document WT/DS177, 178/R, para. 7.95.

case states that it concurs with the reasoning of those panels that separability of operations and data between different stages of production, rather than vertical integration, common ownership, continuous lines of products, economic interdependence or substantial coincidence in economic interests are relevant for determining the scope of the industry in consistency with SG Article 4.1(c).[104].

For the last element of determining the definition of "domestic industry", the Panel examines the historical context of the provision as a supplementary means to confirm the interpretation resulted from Article 31 in accordance with Article 32 of the Vienna Convention on Law of Treaties. As the Panel believes, the Uruguay Round negotiation history reveals that the above-mentioned panel reports formed part of the basis of the discussions during the negotiations. There seems to have been a general understanding among negotiators that broadening the industry definition standard would have required an amendment of the treaty law or at least the adoption of an agreed interpretation by negotiators. Although there were a number of proposals to redress the findings of the panels on the above cases, a number of countries submitted negotiating proposals in opposition to such amendment or agreed interpretation. These proposals favoured maintaining a narrow industry definition based on like (or directly competitive) products for purposes of applying contingent trade remedies. [105]

Thus, the Panel concluded that UR proposals for and objections against changing the 'domestic industry' definition demonstrates that the issue was extensively discussed in the UR negotiations, especially in the context of subsidies, but also in respect of anti-dumping and safeguards. These negotiating documents also demonstrate that the discussion was heavily influenced by the panel reports on Canada-Beef and US-Wine and Grapes. However, in the end the relevant UR negotiating groups did not

[104] WTO document WT/DS177, 178/R, para. 7.109.
[105] WTO document WT/DS177, 178/R, para. 7.113.

agree to any broadening of the industry definitions in the text of Anti-dumping, SCM and SG, and the relevant provisions remained unchanged from the predecessor provisions in the Tokyo Round Codes.

The USITC did not explicitly make any determination concerning "directly competitive" products. This issue was not before the Panel and therefore the Panel decided not to speculate as to whether live lambs and imported lamb meat are considered "directly competitive" because panels in disputes under the SG must not engage in a *de novo* review of the evidence before a competent national authority.[106]

This being clear, however, the Panel noted that the product coverage of a safeguard investigation can potentially be broader than in anti-dumping or countervailing case, to the extent that "directly competitive" products are involved. The Panel viewed that this apparent additional latitude may be related to the basic purpose of the SG and GATT Article XIX, namely to provide an effective safety valve for industries that are suffering or are threatened with serious injury caused by increased imports in the wake of trade liberalization.[107]

In general the AB agrees with the Panel's findings on the definition of "domestic industry" as provided for in Article 4.1(c) of the SA. In examining the appealed issue on "domestic industry", the AB primarily relies on textual approach of interpretation.

The AB begins its analysis with the definition of the term "domestic industry" in Article 4.1(c) of the SG. The definition refers to two elements. First, the industry consists of "producers". As the Panel indicated "producers" are those who grow or manufacture an article; "producers" are those who bring a thing into existence.[108] This meaning of "producers" is, however, qualified by the second element. According to the clear and express wording of the text of Article 4.1(c), the term "domestic industry"

[106] WTO document WT/DS177, 178/R, para. 7.115.
[107] WTO document WT/DS177, 178/R, para. 7.117.
[108] WTO document WT/DS177, 178/R, para. 7.69.

extends solely to the "producers... of the like or directly competitive products" Therefore, producers that do not produce like or directly competitive products do not constitute part of domestic industry.[109]

The AB, therefore, concludes that the determination of "domestic industry" is based on the "producers... of the like and directly competitive products". In its view, the focus must, therefore, 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. Thus, the AB upholds the Panel's finding.

V.4. Causal Link

Complainants are required to show the causal link between increased quantities of imports and serious injury. In making assessment of the causation analysis and finding, the Panel in Argentina-Footwear and US-Wheat Gluten basically follows three questions: (i) whether an upward trend in imports *coincides* with downturn trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether *the conditions of competition* in the Argentina footwear market between imports and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports of any injury; and (iii) whether *other relevant factors* have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[110] This step was accepted by the Appellate Body.

However, in US-Lamb Meat, the Appellate Body emphasizes that these three

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[109] WTO document WT/DS177, 178/AB/R, para. 84.
[110] WTO document WT/DS177, 178/R, para, 8.229.

steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). It states:

> … these steps are not legal "tests" mandated by the text of the SG, nor is it imperative that each step be the subject of a reasoned conclusion by the competent authority.[111]

The AB ascertains its findings in the *US-Wheat Gluten*, by saying that:

> The primary objective of the process we describe in US-Wheat Gluten Safeguard is, of course, to determine whether there is "a genuine and substantial relationship of cause and effect" between increased imports and serious injury or threat thereof.
>
> In a situation where *several factors* are causing injury "at the same time", a final determination about the injurious effects caused by *increased imports* can only be made if the injurious effects caused by all different causal factors are distinguished and separated. Otherwise, any conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rest on an uncertain foundation because it assumes that the other causal factors are not causing the injury which has been ascribed to increased imports.

Nevertheless, the AB notes that the USITC identified six factors other than increased imports, and then it considered, individually, each of these six factors was a "more important cause" of the threat of serious injury than the increased imports. The AB, however, states that a relative causal importance of the different factors may satisfy the requirements of the US law but such an examination does not satisfy the requirements of the SG because, where there are several causal factors, the process of ensuring that injury caused by other causal factors is not attributed to increased imports must include a separation of the effects of the different causal factors. The USITC report neither explain the process by which it separated the injurious effects of the different causal factors

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[111] WTO document WT/DS166/AB/R, para. 178.

nor does it explain how the USITC ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports. It only concludes that each of four of the six "other factors" was, relatively, a less important cause of injury than increased imports. Based on its finding that the USITC's injury determination was not adequate for the non-attribution requirements, the AB upholds the Panel's conclusions that the US acted inconsistently with Article 4.2(b) of the SG, and hence, with Article 2.1 of SG.

