Global Business & Development Law Journal

Volume 14 | Issue 2 Article 3

1-1-2001

Safeguard Mechanism in Korea under the WTO World

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TABLE OF CONTENTS

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This article is based on the article *Korea Version of Uruguay Round Agreement on Safeguards*, 8 MICH. J. INT'L L. 397 (1999), which has been modified and rewritten according to the recent change of legal environments in Korea including establishment of the Act on the Investigation of Unfair International Trade Practices and Safeguards Against Injury to Domestic Industries in 2001.

I would like to thank Ms. Jennifer S. McGeorge and the editorial staff members for their valuable comments and assistance during the work of this article.

I. INTRODUCTION

The Uruguay Round Agreement on Safeguards,[1] a significantly amended and modified revision of Article XIX of the General Agreement on Tariffs and Trade (GATT 1947),[2] was enacted under the World Trade Organization (WTO) system in 1994.[3] The Agreement is designed to prevent safeguard measures from being selectively applied to individual countries and to force each country to abolish "gray area" measures, such as voluntary export restraints (VERs), orderly marketing agreements (OMAs), basic price systems, export moderation, and export-import price monitoring systems.[4] Under the Agreement, the total period of operation of safeguard

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1. *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 175 (2nd ed. 2000) [hereinafter JACKSON, THE WORLD TRADING SYSTEM] (defining "safeguards" as being "generally used to denote government actions responding to imports that are deemed to 'harm' the importing country's economy or domestic competing industries . . . the term 'safeguards' embraces a number of legal and political concepts, including that of the *escape clause* . . ." (emphasis added).

To obtain information on the history and use of safeguards (i.e., the "escape clause"), *see id.* at 175-81 (noting that "[t]he modern era of safeguards measures stems from the beginning of the U.S. Reciprocal Trade Agreements program of its 1934 act"); *see also* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 604-10 (3rd ed. 1995) [hereinafter JACKSON ET AL., LEGAL PROBLEMS] (same); THOMAS V. VAKERICS ET AL., ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS, 273-75 (1987) (same).

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]. Prior to the Uruguay Round, safeguard measures were governed mainly by Article XIX of GATT, which is often referred to as GATT's "escape clause." JACKSON, ET AL., LEGAL PROBLEMS, *supra* note 1, at 596-97. Article XIX is the central and most prominent safeguards provision of GATT; however, a number of other measures are taken under GATT, or in evading GATT, that can also be termed "safeguard." Various GATT clauses afford nations an opportunity to impose border-import restraints, some of which may be "safeguard." For example, both Article XII and Article XVIII of GATT provide some exceptions for balance-of-payments situations. These measures can often provide GATT with legal cover for various border-import restraints that are motivated by safeguard policies. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 1, at 180.

3. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, *available at* http://www/wto.org/english/docs_e/legal_e/25-safeg.pdf [hereinafter Uruguay Round Agreement on Safeguards] (copy on file with *The Transnational Lawyer*).

4. *See* JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 597 (explaining that Article XX of GATT:

> [S]pecifies standards that are supposed to be met before safeguards measures can be imposed. But these standards were increasingly disregarded as other techniques to protect domestic industries, such as 'voluntary' export restraints and orderly marketing agreements, came to replace formal actions under Article XIX. In the United States, for example, the domestic statute that implements U.S. rights and obligations under Article XIX (Section 201 of the Trade Act of 1974) has been used very little in recent years, with only a handful of actions filed since the mid-1980s, mostly in small industries and mostly unsuccessful. Yet, during the same period, the U.S. automobile industry was protected by a voluntary restraint agreement with Japan, the U.S. steel industry was protected by a network of voluntary restraint agreements with major steel producing nations, and

measures must not surpass eight years, counting the period of application of any provisional measure as well as the period of initial application, including extensions.[5] In addition, a second application of safeguard measures against the same item is not allowed for at least two years from the date of the initial application.[6] The existing safeguard measures, taken pursuant to Article XIX of GATT 1947, should be rescinded within eight years of the initial application of the WTO Agreement or five years of the date of entry into the WTO, whichever comes later.[7] To preserve the effectiveness of safeguards, the Agreement specifies that the export country may not retaliate against the import country for three years after initial application of safeguard measures.[8]

Considering the Agreement on Safeguards, the prohibition of selective application and the four-year grace period for abolishing "gray area" measures seem to have had favourable effects on international trade for the Republic of Korea (hereinafter Korea). In fact, Korea will expectantly bear less of a burden in bilateral negotiations with major partner countries such as the United States,[9] the EU countries, and Japan due to its weak bargaining power against them. However, the frequency of operation of safeguard measures is predicted to increase compared to the GATT 1947 system[10] for two reasons: first, because the Uruguay Round Agreement on Safeguards requires that essentially all "gray area" measures be eliminated,[11] and second, because the importing country can apply safeguard measures without any concern for import quantity restrictions for three years, while the exporting country is not allowed to retaliate against the safeguard measures.[12] Even though negotiations over compensation are

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> the U.S. textile and apparel industries continued to enjoy protection under the Multifiber Arrangement . . . Trade restrictions such as these, taken outside the formal ambit of Article XIX, have come to be known as "gray area" measures. Although they are negotiated without formal reference to the legal requirements in Article XIX, they nevertheless embody government-to-government accords, and nations have had little incentive to complain about them).

With regard to the "gray area" measures, the preamble of the Uruguay Round Agreement on Safeguards reads ". . . to re-establish multilateral control over safeguards and eliminate measures that escape such control ..." Uruguay Round Agreement on Safeguards Preamble.

5. *Id.* art. 7(3).

6. *Id.* art. 7(5).

7. *Id.* art. 10.

8. *Id.* art. 8(2)(3).

9. Since 1988, when Korea recorded total foreign trade of US$100 billion with the first trade surplus in Korean history, the system to regulate and administer foreign trade in Korea has been influenced by trade friction with, and pressure from, partner countries such as the United States as well as by the requirements of international trade organizations. Since the 1980s, trade friction with the United States, the largest export market for Korea, has been one of the most serious problems for the Korean government in its attempt to expand foreign trade. Eun Sup Lee, *Regulation of International Trade in Korea Under the WTO Mechanism, in* 3 NEW ZEALAND ASS'N FOR COMP. L. 513, 516-17 (1998) [hereinafter *Regulation of International Trade in Korea*].

10. *See* JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 653 (stating that "[i]n the period leading up to the Uruguay Round, there was a feeling that the compensation requirement of Article XIX discouraged its use and encouraged resort to 'gray area' measures").

11. *Id.* at 597.

