

NOTIFICATION OF LAWS AND REGULATIONS UNDER
ARTICLE 12.6 OF THE AGREEMENT

Replies of JAPAN¹ to questions posed by the
EUROPEAN COMMUNITY²

The following communication, dated 11 September 1996, has been received from the Permanent Mission of Japan.

1. In general

Q1.1 May an import restriction be imposed on the basis of Article 52 of the Foreign Exchange and Foreign Trade Control Law without complying with the criteria of the WTO Safeguard Agreement?

A1.1 Import restrictions for a safeguard measure will be imposed in accordance with "Regulations to Govern Emergency Measures to be Taken in Response to an Increase in the Importation of Goods" which was enacted in compliance with the Agreement on Safeguards as the secondary legislation of Article 52 of the "Foreign Exchange and Foreign Trade Control Law".

Q1.2 What is the legal status of the WTO Safeguard Agreement under Japanese law? May its provisions be invoked by private parties in national courts to prevent the application of domestic rules which are contrary to the Agreement?

A1.2 Japan has incorporated the requirements which are provided for in the Agreement on Safeguards into its domestic legislation. Except for the provisions in the Agreement on Safeguards which regulate the international obligations between Member States, such as notifications to the Committee on Safeguards and prior consultations with Members having substantial interest.

Japan, however, interprets its domestic legislation in accordance with provisions of the Agreement on Safeguards when no explicit provisions exist in the domestic legislation.

Regarding the second question, as this is the matter to be decided by a court, we cannot give an exact answer.

Q1.3 The Japanese legislation makes a distinction between two types of safeguard measures, i.e. import quotas and tariff increases, which are governed by a different set of rules (Regulations to govern

¹G/SG/N/1/JPN/2 + Corr.1

²G/SG/W/89

emergency measures to be taken in response to an increase in the importation of goods; Customs Tariff Law, Article 9). Can a safeguard procedure be based on both types of rules, or must a choice be made already at the time of opening of the investigation? How is a choice made between both types of measures?

A1.3 Investigations for import restrictions and tariff increases as safeguard measures have to be initiated and concluded jointly and collectively, and the findings of the investigations shall be processed in the same manner.

When, as a result of the investigations, safeguard measures are considered necessary to be taken, either an import restriction measure or a tariff measure is chosen by the consensus of the Ministry of Finance, the Ministry of International Trade and Industry and the Ministry having jurisdiction over the product concerned.

2. Substantive conditions for safeguard action

Q2.1 Under Article 2(1) of the Safeguard Agreement, a safeguard measure may be applied only when "a product is being imported in such increased quantities [...], and under such conditions as to cause or threaten to cause serious injury [...]" (emphasis added). Where is this important requirement mentioned in the Japanese legislation? Does Japan consider that the reference to the decrease in the market price of the product under investigation in any foreign market (Article 2 of the Regulations to govern emergency measures to be taken in response to an increase in the importation of goods, Article 9 of the Customs Tariff Law) complies with Article 2(1) of the Safeguard Agreement?

A2.1 We understand that the increased imports caused by unforeseen price decrease is one of the typical examples of the conditions which could cause or threaten to cause serious injury.

Q2.2 Article 4(2)(a) of the Safeguard Agreement lists relevant factors having a bearing on the situation of the domestic industry (market share, production, ...). Where are those factors mentioned in the Japanese legislation? On the basis of which precise factors may a safeguard measure be adopted under Japanese law?

A2.2 Such factors are not provided in the domestic legislation. However, we will evaluate all the factors listed in Article 4.2(a) of the Agreement on Safeguards, when we determine the serious injury or threat thereof.

Q2.3 Article 4(1)(b) of the Safeguard Agreement defines the concept of "threat of injury". How is this definition implemented in the Japanese legislation?

A2.3 This is not defined in the domestic legislation. However, we interpret "threat of serious injury" based on the Agreement on Safeguards.

Q2.4 The Japanese legislation does not appear to contain a specific provision on the causal link. In particular, the impact of factors other than increased imports (Article 4(2)(b) of the Safeguard Agreement) is not mentioned.

A2.4 Article 2 of the "Regulations to Govern Emergency Measures to be Taken in Response to an Increase in the Importation of Goods" and Article 9.1 of the "Customs Tariff Law" require 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.

Q2.5 What is the meaning of the expression "necessary for the national economy" mentioned in Article 2 of the Regulations to govern emergency measures and Article 9-1 of the Customs Tariff Law?

A2.5 The "necessity for the national economy" is the additional requirements for the invocation of safeguard measures. Safeguard measures cannot be taken unless "it is urgently necessary for the national economy".

The existence of such necessity is determined with due account being taken of the effects which possible safeguard measures may have on users, sellers and consumers of the product concerned, on international relationship, on structural adjustment plan in the industry concerned, and on employment in a specific region, etc.

3. Procedure

Q3.1 Article 2 in fine of the Regulations to govern emergency measures refers to Article 3(1) of the Import Trade Control Order. Under the latter provision, the Minister of International Trade and Industry may find appropriate not to publish certain import restrictions. How can this provision be reconciled with the transparency requirement of the Safeguard Agreement?

A3.1 In the case of import quotas for safeguard measures, Article 17 of the Regulations is applied. Article 17 of the Regulations requires the Minister of International Trade and Industry to give, in the Official Gazette, public notification with regard to his/her decision on the Emergency-Import-Quota-related matters.