V.4.1. Coincidence of Trends

In Argentina-Footwear, the Panel notes that Article 4.2(a) requires the authority to consider the "rate"(i.e., direction and speed) and "amount" of the increase in imports and the share of the market taken by imports, as well as the "changes" in the injury factors (sales, production, productivity, capacity utilization, profits and losses, and employment) in reaching a conclusion as to injury and causation. The Panel interprets this language as meaning "the trends – in both the injury factors and the imports – matter as much as their absolute levels".[112] The Panel further states that that "it is the relationship between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination".[113]

According to the Panel, if causation is present, an increase in imports normally should coincide with a decline in the relevant injury factors. Then, the

[112] WTO document WT/DS177, 178/R, para. 8.237.
[113] WTO document WT/DS177, 178/R, para. 8.237.

Panel emphasizes that:

> While such a coincidence by itself cannot prove causation because, inter alia, Article 3 requires an explanation –i.e. "findings and reasoned explanations", its absence would create serious doubts as to the existence of a causal link, and would require a very compelling analysis of why causation still is present.[114]

On this basis, the Panel notes that Argentina did not provide detailed and reasoned explanation that would be necessary to reconcile the consistently and significantly declining trend in imports with a finding of the serious injury caused by increased imports.[115]

The AB agrees with the Panel's interpretation that the words "rate and amount" and "changes" in Article 4.2(a) mean that "the trends" – both in the injury factors and the imports - matter as much their absolute levels. The AB also agrees with the Panel that, in an analysis of causation, "it is the relationship between the movements in imports and the movements in injury factors that must be central to a causation analysis and determination." Furthermore, with respect to "coincidence", the AB noted that the Panel stated that it should "normally" occur if causation is present, agreeing that "while such a coincidence by itself cannot prove causation..., its absence would create serious doubts..." On this basis, the AB upholds the Panel's interpretation of causal link.

In US-Wheat Gluten, the Panel had the similar view on the matter and the Appellate Body did not ruled against the Panel's findings.

With regards whether upward trend in imports coincides with negative trends in injury factors, the EC claimed that the USITC failed to satisfy the element of coincidence of trends between serious injury and increased imports. In the view of

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[114] WTO document WT/DS177, 178/R, para. 8.238.
[115] WTO document WT/DS177, 178/R, para. 8.246

the EC, the injury factors cited to support the finding of serious injury began declining before the increase in imports raises serious questions about the existence of a causal link. The EC submits that the USITC provides no analysis or reasoning to demonstrate how the negative trends in injury factors could have been caused by the increase in imports which only began later.

Regarding such claim, the Panel looks at the overall trends in imports and the overall trends in serious injury factors pertaining to the overall situation of the industry over the period of investigation. The Panel recognizes that USITC Reports indicated that when one looks at the trends of imports vis-à-vis the trends in certain individual injury factors in isolation, several of these injury factors were declining prior to the surge in imports. However, in light of the overall coincidence of the upward trends in increased imports and the negative trend in jury factors over the period of investigation, the Panel concludes that the existence of slight absence of coincidence in the movement of individual injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.[116]

V.4.2. Under the Conditions of Competition

In Argentina-Footwear, the EC argued that the reference to "under such conditions" in Article 2.1 refers especially to price analysis because the EC believes that it is through price that imports compete with like or directly competitive domestic products, and that therefore a price analysis is required under the Agreement.

In the Panel's view, the phrase "under such conditions" does not constitute a specific legal requirement for a price analysis.

[116] WTO document WT/DS166/R, paras. 8.100~8.101.

Noting that there are different ways in which products can compete, the Panel states that sales price clearly is one of these, but it is certainly not the only one. Other bases on which products may compete include physical characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market. These sorts of factors must be analyzed on the basis of objective evidence in a causation analysis.[117]

The Panel concludes, therefore, that, in the present dispute, while the phrase "under such conditions" does not require a price analysis per se, it nevertheless has an implication for the nature and content of a causation analysis, which may logically necessitate a price analysis in a given case.[118]

In US-Wheat Gluten, the Panel recalls that Article 4.2(a) and (b) require the importing states to perform an adequate assessment of the impact of the increased imports at issue on the domestic industry under investigation. The Panel adds that certainly price aspect of conditions of competition is relevant; however, this is not to say that the phrase requires a price analysis in every case, nor is it the only way, nor is it sufficient.[119]

V.4.3. "Other Relevant Factors" and Non-attribution Obligation

In Argentina-Footwear, the EC claimed that there were several elements which it views as "other factors" that in fact were responsible for any injury suffered by the

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[117] WTO document WT/DS177, 178/R, para. 8.251.
[118] WTO document WT/DS177, 178/R, para. 8.252.
[119] WTO document WT/DS166/R, paras. 8.108~8.110.

Argentine footwear industry. These factors were (1) the "tequila effect"[120]; (2) imports under the Industrial Specialization Regime; [121] and (3) imports from MERCOSUR countries. The EC claims that Argentina did not sufficiently examine these factors, and that it therefore wrongly attributed injury caused by them to imports. [122]

Concerning the "Tequila effect", the Panel views that the comparison of the macroeconomic indicators for footwear and for the economy as a whole is not sufficient consideration of the potential injury from the "tequila effect". The Panel concludes that an analysis separating the effects of the recession from those of imports would have been necessary.[123] In respect of "the Industrial Specialisation Regime", the Panel notes that the low volume of the imports under this program supports Argentina's conclusion regarding their insignificance as a potential cause of injury.[124] Regarding the imports from other MERCOSUR countries, the Panel notes that "while imports from MERCOSUR countries increased steadily and significantly during the investigation period, imports from all other countries steadily decreased during the second half of the period.... by the end of the period, MERCOSUR countries accounted for one-half of total footwear imports, up from less that one-fifth in the beginning".[125]

In conclusion, the Panel finds that Argentina's investigation and determination of increased imports, serious injury and causation are inconsistent with Article 2 and 4 of SA.