12. *See id.* at 653-54; *see also supra* note 8.

required in all cases under the provisions of the Uruguay Round on Safeguards,[13] the importing nation seemingly faces no credible threat of a retaliatory suspension of concessions during the first three years of WTO membership due to GATT's legal safeguards, which respond to an absolute rise in imports.[14]

Relying on the safeguard measures of the GATT 1947 system has been more difficult for Korea with its small open economy[15] than it has been for other partner countries, such as the United States. That is, Korea's dependency on foreign trade is much larger than that of other partner countries, and its major exporting items[16] have been less competitive in the partner countries' markets, which have been vulnerable to all sorts of retaliatory barriers.[17]

The purpose of this paper is two-fold. First, this paper will examine how the safeguard agreement under the WTO system has been absorbed into and applied to Korea's safeguard system. Second, it will investigate how Korea can avoid the devastation of its industry from the rapid increase of importation while staying within the boundaries of the WTO Agreement.

II. OUTLINE OF KOREA'S SAFEGUARD SYSTEM

Korea's safeguard system for seeking relief measures against industrial injuries due to rapid increases in imports has its legal basis in two Acts: the industrial injury relief system of the Act on the Investigation of Unfair International Trade Practice and

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13. Uruguay Round Agreement on Safeguards, arts. 8(1)-8(3).

14. JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 653-54.

15. In Korea, since the 1960s, as the foreign trade sector has grown faster than the economy as a whole, foreign trade dependency, or the ratio of total trading volume to Gross National Product, has increased drastically. The Korean economy's trade dependency, particularly export dependency, has increased more substantially than import dependency, which had increased rapidly throughout the 1960s and 1970s, from 21.3% in 1965 to 67.4% in 1975. The ratio reached and stayed well over 60% during the 1980s and was at 65.5% in 1999. *See* Korean Social Science Data Center, *at* http://www.ksdc.re.kr (last visited Oct. 9, 2001) (in Korean) (copy on file with *The Transnational Lawyer*).

16. In Korea, the main items of exportation have changed first from the primary industry to the light industry, and subsequently to the heavy chemical industry. In 1962, Korea's major exports were composed entirely of raw materials, minerals, lumber, and agricultural and fishing goods. In 1971, 68% of Korea's exports were composed of textiles and other light industry goods, reflecting the nation's push into light industry. BYUNG HONG PARK, MODERN KOREA'S FOREIGN TRADE 148 (1983) (in Korean) 박병홍, 현대한국무역론. By 1981, electronic products, steel products, and footwear together made up 24% of exports, while textiles declined to 30%, and raw materials virtually disappeared from the major items of export. *See* KOREA INTERNATIONAL TRADE ASSOCIATION, KOREA TRADE YEARBOOK (in Korean) 한국무역협회, 한국무역연감 618-25 (1982). In 2000, electronic goods were Korea's single largest export (36%) as the nation moved more firmly into higher-value-added production. *See* Korea National Statistical Office, *Exports and Imports by SKTC*, 통계청, 수출입통계 *available at* http://www.nso.go.kr (last visited Oct. 9, 2001) (in Korean) (copy on file with *The Transnational Lawyer*).

17. For example, Korea has used provisions of the Foreign Trade Act to restrict imports and exports when it believed that it was being treated unfairly by counterpart countries with respect to international transactions. Foreign Trade Act, Law No. 3895 (1986), amended by Law No. 6417 (2001), art. 5 (in Korean) [hereinafter Foreign Trade Act] 대외무역법. This provision seems to be similar to Section 301 of the United States Trade Act of 1974 in that if a foreign government maintains unreasonable or unjustifiable restrictions against an export of the United States, then the United States Trade Representative is supposed to take retaliatory action against the offending countries. However, it is very difficult for Korea to take retaliatory measures against partner countries engaging in unfair trade treatment, because it has a small, open economy compared with the countries such as the United States.

Safeguards Against Injury to Domestic Industries (hereinafter, Act on the Investigation),[18] and the emergency duties system of the Customs Tariff Act.[19] The safeguard system is a system demanding urgent measures because it is operated when a domestic industry faces serious injury due to a rapid increase in the importation of goods that are similar or directly competitive with those produced domestically.

Particularly in the case of Korea, the existing adjustment duties[20] alone cannot avoid injury to its domestic industry because 91.2 percent of the imported goods of Korea that are listed as Harmonized System (hereinafter HS)[21] items are bound to

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18. Act on the Investigation of Unfair International Trade Practices and Safeguards Against Injury to Domestic Industries, Law No. 6417 (2001) (in Korean) [hereinafter Act on the Investigation] 불공정무역행위조사및산업피해구제에관한법률. The purpose of the Act, the special law governing the investigation on the international unfair trade practices and the industries injury relief is to contribute to development of national economy by establishing a fair transaction order and to enforce the international agreement on trade including WTO agreements. Before the Act was established in 2001, the provisions about the industrial injury relief system were incorporated in the Foreign Trade Act, the general law governing foreign trade in Korea. The purpose of the Foreign Trade Act is to contribute to development of a strong economy by achieving a balance of international payments, increasing international transactions through promotion of trade, and establishing a fair transaction order. The basic principle of the Foreign Trade Act is to promote *free and fair trade* under the conditions prescribed by valid treaties, other international agreements, and generally approved international laws. Under the Act, when necessary to restrict international trade, the government should apply such restrictions during a limited period of time and only to the extent necessary to obtain the restrictions' objectives. Foreign Trade Act, *supra* note 17, arts. 1, 3. The Minister of Commerce, Industry, and Energy is ultimately responsible for trade administration, and is given certain discretion in taking measures to promote and regulate foreign trade. *Id.* art. 5.

19. Customs Act, Law No. 1976 (1967), amended by Law No. 6305 (2000) (in Korean) [hereinafter Customs Act] 관세법. The Customs Act seeks to secure revenues through the imposition and collection of reasonable customs taxes and proper clearance of imported and exported goods. The Minister of Finance and Economy is in charge of customs administration. The main provisions of the Act are related to the imposition, collection, and reduction of duties, the exemption from duties, the regulation of bonded transportation and storage, customs clearance, and customhouse brokerage. *See id.* art. 1; *see also* National Government Organization Act, Law No. 2437 (1973), amended by Law No. 6400 (2001), art. 27(7) (in Korean) 정부조직법.

20. Customs Act, *supra* note 19, art. 69 (in Korean) 관세법. In order to protect related industries, adjustment duties may be levied when, as a result of change in tariff classification, there is an increased importation of goods. Generally, adjustment duties can be imposed up to 100% of dutiable value of the goods.