Q3.2 Who can file a complaint for a safeguard action?

A3.2 The ones who have legitimate interests against specific safeguard measures may request judicial review.

This is the matter to be decided by a court pursuant to the administrative disputes legislation.

Q3.3 Do the representatives of an exporting country have access to the evidence collected during the investigation? Do they have the status of "interested party" for the purpose of the procedure?

A3.3 We do not believe that the representatives of an exporting country have the status of "interested party".

Q3.4 Under Article 12(6) of the Regulations to govern emergency measures and Article 4(6) of the Cabinet Order relating to emergency duties, the investigating authority may disregard confidential information when no non-confidential summary has been submitted nor a statement setting forth why a summary is not possible. Under Article 3(2) of the Safeguard Agreement, such confidential information must however be accepted when it can be demonstrated from appropriate sources that the information is correct.

A3.4 We accept such confidential evidence in accordance with Article 3.1 of the Agreement on Safeguards. The articles concerned of the "Regulations" and the "Order" only state that "the Ministers may (N.B. not "shall") disregard such confidential evidence". Therefore these articles do not conflict with requirements of this article of the Agreement.

Q3.5 Under Article 13(2) of the Regulations to govern emergency measures and Article 5(2) of the Cabinet Order relating to emergency duties, the right of access to the file is made conditional upon a written statement setting forth the title of the particular item or items of the available evidence which

the interested party wishes to inspect. How can an interested party know which items are included in the available evidence? How is a full disclosure of the file organized in practice by the investigating authority?

A3.5 We notify the title(s) of the item(s) to an interested party upon its enquiry. The interested party may inspect the evidence with a written request describing the title(s) of the item(s).

4. Measures

Q4.1 Under Article 7(1) of the Safeguard Agreement, a safeguard measure may be applied only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. How is this requirement of the Safeguard Agreement implemented in the Japanese legislation?

A4.1 We abide by the requirements in the provisions of the Agreement on Safeguards. The non-existence of the relevant provision does not mean that the administrative authority disregards such requirements.

Q4.2 Under Article 5(1) of the Regulations to govern emergency measures, the level of an import quota may be different from the average of the last three years if such is required for the purposes of "sustaining the national economy". Under Article 5(1) of the Safeguard Agreement, such a deviation is only authorized when necessary "to prevent or remedy serious injury". How can this difference be explained?

A4.2 We interpret "sustaining the national economy" as having the same meaning as "when necessary to prevent or remedy serious injury".

Q4.3 In Article 5(5) of the Regulations to govern emergency measures, no reference is made to consultations under the auspices of the WTO Committee on Safeguards.

A4.3 Inter-governmental obligations, such as notifications to the Committee on Safeguards and prior consultations with other WTO Members, provided for in the Agreement on Safeguards need not be stipulated in the domestic legislation. Of course, without explicit provisions in the domestic legislation, the Japanese Government will negotiate under the auspices of the Committee on Safeguards based on the Agreement.

Q4.4 Under Article 9-1(1) of the Customs Tariff Law, a safeguard measure on a product can take the form of an additional duty "in an amount equal to or less than the amount corresponding to the difference between the customs value of the said product and the wholesale price in Japan of like or similar product". How can such an amount be deemed to be always appropriate in the light of the Safeguard Agreement?

A4.4 The measures to be taken under subparagraph 1 of Paragraph 1 of Article 9 of the Customs Tariff Law are not measures taken under the Agreement on Safeguards. Under this subparagraph, the authority may increase its statutory tariff rate either within bound rate or when no concession is granted by the WTO Agreement.

Safeguard measures which raise tariff rates in excess of the bound rates will be taken under subparagraph 2 of Paragraph 1 of Article 9 of the Customs Tariff Law.

Q4.5 In Article 6 of the Regulations to govern emergency measures and Article 9-1 of the Customs Tariff Law, a reference is made to developing countries whose shares of imports of the product under investigation are "small". Why has the 3-9 per cent limit of Article 9(1) of the Safeguard Agreement

not been implemented in the Japanese legislation? Why is there no requirement for the developing country to be a member of the WTO in the Regulations to govern emergency measures?

A4.5 Both Article 6 of the "regulations" and Article 9.1 of the "Customs Tariff Law" do not conflict with Article 9.1 of the Agreement, and we will interpret "the treatment for developing country members" in accordance with the Agreement on Safeguards. As for the "Regulations", Article 6 provides for the special treatment of the developing country Members of the WTO. Our notification inadvertently omitted the words "Member(s) of the WTO" (see G/SG/N/1/JPN/2/Corr.1).

Q4.6 *Under Article 9-1(8) of the Customs Tariff Law, provisional safeguard measures may be taken when "it is deemed urgently necessary in the interest of the national economy". How can this provision be reconciled with Article 6(1) of the Safeguard Agreement, which requires "critical circumstances where delay would cause damage which it would be difficult to repair"?*

A4.6 We interpret "the case where it is deemed particularly and urgently necessary in the interest of the national economy" referred to in paragraph 8 of Article 9 of the Customs Tariff Law as having the same meaning as "the critical circumstances where it would be difficult to repair" referred to in Paragraph 1 of Article 6 of the Agreement on Safeguards.