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[120] That is, the domestic recession in Argentina brought on by the collapse of the Mexican peso.
[121] The Industrial Specialisation Regime, which terminated in 1996, allowed footwear producers to import duty-free a certain volume of footwear to round out their production lines, based on the volume of their footwear exports.
[122] WTO document WT/DS177, 178/R, para. 8.265.
[123] WTO document WT/DS177, 178/R, para. 8.269.
[124] WTO document WT/DS177, 178/R, para. 8.271.
[125] WTO document WT/DS177, 178/R, para. 8.274.

V.4.4. Causation Analysis

V.4.4.1. Panel's finding

In US-Wheat Gluten, the Panel views that the issue before it involves the question of whether the USITC satisfied the requirements in Article 4.2(b) SA which requires it to demonstrate the causal link between the increased imports and the serious injury, and not to attribute to imports injury caused by other factors. Then, the Panel observes that Article 4.2(b) of the Agreement of SA "contains an explicit textual link to Article 4.2(a)"[126] of that Agreement. Consequently, reading these two provisions together, the Panel opines,

> that a Member demonstrates that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause serious injury. This is not to say that the imports must be sole causal factor present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement.[127]

In other words, it states,

> ... where a number of factors, one of which is increased imports, are sufficient collectively to cause a "significant overall impairment of the position of the domestic industry", but increased imports alone are not causing injury that achieves that threshold of "serious" within the meaning of Article 4.2(a) of the Agreement, the conditions for imposing a safeguard measure are not satisfied.[128]

V.4.4.2. Appellate Body's finding

The AB reasoned that the term "the causal link" denotes a relationship of cause and effect such that increased imports contribute to "bringing about", "producing" or

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[126] WTO document WT/DS166/R, para. 8.138.
[127] WTO document WT/DS166/R, para. 8.138.
[128] WTO document WT/DS166/R, para. 8.139.

"inducing" the serious injury. Then the AB clarifies the following:

> Although that contribution must be sufficiently clear as to establish the existence of the "causal link" required, the language in the first sentence of Article 4.2(b) does not suggest that increased imports be *the sole* cause of the serious injury, or that "*other* factors" causing injury must be excluded from the determination if serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that "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.*[129]

The AB suggests two-stage process through which the competent authorities comply with Article 4.2(b). As a first step, injurious effect caused by increased imports are *distinguished from* the injurious effect caused by others; then, the competent authorities attributes to increased imports and, by implication, to other relevant factors, "injury" caused by all of these different factors, including increased imports. Through this two-stage process, the competent authorities ensure that any injury to the domestic industry that was actually caused by factors other than increased imports is not "attributed" to increased imports and is therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether "the causal link" exits between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements.[130] The need to distinguish between the effects caused by increased imports and the effects by other factors does not necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor the injury caused by other factors must be *excluded* from the determination of serious injury.[131]

In US-Lamb Meat, the Panel applies general interpretative analysis and examines

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[129] WTO document WT/DS166/AB/R, para. 67.
[130] WTO document WT/DS166/AB/R, para. 69.
[131] WTO document WT/DS166/AB/R, para. 70.

the ordinary meaning of "cause". The Panel concludes:

> ... It is not enough that increased imports cause just some injury which may then be intensified to a "serious" level by factors other than increased imports. In our view, therefore, the ordinary meaning of these phrases describing the SA's causation standard indicates that increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is "serious" enough to constitute a significant overall impairment in the situation of the domestic industry.[132]

Meanwhile, in the Panel's view, the second sentence of SG Article 4.2(b) also makes clear:

> ... that increased imports need not be the sole or exclusive causal factor present in a situation of serious injury or threat thereof, as the requirement not to attribute injury caused by other factors by implication recognizes that multiple factors may be present in a situation of serious injury or threat thereof.[133]

Then, the Panel concludes that where a number of factors, including increased imports, are sufficient *collectively* to cause a significant overall impairment of the domestic industry, but increased imports *alone* are not causing injury that achieves the threshold of "seriousness", the conditions for imposing a safeguard measure are not satisfied.[134] In addition, the Panel interprets the phrase as that increased imports must be a "necessary and sufficient cause" of serious injury or threat thereof; or "considered alone" it must cause serious injury or threat thereof.

The AB notes that the Panel's interpretation of the causation requirements in Article 4.2(a) and 4.2(b)of SA is very similar to the interpretation of the same provisions by the panel in the US-Wheat Gluten Safegurd.[135] In view of the close similarity between the two, the AB reversed the Panel's interpretation of the causation

132 WTO document WT/DS166/R, para. 7.238.
133 WTO document WT/DS166/R, para. 7.239.
134 WTO document WT/DS166/R, para. 7.241.
135 WTO document WT/DS166/AB/R, para. 165.

requirement in SA, for the same reasons it gave in the *US-Wheat Gluten Safeguards*.