21. *See* Harmonized Comodity Description and Coding System, *at* http://pacific.commerce.ubc.ca/trade/HS.html (last visited Sept. 8, 2001) (copy on file with *The Transnational Lawyer*) (stating as follows:

> The Harmonized System is an international six-digit commodity classification developed under the auspices of the Customs Cooperation Council. Individual countries have extended it to ten digits for customs purposes, and to 8 digits for export purposes. In the Harmonized System goods are classified by what they are, and not according to their stage of fabrication, their use, or origin. The Harmonized System nomenclature is logically structured by economic activity or component material. For example, animals and animal products are found in one section; and machinery and mechanical appliances which are grouped by function are found in another. The nomenclature is divided into 21 sections. Each of these sections groups together goods produced in the same sector of the economy. Each section comprises one or more chapters, with the entire nomenclature being composed of 97 chapters. Some chapters are reserved for future use. Chapters of sections I to XV (except section XII) are grouped by biological benus or by the component material from which articles are made. For those chapters in which goods are grouped by raw material, a vertical structure is used in which articles are often classified according to their degree of processing. For example, Chapter 44 contains items such as rough wood, wood roughly squared and some wooden finished products such as wooden tableware. Articles may also be classified according to the use or function. This classification (i.e. by function), mainly occurs in section XII and sections XVI-XXI. For example, section XVII

WTO concession tariff rates.[22] Therefore, Korea needs to take the additional measures launched by the safeguard system as well as the emergency duties system.

A. Organizations in Charge

1. Trade Commission

The Trade Commission, a quasi-independent deliberative organ under the umbrella of the Ministry of Commerce, Industry, and Energy was inaugurated in July 1987 based on the provisions of the Act on the Investigation.[23] The Trade Commission conducts investigations with regard to industrial injury caused by the importation of certain goods, recommends relief measures, and examines the system of international trade laws.[24] Although the trade commission is under the umbrella of the Ministry of Commerce, Industry, and Energy, it is considered by the Korean government to perform not only fairly independent duties assigned by the Act on the Investigation, but also quasi-judicial investigations and judgments concerning injury to domestic industry.[25]

The Trade Commission comprises one re-appointable chairman with a three-year term and a nine-person commission that includes one permanent member.[26] The members, who are appointed by the President of Korea upon recommendation of the

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contains chapters 88 (aircraft) and 89 (ships)).

22. YU KEUN SHIN, WTO AND THE MAJOR COUNTRIES' SAFEGUARDS SYSTEM 144 (1997) (in Korean) 와 주요국의 세이프가드제도.

23. The provision about the Trade Commission in the Foreign Trade Act has been modified and moved into The Provision in the Foreign Trade Act in 2001, 대외무역법. *See* Foreign Trade Act, *supra* note 17, arts. 26-38 (in Korean) (detailing the provision about the Trade Commission).

24. *See* Act on the Investigation, *supra* note 18, art. 28 (in Korean) 불공정무역행위조사및산업피해구제에관한법률(noting that the Trade Commission has the following functions:

a) Investigating and judging the injury to a domestic industry due to rapid increase in importation and proposing relief measures;
b) Investigating and judging the injury to a domestic industry caused by importing subsidized goods or by dumping;
c) Investigating and judging the injury to a domestic industry caused by rapid increase in distribution services provided by foreigners, and proposing relief measures against the injury;
d) Investigating and analysing the influence of imports on the competitiveness of domestic industries;
e) Studying international trade laws, systems, and cases of competition;
f) Investigating, deciding and imposing sanctions against unfair international transactions;
g) General investigations and proposals concerning fair trade practices).

25. There is no explicit provision about the binding power of the Trade Commission, but it was made explicit during the process of interpellation and reply in the 131st session of the National Assembly. Additionally, the binding power is confirmed by the general construction of the relevant provisions of the Act on the Investigation. *See id.* arts. 37-43; *see also* Eun Sup Lee, *Regulation of Foreign Trade in Korea*, 26 GA. J. INT'L & COMP. L. 135, 150, n. 88 (1996) [hereinafter *Regulation of Foreign Trade in Korea*]; *Regulation of International Trade in Korea, supra* note 9, at 523.

26 Act on the Investigation, *supra* note 18, art. 29 (in Korean) 불공정행위조사및산업피해구제에관한법률.

Ministry of Commerce, Industry, and Energy,[27] include persons well experienced in industry and trade.[28] As of 2001, the Trade Commission includes one chairman, one permanent member, six regular members, and about forty employees assigned to one division[29] and four departments.[30]

2. Deliberative Committee on Tariffs

The Deliberative Committee on Tariffs has its legal basis in the Customs Act[31] and is a non-permanent advisory organization with twenty members,[32] including the chairman, who is the high-ranking official in the Ministry of Finance and Economy. The Committee deliberates matters pertaining to the operation of the anti-dumping duties system as well as other details of customs tariff policies, as deemed necessary by the Minister of Finance and Economy.[33] Therefore, this committee is simply a deliberative organ that is not binding on the Minister, and is completely different from the Trade Commission in terms of its independence. For instance, half of the members of this committee are public officials appointed by the Minister of Finance and Economy. When the Trade Commission determines an industrial injury to be serious due to a rapid increase in imports, the Deliberative Committee on Tariffs evaluates customs tariff measures as safeguards.[34]

B. Operation Requirements and Judgment Criteria

A petition for investigation of industrial injury due to a surge in imports may be filed when the importation of specific goods or the supply of distribution services by foreigners causes serious injury to the domestic industry.[35] The requirements for the imposition of safeguards include a rapid increase in import quantity, the existence of serious injury or threat of serious injury to the domestic industry, and a causal relationship between the increase in imports and the industrial injury.[36]

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27. *Id.* (in Korean),.불공정행위규제및산업피해구제에관한법률.

28. Even in a case where the chairman and members are not public officials, they shall be considered public officials in the application of relevant provisions of the Criminal Code and other laws and regulations.

29. The Trade Research Office of the Trade Commission performs functions such as the investigation of injuries to domestic industries and the study of international trade law systems.

30. These include the Department of General Investigation, Department of Investigation into Injurious Effect, the Department of Investigation into Unfair Trade, and the Department of Investigation into Import Price.

31. Customs Act, *supra* note 19, art. 13 (in Korean) 관세법.

32. The Committee's twenty members consist of administrative officials, researchers or practitioners, with deep knowledge about trade and tariffs. Enforcement Decree of the Customs Act, President Decree No. 17166 (2001), art. 4 (in Korean) [hereinafter Enforcement Decree of the Customs Act] 관세법시행령, 대통령,령.

33. *Id.* art. 4(1) (in Korean) 관세법시행령.

34. *See id.* arts. 4-26 (1), (2) (in Korean) 관세법시행령.

35. Act on the Investigation, *supra* note 18, arts. 15(1), 22(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

36. *Id.* (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

The meaning of "increase in imports" is specified in Article XIX of GATT 1994[37] and in the Uruguay Round Agreement on Safeguards.[38] As in the cases of other countries,[39] the term should be construed here to include both absolute and relative[40] increases in imports. However, in the case of a relative increase in imports,[41] the imposition of safeguards will be fairly restricted due to difficulty showing causation between the increase in imports and the resultant injury, and also because the exporting countries may possibly require immediate compensation or impose retaliation.

The domestic industry refers to the producers that account for a considerable portion of the total national production, or the national producers who produce articles like or directly competitive with the specific imports. In cases where domestic

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37. *See* General Agreement on Tariffs and Trade, Apr. 15, 1994, art. XIX, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994] (noting that an increase in imports can be said to occur in one of two ways under the WTO provisions: (1) The absolute volume of imports may increase or (2) the import share of the domestic market may increase, even though the total volume of imports declines); *see also* JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 612 (explaining that GATT 1994 Article XIX requires that imports be in increased quantities, but earlier GATT materials suggested that the increase may be relative).

38. *See* Uruguay Round Agreement on Safeguards, art. 2(1) (stating that "[a] Member may apply a safeguard measure... if... such product is being imported ... in such increased quantities, absolute or relative to domestic production...").

39. The United States International Trade Commission (USITC) "usually interpreted the U.S. Statute as not requiring an absolute increase, though some Commissioners quarrelled with this view. [Internationally, the] Uruguay Round Agreement on Safeguards resolves the matter conclusively for GATT purposes in paragraph 2, which indicates that an increase in the market share of imports will suffice." JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 612. Concerning the term "increased imports,"

> Section 201(a) of the [Trade Act of 1974] merely states that the articles involved must be imported in "increased quantities." On its face, that would appear to require an absolute increase. However, Section 202(c)(1)(C) provides that in making its determination, the Commission shall take into account "an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers." Accordingly, it is clear that Congress intended that this criterion for relief is satisfied if imports have increased either absolutely or relatively compared to domestic production. This interpretation of the statute is confirmed by legislative history...

BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 735-36 (1991). That is,

> [T]he House version of the bill that became the Trade Act of 1974 provided that the Commission could take into account either absolute or relative increases in imports. The Senate version required an absolute increase, however, and in this connection the Senate Finance Committee said, "The House bill would require the Commission to take into account, among other things, whether there is either an absolute or a relative increase in imports; § 201(b)(2)(C) [present 202(c)(2)(C)] of the Committee bill would require the Commission to consider only whether there is an *absolute* increase in imports, as well as a decline in the proportion of the domestic market supplied by domestic producers..." S. Rep. No. 1298, 93d Cong., 2d Sess. 121 (1974). In the conference between the House and the Senate to resolve their differences in the 1974 Act, the Senate retreated from this amendment, and the House version became law.

Id. at 736 n. 3 (citing H. R. Rep. No. 1644, 93d Cong., 2d Sess. 33 (1974)).

40. *See Regulation of International Trade in Korea*, *supra* note 9, at 522 (observing that in Korea, the term has been construed to mean that the absolute increase in imports is absolutely larger than that of the domestic production, and that the relative increase in import is relatively larger than that of the domestic production).

41. An increase in imports is regarded as a more important required condition for safeguards measures, particularly when the importing countries are in commercial depression.

manufacturers are producing articles concurrently with importation of the same article, any domestically manufactured portions as well as the article like or directly competitive with the imported article could fall within the scope of domestic industry.[42]

The terms "serious injury" and the "threat of serious injury" come from Article XIX of GATT 1994[43] and Article 4 of the Uruguay Round Agreement on Safeguards.[44] When serious injury is charged, consideration is given to any significant impact on: domestic production facilities, the level of profits maintained by the companies concerned, domestic sales, unemployment, decreases in market share, increases in inventory, or decreases in production profit of the domestic industry, to name a few.[45] "Threat of serious injury" exists when serious injury, although not yet existing, is imminent.[46]

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42. *See* GATT 1994 art. XIX (requiring that the increased imports injure producers of "like or directly competitive products," which is language that carries over into the Uruguay Round Agreement). The same requirement appears in United States law. The concept of like products is found in other GATT provisions, such as Articles III and VI, but the addition of the words "directly competitive" suggests that a more expansive definition is intended in Article XIX. *See, e.g.*, JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 616 (indicating that the mere fact that an industry is seriously injured by imports is evidence that it produces "directly competitive products").

The Uruguay Round Agreement on Safeguards provides that 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 major proportion of the total domestic production of those products. Uruguay Round Agreement on Safeguards, art. 4(1)(c).

43. *See* GATT 1994 art. XIX 1(a) (stating that "[i]f . . . under such conditions as to cause or threaten serious injury to domestic producers. . . .").

44. *See* Uruguay Round Agreement on Safeguards, art. 4(1)(a),(b) (providing that "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry, and "threat of serious injury" shall be understood to mean serious injury that is clearly imminent). 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. *Id.*

45. Enforcement Decree of the Act on the Investigation, Decree No. 17222 (2001), art. 17(2) (in Korean) [hereinafter Enforcement Decree of the Act on the Investigation] 불공정무역행위조사및산업피해구제에관한법률시행령. Escape clause relief is permissible under GATT and United States law only if the increased imports cause or threaten to cause serious injury to the domestic industry. Concerning the injury test for relief measures in dumping and subsidies cases, the domestic industry must be materially injured—a test thought to be easier to meet than serious injury. For United States law, *see* JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 622 (detailing the Trade Act of 1974 § 202(c)(1)(A)).

46. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 17(3) (in Korean) 불공정무역행위조사및산업피해구제에관 한법률시행령. Concerning the factors to evaluate in determining "serious injury" or "threat of serious injury," the Uruguay Round Agreement on Safeguards illustrates 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. Uruguay Round Agreement on Safeguards, art. 4(2)(a).

For the case of the United States, *see* 19 U.S.C.A. § 2252(c)(1)(B)(i)-(iii) (1990). Regarding prudent evaluation of the threat of serious injury, the United States Senate Finance Committee stated that the existence of any of those factors, such as the growth in inventory, would not itself be relevant to the threat of injury from imports if it resulted from conditions unrelated to imports. Such conditions could arise from a variety of other causes, such as changes in technology or in consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management. The Committee intends the threat of serious injury to be present when serious injury, although not yet existing, is clearly imminent if import trends continue unabated. *See* BRUCE. E. CLUBB, *supra* note 39, at 740 n.6 (citing H.R. Rep. No. 571, 93d Cong., 1st Sess. 37 (1973); S. Rep. No. 1298, 93d Cong., 2d Sess. 121 (1974)); *see also* JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 626.