V.5. Application

V.5.1. Parallelism between Investigation and Implication of Safeguard Measures

According to the AB, the concept of parallelism is derived from the parallel language used in the first and second paragraphs of Article 2 of the SG.[136] Article 2 provides as follows:

> *Conditions*
>
> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set our 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 sources*. (emphasis added)

Recalling what it stated in *US-Wheat Gluten*[137], the AB, in US-Line Pipe, confirms that "the imports included in the determinations made under Article 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2." The AB also confirms that a gap between imports covered under the investigation and imports subject to measure can be justified only if the competent authorities "establish explicitly" that imports under the measure "satisfies the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the SG."[138]

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[136] WTO document WT/DS202/AB/R, para. 178.
[137] WTO document WT/DS166/AB/R, para. 96.
[138] WTO document WT/DS166/AB/R, para. 98.

In US-Line Pipe, before the Panel, Korea claimed that the US violated Articles 2 and 4 of the SG by including Canada and Mexico in the USITC analysis of serious injury but by excluding Canada and Mexico from the application of the safeguard measure.

The Panel rejected Korea's claim by pointing out that Korea has failed to establish a *prima facie* case that the US had excluded imports from Canada and Mexico from the line pipe measure, without establishing explicitly that imports from sources other than Canada and Mexico satisfied the conditions for the application of a safeguard measure.[139]

Contrary to what the Panel established, the AB does not consider that it was necessary for Korea to address the information set out in the USITC Report in order to establish a prima facie case of the absence of parallelism in the line pipe measure. The AB reasons that Korea has demonstrated that the USITC considered imports from all sources in its investigation. Korea has also shown that exports from Canada and Mexico were excluded from the safeguard measure at issue. In the AB review, this is enough to have made a prima facie case.

After determining that Korea made a prima facie case, the AB now turns to examine whether the US rebutted Korea's argument. To do so, it is necessary for the US to "establish explicitly" that imports from non-NAFTA sources "satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1. and elaborate in Article 4.2 of the SG."[140] The AB found that the USITC Report does not establish explicitly, through reasoned and adequate explanation, that increased imports from non-NAFTA sources by themselves caused serious injury or threat of serious injury. The AB, therefore, concludes the US does not rebut the *prima facie* case made

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[139] WTO document WT/DS202/R, para. 7.171.
[140] WTO document WT/DS202/AB/R, para. 188.

by Korea.

Meanwhile, the AB emphasized that it does not prejudge whether Article XXIV of the GATT 1994 allows a departure from Article 2.2 of the SG. The AB states that "it does not prejudge whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure".[141] Then, the AB adds that the question whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the SG becomes relevant only "(1) when the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury, or (2) when the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2."[142] The AB found that neither of the two cases applies in the case.

V.5.2. Extent of Safeguard Measures

In US-Line Pipe, Korea claimed that Article 5.1 requires to impose a safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." In particular, Korea argued that there is a link between the causation analysis employed by the ITC in reaching its determination and the permissible extent of the measure. Specifically, Korea asserted that the ITC's failure to ensure that injury caused by factors other than increased imports was not attributed to increased imports meant that, as a consequence, the United States could not ensure that

[141] WTO document WT/DS202/AB/R, para. 198.
[142] Ibid.

the measure was applied only to the extent of the injury attributable to increased imports. Moreover, Korea argued that the burden of establishing a *prima facie* case on this claim was satisfied by its identification of this inconsistency.[143]

The Appellate Body undertook to interpret Article 5.1, first sentence in accordance with the rules of Article 31 of the Vienna Convention on the Law of Treaties. In doing so, the Appellate Body first emphasized the phrase "only to the extent necessary" instructs WTO Members to focus on what is *'necessary'* to fulfill that limited objective, which is "to prevent or remedy serious injury and to facilitate adjustment."[144] Next, it noted that the limited objective of the provision is "founded in" the determination of "serious injury." In defining "serious injury" in the Article 5.1 context, the Appellate Body explained that refers to the "same 'serious injury' that has been determined to exist by competent authorities of a WTO Member pursuant to Article 4.2." [145]

On the other hand, the Appellate Body pointed out that the text of Article 5.1 is unclear as to whether the phrase "remedy serious injury" refers to *all* "serious injury" or only the "serious injury" attributable to increased imports. In their context and in the light of the object and purpose of the Agreement, the Appellate Body concluded that it would be "illogical" to require authorities to ensure that the "causal link" not be based on the share of injury attributed to factors other than increased imports, while at the same time permitting a Member to apply a safeguard measure addressing injury caused by all factors.[146] Then, the Appellate Body also noted the customary international law rules on state responsibility, which require that countermeasures in response to breaches by States of their international obligations be proportionate to

[143] WTO document WT/DS202/AB/R, para. 238.
[144] WTO document WT/DS202/AB/R, paras. 245-246.
[145] WTO document WT/DS202/AB/R, paras. 244-249.
[146] WTO document WT/DS202/AB/R, paras. 250-252.

such breaches.[147] On this basis, the Appellate Body concluded that Article 5.1, first sentence "must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."[148]

About whether Korea failed to make a *prima facie* case, the Appellate Body reversed the Panel's finding. It explained that, by establishing that the United States violated Safeguards Agreement Article 4.2(b), Korea made its *prima facie* case that the safeguard measure was not limited to the extent permissible under Article 5.1. Because the United States did not rebut this *prima facie* case, the Appellate Body concluded that the United States applied the line pipe safeguard measure beyond "the extent necessary to prevent or remedy serious injury and to facilitate adjustment."[149] The Appellate Body recognized, however, that a violation of Article 4.2(b), second sentence does not imply an *automatic* violation of Article 5.1, first sentence, in that, had the Panel decided differently, the United States might have attempted to rebut the presumption raised by Korea. In this regard, it stated that even if the ITC "failed to separate and distinguish the injurious effects of the increased imports from the injurious effects of the other factors, it is still possible that the safeguard measure may have been applied in such a manner that it addressed only a portion of the identified injurious effects, namely, the portion that is equal to or less than the injurious effects of increased imports."[150]

As to whether the United States acted inconsistently with the requirement in Article 5.1 that "[a] Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment," the Appellate Body reversed the Panel's finding. As applied in this case, the Appellate Body simply relied on the U.S. violation of Article 4.2(b) as evidence of a violation of

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[147] WTO document WT/DS202/AB/R, paras. 253-259.
[148] WTO document WT/DS202/AB/R, para. 260.
[149] WTO document WT/DS202/AB/R, para. 261.
[150] WTO document WT/DS202/AB/R, para. 262.

Article 5.1, finding that the existence of the Article 4.2(b) violation made Korea's *prima facie* case of violation of Article 5.1. Furthermore, the United States did not rebut this case. Thus, the Article 5.1 violation was simply an extension of the Article 4.2(b) violation.

This finding may have significant implications for the imposition of safeguard measures generally. The Appellate Body stated that the phrase "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment" in Article 5.1, first sentence "must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports." In other words, a safeguard measure cannot target *all* of the serious injury experienced by the domestic industry. Rather, it can only target the serious injury caused by *increased imports*. How this standard is to be applied is unclear.

VI. CRITICAL ISSUES FOR IMPROVING SAFEUGARD MECHANISM

VI.1. Extent of Safeguard Measures: "To Facilitate Adjustment"

When a WTO Member applies a safeguard measure, it may do so only to the extent permitted under the SA. According to Article 5.1, first sentence of the SA, a Member is obliged to apply safeguard measures "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment". This rule may be interpreted as being composed of two parts in respect of the extent of safeguard measures: (1) to the extent necessary to prevent or remedy serious injury, and (2) to the extent necessary to facilitate adjustment. It is also important to note that the connecting word between the two parts is "and," not "or". Literally speaking, this means that both parts should be fulfilled, not either of them. In terms of the legal text, requirement of these two parts are consistent with the fundamental purpose of permitting safeguard measures. The primary purpose of safeguard measures is to give Members some time to restructure their domestic industries in emergency situation so that they can promote their competitiveness in liberalized markets. However, throughout the negotiating history of safeguard measures, the binding power of "to facilitate adjustment" seems to have subsided. In the case of the US, section 201-204 of the US Trade Act of 1947 provides some rules for implementing a safeguard measure in line with structural adjustment. The history of negotiations over "structural adjustment" and the trade law of the US will be reviewed in detail in the following.

VI.1.1. A Negotiating History of "Structural Adjustment"

During the Tokyo Declaration on safeguards, the issue of whether adjustment assistance should be a requirement for the application of safeguard measures emerged as one of the major areas of disagreement. Some participants sought to make governments more active in the development of structural adjustment programs. Some of these delegations have suggested that instead of imposing safeguard measures, the government deciding to protect its domestic industry can provide the industry with domestic assistance such as financial support.[151] In particular, Brazil advocated that the Agreement treat government subsidies as the preferred form of safeguard remedy.[152] Many of these countries had comprehensive structural adjustment programs to help industries re-allocate resources and to take other measures deemed necessary to restore competitiveness. For instance, the EC favored a provision that provided for maximum flexibility in adopting structural adjustment measures.[153] In the opinion of the Community such measure should be permitted "so long as measures do not cause injury to producers located in the territory of other contracting parties".[154] In addition, it was proposed by some delegations including India, and the Pacific Rim countries that some form of structural adjustment measure be in place before a safeguard action can be extended beyond its initial period of application.[155]

Other delegations have contended that because safeguard measures are of a temporary nature, industries should be self-motivated to implement structural

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[151] Stewart, Terence P. The GATT Uruguay Round : A Negotiating History. Vol.II. Boston: Kluwer Law and Taxation Publishers, 1999. p. 1774.

[152] Stewart, p. 1774; See also, *Communication from Brazil*, GATT Doc. MTN.GNG/NG9/W/3 (May 25, 1987); See also *Communication from Switzerland*, GATT Doc. No. MTN.GNG/NG10/W/26 (September 13, 1989).

[153] Stewart, p. 1774; See also, *Submission by the European Communities*, GATT Doc. No. MTN.GNG/NG9/W/24/Rev. 1 (June 26, 1989).

[154] Stewart, p. 1774; See also, EC Committee, *GATT Visit*, September 1991.

[155] Stewart, p. 1774; See also, *Communication from Australia, Hong Kong, Korea, New Zealand, and Singapore*, GATT Doc. No. MTN.GNG/NG9/W/4 (May 25, 1987), at 3. *Communication from India*, GATT Doc. No. MTN.GNG/NG9/W/15 (March 21, 1988), at 2.

adjustment program without direct financial assistance. These delegations have taken the view that the industries should themselves remain responsible for taking steps to restructure. In particular, the US and Japan opposed proposals that encourage governments to invest financially in their domestic industries and opposed a formal inclusion of the structural adjustment requirement.[156] These countries do not view heavy government involvement in the structural adjustment of an injured industry as beneficial. While they would generally agree that structural adjustment should take place, they contended that such decisions shall be made by the companies in the industries benefiting from the protective measures.[157]

At the start of the Uruguay Round in 1986, it was generally agreed that safeguard measures should not serve as a substitute for structural adjustment and that governments should take appropriate steps to encourage adjustment by domestic producers to import competition.[158] However, the issue was whether a safeguard agreement should contain more explicit provisions for structural adjustment assistance than already existed.