C. Investigation Procedure

1. Petition for Investigation

Regarding the initiation of an escape clause proceeding, the chief administrative official of the domestic industry or any person who has an interest in the corresponding domestic industry, is eligible to petition for investigation into an industrial injury.[47] Complainants who may have interests in the corresponding industry include: labour unions; associations of manufacturers; and manufacturers who account for more than twenty percent of the total production amount or the number of companies,[48] but are producers who have more than five employees in the cases of agriculture, forestry, and fisheries.[49] The latter complainant provision is distinctive compared with that of other countries such as the United States or the EU. The Act on the Investigation does not, however, include parliament or the President as qualified petitioners seemingly because the Trade Commission of Korea is not formally independent of the Ministry of Commerce, Industry, and Energy.[50]

A complainant who petitions for investigation of industrial injury must submit the required documentary evidence and the application form along with additional items specified in the investigation regulations of the Trade Commission.[51] Among the

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47. Act on the Investigation, *supra* note 18, art. 15 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

48. In the case of the United States, the statute provides that a petition may be filed by an entity which represents an industry including a trade association, firm, certified or recognized union, or a group of workers. Concerning the meaning of the term "representative of an industry," at least one commentator has argued, however, that to be representative of an industry:

> [A] petitioner must not only be a member of the industry, but also that firms accounting for more than 50 percent of the domestic production of the article involved must support the petition. The Commission has not decided whether the term "representative" as used in the statute means only (1) that the petitioner is similar in a sampling sense to the other firms in the industry, or (2) that the petitioner has the consent of a majority of other producers to act, in effect, as their agent in filing the petition. Nonetheless, a prospective petitioner is very wise to persuade as many as possible of the other firms in the industry to join in the petition because the Commission is reluctant to institute an investigation unless the petition has broad support within the industry.

BRUCE. E. CLUBB, *supra* note 39, at 756-57.

49. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 14(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

50. In the United States:

> [A]n escape clause case may be initiated at the request of the President, the Trade Representative, the House Ways and Means Committee, the Senate Finance Committee, or by the Commission on its own motion, as well as by complaint from an interested party. There is no record of the Commission ever initiating such an investigation on its own motion, but occasionally investigations are initiated at the request of one of the Congressional Committees or the President.

BRUCE E. CLUBB, *supra* note 39, at 755.

51. A complainant shall submit a petition in which the following matters are specified, along with necessary documentary evidence:

> a) Names, specifications, properties, and uses of the goods involved and the names of

documents provided, those that are submitted on a confidential basis may not be open to the public without clear consent of the document provider.[52] In such case, the Trade Commission may not demand the confidential documents, but only the summary report.[53]

2. *Execution of the Investigation*

When a petition of investigation of industrial injury is filed with the Trade Commission, the Commission must decide within thirty days whether or not it will initiate an investigation.[54] However, the Trade Commission may not initiate an investigation in the following types of cases: when the petitioner does not comply with the requirements concerning the qualification; when it is not found that the domestic industry is or is likely to be threatened by the import of specific goods based on a review of the petition and the documentary evidence (*i.e.*, lack of causation); and when it is unnecessary to initiate the investigation because relief measures were taken already.[55]

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producers,

b) Exporter, importer, import record (volume and value), and estimated import amount for a specified period regarding the goods involved,

c) Names, specifications, properties, uses of like of directly competitive domestic products, and the names of producers,

d) Circumstances in which the domestic industry is materially injured by reason of imports of the goods concerned, etc., or is threatened with material injury;

e) Descriptions and the degree of the support the domestic industry concerned is receiving under laws and regulations concerning assistance of industry;

f) Type, degree, and duration of action requested for the relief of the domestic industry concerned.

Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 15(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률시행령. In the United States,

> The regulations state that the petition must contain 'specific information in support of the claim that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. . .'

BRUCE E. CLUBB, *supra* note 39, at 758 (citing 19 C.F.R. § 206.14 (1990)). These elements are almost the same as those provided by the Act on the Investigation of Korea, except that the U.S. regulations require a statement concerning efforts made by firms and workers in the domestic industry to compete more effectively with the imported article, whereas such a statement is not required by the Korean Act.

52. *See* Uruguay Round Agreement on Safeguards, art. 3(2) (stating that "[a]ny 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. . . .").

53. *See* Enforcement Decree of the Act on the Investigation, *supra* note 45, at 25(1) (in Korean) 불공정무역행위조사및산업피해 구제 에관한법률시행령; *see also* Uruguay Round Agreement on Safeguards art. 3(2) (stating that ". . . [p]arties 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. . . .").

54. Act on the Investigation, *supra* note 18, art. 5(3) (in Korean) 불공정무역행위조사및산 업피해구제에관한법률.

55. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 16(1) (in Korean) 불공정무역행위조사및산업피해구제에관 한법률시행령.

Once the Trade Commission initiates an investigation, it then forms an investigation team consisting of the Commission itself, the officials of the administrative organ who exercise jurisdiction over the industry concerned, officers or employees of government-funded research institutes and of associations of the businessmen concerned, and other specialists in industry, trade, and international economics.[56] After the team is chosen, it conducts the investigation by consulting sources such as surveys, hearings from surveyors, administrative organs or research institutes concerned, and on-the-spot examinations.[57] The investigation must be finalized within sixty days of its initiation.[58] However, when the contents of the investigation are very complicated, or a postponement of the investigation is requested with good reason, the deadline may be extended up to 120 additional days.[59]

If the interested parties come to revoke the petition while the investigation is in process, the investigation is terminated.[60] Additionally, if the investigation team recognizes that without urgent action the industry subject to the investigation may suffer irreparable harm, provisional relief measures may be recommended to the head of the administrative agency concerned.[61] The conference held by the Trade Commission is open to the public in principle, except when it is necessary to protect public interests or trade secrets.[62] Judgment is passed by a majority vote of the Commission.[63]

3. Relief Measures

Within one month of the date of a decision concerning an industrial injury, the Trade Commission can recommend that the head of the administrative agency concerned take relief measures for a designated period of time. Based on the recommendations, the head of the administrative agency concerned finalizes the relief measures. The relief measures may be as follows:

a) regulations on the quantity of imports;
b) adjustment of customs tariff rates;
c) various assistance measures to relieve industrial injury or to promote the structural adjustment of the domestic industries concerned such as:

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56. Act on the Investigation, *supra* note 18, art. 37(1) (in Korean) 불공정무역행위조사및산 업피해구제에관한법률.