In June 1989, a draft proposal was made, incorporating adjustment measures compulsory if a contracting party wanted to extend a safeguard action beyond an initial period.[159] An extension of a safeguard measure would be made conditional on a demonstration that adjustment measures had been introduced in the initial phase. This was opposed by some delegations on the grounds that such measures "might discourage industries from adjusting autonomously and might make them claim broader protection as a precondition for adjustment".[160]

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[156] Stewart, p. 1775; See also,US Dept of Commerce, *Uruguay Round Update 4* (Sept. 1988); See also, *Communication from Japan*, GATT Doc. No. MTN.GNG/NG(/W/11 (October 13, 1987), at 2.
[157] Ibid.
[158] Stewart, p. 1774. *Work Already Undertaken in the GATT on Safeguards*, GATT Doc. No. MYN.GNG/NG9/W/1 (April 8, 1987).
[159] Ibid., at Section III.
[160] Ibid., at 3.

The Dunkel Draft largely succeeds in accomplishing the objectives set out in the Ministerial Declaration by the Safeguards Group at the beginning of the Round. In the Dunkel text, contracting parties have maximum flexibility in choosing the domestic adjustment measure, including the use of subsidies. Therefore, unlike in previous drafts where there was a prohibition on the use of export subsidies, the final text of the Dunkel Draft contains no such explicit limitation on the contracting parties.[161]

Thus, while the Dunkel Draft does not impose a condition of structural adjustment on countries taking safeguards action, the Draft states that safeguard measures should be applied only for a period of time needed to facilitate adjustment. The Dunkel Draft, however, neither requires the implementation of structural adjustment as a prerequisite for the application of a safeguard measure, as proposed by some delegations, nor restricts how governments can respond to the structural adjustment needs of an industry, as proposed by other delegations.

VI.1.2. The U.S. Trade Act of 1974

For implementation of the SA, Section 201-204 of the US Trade Statue encourages petitioners to submit a plan to promote positive adjustment to import competition at any time prior to the ITC injury determination.[162] Also, before submitting an adjustment plan, the petitioners may consult with the U.S. Trade Representatives and other federal governmental officials for the purpose of the adequacy of the proposals being considered for inclusion in the plan. In addition, during the ITC investigation, the ITC is required to seek information on actions being

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[161] Stewart, p. 1798; See also, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc.No.MTN.TNC/W/FA (December 20, 1991), at para. 8.
[162] This provides that positive adjustment occurs when (1) the domestic industry is able to compete successfully with imports after actions taken under section 204 terminate, or the domestic industry experiences an orderly transfer of recourses to other productive pursuits; and (2) dislocated workers in the industry experience an orderly transition to productive pursuits.

taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition. Any party may individually submit to the ITC commitments regarding actions such party intends to take to facilitate positive adjustment to import competition.[163]

VI.2. Accelerated Dispute Settlement System for Safeguards

VI.2.1. Dragged Dispute Settlement Procedures for Safeguards Disputes

When a WTO Member believes that the other Member has applied a safeguard measure inconsistently with the requirements in the Article XIX of the GATT 1994 and the provisions of the SA, it is required to resolve the dispute in accordance with the DSU.[164] However, the problem is that the standard dispute settlement procedures provided under the DSU do not appear to be speedy enough for resolving safeguards cases. The specific procedures are explained in the next section.

Unlike the dispute settlement mechanism under the GATT regime, the DSU under the WTO trade system provides a more efficient, integrated and legal – rather than political – dispute settlement system with a fixed time schedule. However, this time schedule is generally not strictly abided by. Safeguards disputes are no exception. In all of the safeguards cases, it took longer than the required 60 days to establish a panel after the request of a party to a dispute. Besides, on average, it took approximately one and a half years before the panel or the Appellate Body reports have been adopted after the establishment of a panel. (See Table IV-1) As a result, a

[163] U.S. Government Printing Office, June 2001, *Overview and Compilation of U.S. Trade Statues*, p.134.
[164] SA, Article 14.

delayed functioning of each dispute settlement process slackens the overall effectiveness of the WTO dispute settlement system for safeguards cases.

Such dragged dispute settlement proceedings threatens the purpose of settling disputes through the standard WTO dispute settlement system. Table IV-1 shows this problem. Table III-1 mainly contains two things: (1) initially proposed duration of each safeguard measure at issue and (2) actual timeline of each disputes settlement procedure. For instance, Argentina's initially proposed duration of a safeguard measure on footwear products was three years dating from February 25, 1997 to February 25, 2000. By the time the EC and Argentina reach the stage where the Dispute Settlement Body (hereinafter "DSB") adopts the Panel and the Appellate Body reports, only about a month is left until the initially proposed duration of the safeguard measure expires. Furthermore, the date by which Argentina promises to implement the DSB's rulings and recommendations coincides with the last day of the initially proposed expiry date of the safeguard measure. In other words, it turned out that the EC had raised a rightful objection to Argentina's safeguard measure; but even though this claim was proven right by the WTO dispute settlement mechanism, all the EC can expect from Argentina's implementation of the DSB rulings and recommendations is just Argentina's assurance of no extension or re-application of the original measure. The situation of the US-Wheat Gluten case is also quite similar.

The critical issue is that it is problematic to resolve a safeguard case through the standard WTO dispute settlement system. This becomes even more evident in the case of Chile-Agricultural Products. The consultation over the Chilean safeguard measure on agricultural products began on October 5, 2000. The Panel's finding was issued on April 4, 2002. However, the imposition of a safeguard measure expired on November 26, 2000.[165] (See Table IV-1)

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[165] Chile sent notice of an appeal to the DSB on June 24, 2002, regarding the Panel's finding that the

When a Member fails to resolve a dispute through consultation and brings the case before the DSB, the primary purpose may be to remove adverse effect caused by another Member's trade practice as soon as possible. However, if it takes longer to prove unlawful application of a safeguard measure than the actual duration of the measure, such an effort to disclose illegal trade remedy measures will be meaningless.