57. *Id.* art. 36 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

58. *Id.* art. 16 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

59. *Id.* (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

60. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 16(3) (in Korean) 불공정무역행위조사및산업피해구제에관한 법률시행령.

61. Act on the Investigation, *supra* note 18, art. 18(1) (in Korean) 불공정무역행위조사및산업 피해구제에관한법률.

62. *Id.* art. 33(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

63. *Id.* art. 32 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

(i) financial assistance measures;
(ii) re-education of the employees in the domestic industries;
(iii) assistance measures to promote technology and productivity.[64]

The head of the related administrative organ must decide within forty-five days of the Trade Commission's suggestions whether or not the relief measures will be implemented.[65] During this time, the head must evaluate the impact of the relief measures on international trade relationships and the domestic economy through hearing from the other head of the related administrative organ.[66] The head of the

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64. *Id.* art. 17(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 18 (in Korean) 불공정무역행위조사및산업피해구제에관한법률시행령. The United States International Trade Commission may make the following recommendations after an affirmative injury determination:

(A) an increase in, or the imposition of, any duty on the imported article;
(B) a tariff-rate quota on the article;
(C) a modification or imposition of any quantitative restriction on the importation of the article;
(D) one or more appropriate adjustment measures, including the provision of trade adjustment assistance;
(E) any combination of the actions described above.

19 U.S.C.A. § 2252(e)(2) (1990). These measures recommended by the United States International Trade Commission are not so different from those provided in the Act on the Investigation of Korea. In the United States, however, the President in charge of implementation of the relief measures is required to take all appropriate and feasible actions. Trade Act of 1974, as amended § 202(a), 19 U.S.C.A. § 2253(a)(1)(A) (1990). Under the Act, the remedies open to the President include a range of options. He can increase duties, impose tariff rate quotas or quantitative restrictions, enter into "agreements" with exporting nations (subject to GATT (1994) discipline after the Uruguay Round), and take any other action within the Presidential power, or any combination of the above. The President also has broad discretion to impose as large a trade restriction as he considers necessary to achieve the purpose of Section 201 of the 1974 Trade Act. JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 643; BRUCE E. CLUBB, *supra* note 39, at 768-69.

65. Act on the Investigation, *supra* note 18, art. 19(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

66. *See id.* art. 19(2) (in Korean) 불공정무역행위조사및산업피해구제에관한법률; *see also* 19 U.S.C.A. § 2253(A)(2) (1990) (stating that:

In determining what action to take. . . the [U.S.] President shall take into account—

(A) the recommendation and report of the International Trade Commission,
(B) the extent to which workers and firms in the domestic industry are—
  (i) benefiting from adjustment assistance and other manpower programs, and
  (ii) engaged in worker retraining efforts;
(C) the efforts being made, or to be implemented, by the domestic industry (including the efforts included in any adjustment plan or commitment submitted to the Commission under section 201(b) to make a positive adjustment to import competition;
(D) the probable effectiveness of the actions authorized under paragraph (3) to facilitate positive adjustment to import competition;
(E) the short- and long-term economic and social costs of the actions authorized under paragraph (3) relative to their short- and long-term economic and social benefits and other considerations relative to the position of the domestic industry in the United States economy;
(F) other factors related to the national economic interest of the United States, including, but not limited to—

related administrative organ should also review the effectiveness of the relief measures from the date of implementation. Based on this analysis, the corresponding measures may be phased down, extended, or cancelled by the Trade Commission.[67]

D. Emergency Duties System

The Emergency Duties System aims to protect the domestic industry by promptly addressing changes in the international economic environment.

Namely, when the domestic industry is seriously injured or threatened to be seriously injured by rapid increases in import, emergency duties can be levied to protect the domestic industry without the long and cumbersome process of modification of the law.[68] The emergency duties may be deemed necessary to prevent or control serious injury on two conditions. First, an investigation should confirm that the particular domestic industry which is like or directly competitive with the imports is, in fact, seriously injured or threatened to be seriously injured by the rapid increase in imports. Second, it should be worthwhile to protect the corresponding industry.[69]

During the process of safeguard investigation under the provisions of the Act on the Investigation, provisional emergency duties may be levied on the article that is being considered for emergency duties or on the imports against which provisional measures are suggested.[70] Provisional emergency duties shall be imposed as necessary *before* completion of the investigation when it is recognized that an irretrievable injury may occur unless such a provisional measure is urgently taken, even while the investigation is in process.[71] The customs tariff rate is set to relieve or control the

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(i) the economic and social costs which would be incurred by taxpayers, communities, and workers if import relief were not provided under this chapter,

(ii) the effect of the implementation of actions under this section on consumers and on competition in domestic markets for articles, and

(iii) the impact on United States industries and firms as a result of international obligations regarding compensation;

(G) the extent to which there is diversion of foreign exports to the United States market by reason of foreign restraints;

(H) the potential for circumvention of any action taken under this section;

(I) the national security interests of United States; and

(J) the factors required to be considered by the Commission . . .).

In the United States, the factors used to determine what actions are to be taken are more detailed than in Korea.

67. Act on the Investigation, *supra* note 18, art. 20(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률. Regarding duration and review of safeguard measures, the Uruguay Round Agreement on Safeguards art. 7(4) provides that in order to facilitate adjustment in a situation where the expected duration of a safeguard measure is over one year, the member applying the measure shall progressively liberalize it at regular intervals during the period of application and shall, if appropriate, withdraw it or increase the pace of liberalization. The degressivity provision in the Act on the Investigation comes from the above Agreement. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 19(3) (in Korean).

68. Customs Act, *supra* note 19, art. 65(1) (in Korean) 관세법.

69. *Id.* (in Korean) 관세법.

70. Act on the Investigation, *supra* note 18, art. 18 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

71. Customs Act, *supra* note 19, art. 66(1) (in Korean) 관세법.

serious injury, and is applied preferentially over the WTO concession tariff rates.[72]

The Minister of Economy and Finance re-examines the decision to levy emergency duties when necessary. Based on the re-examination, the details of the decision may be altered. In such a case, the altered measures may not be more rigid than the original ones.[73]

According to the provisions of the WTO Safeguard Agreement, the duration of emergency duties and provisional emergency duties may not exceed four years[74] and two hundred days,[75] respectively. Even when the duration is extended based on re-examination, the total duration of implementation including emergency duties, provisional emergency duties, and import quantity restrictions may not exceed eight years.[76] The aforementioned regulations of the WTO Safeguard Agreement concerning provisional safeguard measures, duration, and review of the safeguard measures are stipulated accordingly in the Customs Act of Korea.[77]

III. ALTERNATIVES TO IMPROVE KOREA'S SAFEGUARD SYSTEM

A. Qualification of Petitioners

The WTO Safeguard Agreement does not stipulate the qualification of petitioners.[78] Korea's safeguard system classifies qualified petitioners into two groups: persons interested in the domestic industry included or the heads of the administrative agencies concerned.

The Act on the Investigation needs to be revised to authorize Congress to request that the Trade Commission apply safeguard measures as in the United States.[79] However, in the case of Korea, because the Trade Commission belongs to the Ministry

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72. In Korea, the adjustment customs tariff system is similar to the emergency customs tariff rate system. However, there are two differences between the two systems. First, the former can be implemented for less than six months with renewals to protect small- and medium-sized industry and agriculture injured by a rapid increase in import. In the case of necessity, it could be levied without investigation by the Trade Commission. The latter can be imposed for not more than 4 years (in case of the provisional measures, 200 days) to protect the domestic industries concerned in accordance with the determination in an injury investigation. Second, the former must be levied within the WTO concession tariff rates, while the latter may be levied beyond the concession tariff rates.

73. Customs Act, *supra* note 19, art. 67 (in Korean) 관세법.

74. Uruguay Round Agreement on Safeguards art. 7(1).

75. *Id.* art. 6.

76. *Id.* art. 7(3).

77. Customs Act, *supra* note 19, arts. 65, 66, 67 (in Korean) 관세법.

78. There is no provision concerning qualified petitioners in the WTO Safeguard Agreement, which seems to reflect the urgent necessities of the safeguard measures. For example, the Agreement on Implementation of Article VI of GATT 1994 stipulates that an investigation shall not be initiated unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers representing more than 50% of total production. However, no investigation shall be initiated when domestic producers account for less than 25% of total production. Agreement on Implementation of Article VI of the GATT 1994, art. 5.4.

79. *See supra* note 50 and accompanying text.

of Commerce, Industry, and Energy, the Commission may have difficulty providing an objective solution due to its lack of complete independence. Therefore, the authority to petition for safeguard measures should be given to Congress after the Trade Commission can impartially exercise its quasi-judicial power, which should materialize in the near future.

In order to restrict vexatious or indiscreet petitions, the Act on the Investigation requires that petitioners represent a minimum portion of the total amount of domestic production or the total number of domestic producers.[80] For the same purpose, the Act on the Investigation also provides that the Trade Commission shall not commence a second escape clause investigation of the same subject matter unless one year has passed since the previous investigation, except for good cause.[81] Requiring petitions to demonstrate support by a substantial number of the companies or workers in the industry are desirable. In this sense, the petitioner acts like a class action representative. While it is not necessary for all concerned parties in the industry to support the petition, a substantial proportion must support it, for the provisions of the Act are focused upon industry-wide relief.[82] Additionally, it is advisable to stipulate that when a petitioner is disqualified while a safeguard measure is being operated, the safeguard measure in operation may be terminated by the Trade Commission or by re-examination requested by the interested parties. Finally, the Trade Commission itself should actively petition for investigation of an industrial injury[83] in the event the product concerned is monopolized by a large company in importation, and the medium and small-sized companies that have subcontracts with the monopolistic company are reluctant to file their industrial injuries, no matter how serious.

B. Definition of the Domestic Industry

As explained previously, in Korea, the domestic industry is defined as the producers that account for a considerable portion of the total national production, or as the national producers who produce articles like or directly competitive with the specific import.[84] When a domestic producer imports and produces more than one kind of product, the portion that is produced domestically and subject to petition is considered part of the "domestic industry."[85]

When an industry is regionally dispersed, there may be a controversy regarding

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80. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 14 (in Korean) 불공정무역행위조사및산업피해구제에관한법 률시행령.

81. *Id.* arts. 16(1), 17(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률시행령.

82. 1 RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 313 (1996) [hereinafter FOLSOM & GORDON].

83. For the case of the United States, *see supra* note 50 and accompanying text.

84. *See supra* Part II.B (defining "domestic industry"); *see also* Uruguay Round Agreement on Safeguards art. 4(1)(c) (defining a domestic industry 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).

85. YU KEUN SHIN, *supra* note 22, at 55-56 (in Korean) 신유근, WTO 와 주요국의 세이프가드제도.

the range of the domestic industry (*i.e.*, whether or not a regionally dispersed industry can be classified as part of the domestic industry).[86] In the case of Korea, arguing about the regional industry issue is not fruitful because Korea is geographically small and unified. Therefore, Korea does not have a "regional industry."

Another issue related to the range of domestic industry is whether or not "domestic industry" should be construed to include producers who have special relationships with the importers or exporters of the petitioned goods through financial joint-venture or remuneration agreements. Conforming to the globalization trends in foreign investment, the Enforcement Decree of the Foreign Trade Act (the Act on the Investigation), which was modified in 1993, repealed the provision that producers with special relationships such as foreign investors[87] and special related parties[88] should be excluded from the definition of "domestic industry."[89] The anti-dumping duties provision[90] also does not exclude "the producers who have special relationships with the importers or exporters of the petitioned goods through financial joint-venture or remuneration agreements" from the category of domestic industry, reflecting the provision of the Agreement on Implementation of Article XII of the GATT 1994,[91]

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86. *See, e.g.*, Agreement on Implementation of Article VI of the GATT 1994, art. 4.1(ii) (providing with respect to regional industry that:

> [T]he territory of a Member may . . . be divided into two or more . . . . if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory).

87. Considering the provisions of the Foreign Capital Inducement Act that liberalize almost all kinds of foreign business as of 2001, foreign investors are difficult to exclude from domestic industry. Under the Foreign Capital Inducement Act, Law No. 5559 (1998), amended by Law No. 6406 (2001), 외국인투자촉진법. In principle, foreign investment is permitted in all industries except those specifically identified as "restricted" or "prohibited" from foreign investment. Currently, foreign capital may be induced with the following exceptions:

1) In the case of risking the safety of the nation and the maintenance of public order;
2) In the case of endangering the sound development of the national economy; and
3) In the case of violating the law of Korea. Regarding the national treatment, foreign investors shall be treated as nationals of Korea with regard to their business except where the laws specify otherwise.

Also, provisions of the laws relating to tax exemptions or to reductions applicable to a national of Korea shall also apply equally to foreign investors except where the laws specify otherwise. *Id.* art. 5; Enforcement Decree of the Foreign Capital Inducement Act, Decree No. 15931 (1998), amended by Decree No. 17137 (2001), art. 7(2) (in Korean) 외국인투자촉진법시행령.