Furthermore, WTO Members would rely on some other ways to recover their loss. When the US announced its decision to impose a safeguard measure on steel imports earlier this year, major US trading partners in steel product counteracted by simultaneously notifying their initiation of safeguard investigations. Therefore, it is urgent to enhance efficiency of safeguards dispute settlement system in order to prevent more abusive use of safeguard measures.

Chilean Price Band System (PBS) was inconsistent with Article II:1(b), second sentence, of GATT 1994, and with Article 4.2 of the Agreement on Agriculture. See WT/SD207/5.

Table VI-1. Duration of Safeguard Measures & Timeline of Disputes

	SG MEASURES INITIALLY PROPOSED	PANEL REQUESTED	PANEL ESTABLISHED	PANEL REPORT ISSUED	AB REPORT ISSUED	PANEL & AB REPORT ADOPTED	END OF IMPLEMENTATION PERIOD
Argentina-Footwear	**3 years** Feb. 25, 1997 ~ Feb. 25, 2000	June 10, 1998	July 23, 1998	June 14, 1999	Dec. 14, 1999	Jan. 12, 2000	Feb. 25, 2000
Chile-PBS & Agricultural Products	**1 year** Nov. 26, 1999 ~ Nov. 26, 2000	Jan. 19, 2001	Mar 21, 2001	April 4, 2002	Sep. 23, 2002	--	On appeal
Korea-Dairy	**4 years** Mar. 1, 1997 ~ Feb. 28, 2001	June 10, 1998	July 22, 1998	June 21, 1999	Dec. 14, 1999	Jan. 12, 2000	--
US-Lamb Meat	**3 years & 1 day** July 22, 1999 ~ July 22, 2002	Oct. 14, 1999	Oct. 14, 1999	Dec. 21, 2000	May 1, 2001	May 16, 2001	Nov. 15, 2001
US-Line Pipe	**3 years & 1 day** Feb. 23, 2000 ~ Feb. 24, 2003	Sep. 14, 2000	Oct. 23, 2000	Oct. 29, 2001	Feb. 15, 2002	March 8, 2002	Mutually agreed on the reasonable period of time for compliance on July 24, 2002.
US-Wheat Gluten	**3 years** June 1, 1998 ~ June 1, 2001	June 3, 1999	July 26, 1999	July 31, 2000	Dec. 22, 2000	Jan. 19, 2001	June 2, 2001

VI.2.2. Accelerated Dispute Settlement System as an Option

According to the DSU, the time schedule for standard dispute settlement system is like the following. When a dispute arises, parties to a dispute must first consult with each other to settle the dispute. If no agreement is reached within 60 days as a result of consultation, a party to the dispute can request the DSB to establish a panel. Once the establishment of a panel is requested, it should be carried out within 30 days. After a panel is established, the report of the panel should be circulated to the WTO Members within 6 months, and the report should be adopted by the DSB between 20 days and a DSB's second meeting before the 60th day after the circulation. When appealed, the Appellate Body review should not last longer than 60 days, and the Appellate Body report should be adopted with 30 days after the circulation of the report. (See the first column of Table IV-2)

In the safeguards negotiations after the Doha Ministerial Conference held in 2001, some Members have proposed an accelerated procedural time-frame, as a suggestion for improving the safeguards dispute settlement system.[166] In line with such proposal, it is noteworthy to compare the standard dispute settlement system with the accelerated dispute settlement procedures for prohibited subsidies.[167] (See the second column of Table VI-2)

Table VI-2 Comparison between the Standard Dispute Settlement Procedure and the Accelerated Dispute Settlement Procedure for Prohibited Subsidies

Procedure	Standard procedure	Procedure for prohibited subsidies
Panel Request ~ Establishment of Panel	30 (10 in urgency) days	30 days
Panel Review (Panel Establishment ~ Circulation of	9 months (Panel procedure: 6 (3 in	90 days

[166] WTO document, TN/DS/W/8.
[167] Article 4 and Article 7 of the Agreement on Subsidies and Countervailing Measures.

the panel report)	urgency) months)	
Circulation of the Panel report ~ DSB adoption	Between 20 days and a DSB meeting before 60th day after circulation	30 days
Appellate Body Review (Notice of Appeal ~ Circulation of the Appellate Body report)	60 days (Max. 90 days)	30 days (Max. 60 days)
Circulation of the Appellate Body report ~ DSB adoption	30 days	20 days

VII. CONCLUSION

Disputes arise over some ambiguities found in the WTO rules and procedures governing safeguard measures. The Panel and the Appellate Body decisions provide resolutions to many issues in the interpretation and the application of safeguard measures. Certain decisions, however, are still subject to uncertainty. For instance, the Appellate Body's interpretation of critical legal issues like causal link between import increase and serious injury and threat thereof, non – attribution of serious injury to factors other than import increase, and express justification and permissible extent of safeguard measures leaves those ambiguous requirements still left unclarified. Members would find it difficult to resort to a safeguard measure if they are not certain about what is sufficient for the demonstration of these requirements.

Moreover, the standard dispute settlement system proves to be unsuitable for effective resolution of safeguards disputes. Especially, much dragged procedures under the standard system produce late and, in practical sense, meaningless findings and recommendations of the Panel and the Appellate Body. Considering the expeditious dispute settlement mechanism for prohibited subsidies, it is suggested for safeguard disputes to be resolved in the similar expeditious dispute settlement mechanism used for prohibited subsidies. Also, the requirement to apply a safeguard measure "to the extent necessary to facilitate adjustment" should be given more legally binding force. The fundamental purpose of safeguard measures is to give Members some time to restructure their domestic industries in emergency situation so that they can recover from serious injury and acquire more competitiveness in the multilateral trade system. Therefore, it should be assured that structural adjustment be carried out in conjunction with safeguard measures.

A study shows that safeguard measure is not as popular as other trade remedy measures like antidumping measures because Members find the rules and procedures relatively ambiguous and difficult to apply.[168] On the other hand, some view that the ambiguities and difficulties lead to high possibility of abusive invocation of the SA. Therefore, further studies and judicial decisions are called upon to clarify remaining ambiguities in the application of safeguard measures. Meanwhile, dispute settlement mechanism for safeguard measures needs improvement with accelerated time schedule.

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[168] Brown, Chad P. "Why are safeguards under the WTO so unpopular?" *World Trade Review* (2002), 1:1:p. 47-62.

APPENDIX 1

A. Pending Consultations

(As of July 31, 2002)

United States – Safeguard Measure Against Imports of Broom Corn Brooms.	WT/DS78	Colombia
Argentina - Safeguard Measures on Imports of Footwear	WT/DS123 replacing WT/DS121	Indonesia
Hungary - Safeguard Measure on Imports of Steel Products from the Czech Republic	WT/DS159	Czech Republic
Chile – Price Band System and Safeguard Measures relating to Certain Agricultural Products	WT/DS220	Guatemala
Chile – Provisional Safeguard Measure on Mixtures of Edible Oils	WT/DS226	Argentina
Chile – Safeguard Measures and Modification of Schedules regarding Sugar	WT/DS230 replacing WT/DS228	Columbia
European Communities - Provisional Safeguard Measures on Imports of Certain Steel Products	WT/DS260	United States

B. Active Panels

(As of July 31, 2002)

United-States – Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Carbon Quality Line Pipe	WT/DS214	EC
Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches	WT/DS238	Chile
US – Definitive Safeguard Measures on Imports of Certain Steel Products	WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WT/DS259	EC, Japan, Korea, China, Switzerland, Norway, New Zealand, Brazil, respectively

C. Panel Reports appealed

(As of July 31, 2002)

Chile - Price Band System and Safeguard Measures relating to Certain Agricultural Products	WT/DS207	Argentina

D. Completed Panel and Appellate Body Review: Appellate Body and Panel Reports adopted

(As of July 31, 2002)

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products	WT/DS98	EC
Argentina – Safeguard Measures on Imports of Footwear	WT/DS121	EC
United Sates – Definitive Safeguards Measure on Imports of Wheat Gluten from the European Communities	WT/DS166	EC
United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand	WT/DS177, WT/DS178	New Zealand, Australia
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe	WT/DS202	Korea

E. Panel and Appellate Body at the Implementation Stage

(As of July 31, 2002)

Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products	WT/DS98	EC
Argentina – Safeguard Measures on Imports of Footwear	WT/DS121	EC
United Sates – Definitive Safeguards Measure on Imports of Wheat Gluten from the European Communities	WT/DS166	EC
United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand	WT/DS177, WT/DS178	New Zealand, Australia
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe	WT/DS202	Korea

F. Settled or inactive cases

(As of July 31, 2002)

Slovakia – Safeguard Measure on Imports of Sugar(mutually resolved)	WT/DS235	Poland
Chile – Safeguard Measures on Sugar	WT/DS228	Colombia

APPENDIX 2

Actors in Safeguards Disputes

(As of July 31, 2002)

Country groups	Countries		As complainant (A)	As defendant (B)	As third party (C)	(A+B)
Developd countries (DCs)	Australia		1	-	4	1
	Canada		-	-	5	-
	EC		5	1	4	6
	Iceland		-	-	1	-
	Japan		1	-	4	1
	New Zealand		2	-	2	2
	Norway		1	-	-	1
	Switzerland		1	-	-	1
	United States		1	6	4	7
	Subtotal		12	7	24	
Less-developed Countries (LDCs)	Newly Industrialized countries (NICs)	Argentina	2	3	1	5
		Brazil	1	-	2	1
		Chinese Taipei	-	-	1	-
		Korea	2	1	1	3
		Malaysia	-	-	1	-
		Mexico	-	-	3	-
		Thailand	-	-	1	-
	Subtotal		5	4	10	
	Traditional developing countries (TLDCs)	Chile	1	4	-	5
		Colombia	2	-	1	2
		Costa Rica	-	-	1	-
		Cuba	-	-	1	-
		Ecuador	-	-	1	-
		El Salvador	-	-	1	-
		Guatemala	1	-	1	1
		Honduras	-	-	1	-
		Indonesia	1	-	1	1
		Nicaragua	-	-	1	-
		Paraguay	-	-	3	-
		Turkey	-	-	1	-
		Uruguay	-	-	1	-
		Venezuela	-	-	2	-
	Subtotal		5	4	16	
Least-developed Countries (LLDCs)	none		-	-	-	-
	Subtotal		0	0	0	
Transitional Economic Countries (TECs)	China		1	-	-	1
	Czech Republic		1	-	-	1
	Hungary		-	1	-	1
	Poland		1	-	-	1
	Slovak Republic		-	1	-	1
	Subtotal		3	2	0	
Total			25	17	50	

APPENDIX 3

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 subparagraph (*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 4

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[169] 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 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

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[169] A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a custo ms union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or t hreat 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 i njury 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 XI X and paragraph 8 of Article XXIV of GATT 1994.

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.[170]

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[170] A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguard s.

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.[171],[172] 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.

(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[173], 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

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[171] An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and thi s Agreement may, by mutual agreement, be administered by the exporting Member.

[172] 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.

[173] The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreeme nt.

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 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

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