88. According to the WTO Safeguard Agreement as well as legislation in the United States, Canada, and the EU, the special related parties specified in the Agreement on Implementation of Article VII of GATT 1994, art. 15(4), and the Customs Act of Korea, art. 51, are not excluded from domestic industry, 관세법. Therefore, these parties can be considered as members of the domestic industry, reflecting the trends embodied in multilateral agreements. *See, e.g.*, Agreement on Trade-Related Investment Measures, Preamble (stating its desire ". . . to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontier . . ."); *see also* General Agreement on Trade in Services, art. II (in Korean).

89. YU KEUN SHIN, 신유근, *supra* note 22, at 151 (in Korean) 와 주요국의 세이프가드제도.

90. Enforcement Decree of the Customs Act, *supra* note 32, art. 27 (in Korean) 관세법시행령.

91. *See* Agreement on Implementation of Article VII of GATT 1994, art. 1(1) (providing for the customs value of imported goods between the buyer and seller who are not related to each other); *see also id.* art. 15(4) (explaining that persons are considered to be related only if:

(a) they are officers or directors of one another's businesses;

which is reflected also by the related provisions of the United states and EU. Considering all of these conditions, no restrictions may be established against foreign investors or special related parties in filing the petition. However, when the petition is finalized leading to an ultimate judgment, an in-depth examination should be conducted to consider defining the range of "domestic industry."

When the industry simply assembles imported parts, however, it is somewhat questionable that the industry should be considered as domestic[92] because of potential difficulty determining which products are produced in Korea and which products are not.[93] Although industry such as assembling imported parts should not be sanctioned upon application of the petition, the decision concerning the intensity of injury should be made on a case-by-case basis, considering the correlation to related industries and the domestic economy.

One issue regarding the definition of the "domestic industry" is whether it can involve various stages of processing. In other words, the issue is whether the imports must be at the same level of processing as the domestic industry. It should be interpreted that various stages of processing could be considered in defining the imported product. This has the practical effect of allowing the imported article to be at

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(b) they are legally recognized partners in business;
(c) they are employer and employee;
(d) any person directly or indirectly owns, controls or holds 5 percent or more of the outstanding voting stock or shares of both of them;
(e) one of them directly or indirectly controls the other;
(f) both of them are directly or indirectly controlled by a third person;
(g) together they directly or indirectly control a third person; or
(h) they are members of the same family).

92. When the escape clause was first written into the trade laws just after World War II, the U.S. companies typically produced most of their components themselves, and there was no problem about the imported component issue.

93. *See* BRUCE E. CLUBB, *supra* note 39, at 751-52 (describing one U.S. case where the parties advocated 5 different tests for determining the domestic industry in the case of assembling imported parts). The tests were described as follows:

1) "Substantial change" test—comparison of the product before and after each stage of the U.S. production process to determine what changes have been made.
2) "Value-added" or "domestic content" test—analysis of the percentage of U.S. components and labor added to the imported articles;
3) "Major component" test—determination that the finished product comes from the country supplying the essential element;
4) "Commitment to the U.S." test—evaluation of the firm's involvement in the U.S. based on employment, domestic facilities, and capital; and
5) "Degree of control" test—evaluation of the firm's decision-making process focusing on the authority exercised by the foreign firm's U.S. subsidiary over decisions affecting domestic production.

Id. at 751 n. 15. The U.S.I.T.C. did not adopt any single test, but it considered elements of all 5 tests in making its determination. The Commission considered the domestic vale added or the domestic content of the products, but treated this as only one of several factors to be considered in making the domestic industry determination. It also considered the amount of capital invested in U.S. production facilities, the number of persons employed in the United States, and the nature of the domestic activities. *Id.* at 751-52.

a different level of process from that which caused injury to the domestic industry.[94]

C. Investigation of Injurious Effect on Industry

The investigation should meet several execution requirements under the terms of WTO Safeguard Agreements. First, it should be conducted with objectivity and fairness. Second, it should be conducted with open procedure,[95] objective evaluation,[96] and special treatment of confidential information.[97] The related stipulations[98] of the current Act on the Investigation seem to meet these requirements.

The Act on the Investigation stipulates the factors to be examined in making determinations as to the injurious effects on industry as follows:

1. Whether import quantities or supplies of services by foreigners have increased;
2. Whether there is a serious injury or threat thereof,
   a) with respect to serious injury,[99] whether there is a decline in sales or market share, production, profit, or employment, a decrease in operating rate, or a rise in inventory in the domestic industry;[100]
   b) with respect to the threat of serious injury, whether serious injury determining with the above factors is clearly imminent.[101]

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94. *See* FOLSOM & GORDON, *supra* note 82, at 319 (stating that the U.S. International Trade Commission has indicated in one case "that when several stages are involved in the production of goods, the domestic industry includes the facilities involved in all of the various stages").

95. Uruguay Round Agreement on Safeguards, art. 3(1).

96. *Id.* art. 4(2).

97. *Id.* art. 3(2).

98. Enforcement Decree of the Act on the Investigation, *supra* note 45, arts. 15-25 (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

99. With respect to serious injury in the agricultural and fishery industries, the Notification of the Ministry specifies with respect to serious injury as follows: a) whether there is a significant idling of cultivated land, or whether there is a significant change of employment; b) whether there is a serious damage to the domestic industry due to the income decrease of farmers and fishermen; c) whether there is significant underemployment within the domestic industry. Furthermore, it specifies with respect to the *threat* of serious injury as follows: a) whether there is a decline in production, sales as market share, or a rise in inventory and its cost, in the domestic industry; b) trends in production and trade of related exporting countries. Notification of the Ministry of Commerce, Industry, and Energy, art. 2-11(1), (2) (in Korean) 산업자원부고시.

100. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 17(1), (2) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령. In the United States, when determining serious injury, the Commission is required to consider the significant idling of productive facilities, the inability of a significant number of firms to carry out production at reasonable levels of profit, and significant unemployment or underemployment within the industry when determining serious injury. 19 U.S.C.A § 2252(c) (2001). These factors are the same as those required in Korea.

101. Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 17(1), (3) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령. In the United States, when evaluating the threat of serious injury, the Commission must consider the inadequacy of capital to finance modernization or maintain existing expenditures for research and development, and the extent to which the United States is the focal point for a diversion

The Act on the Investigation requires a causal relationship between the import increase and the serious injury of domestic industry as a requirement for safeguard measures. Thus, it fully reflects the provisions of the WTO Safeguard Agreements,[102] which stipulate that the determination of whether or not the injury or the threat thereof exists shall not be made unless the investigation demonstrates the objective evidence of a causal link between increased imports of the products concerned and serious injury or threat thereof. The U.S.[103] and EU[104] regulations also put equal emphasis on both the realized and the possibility of serious injury to prevent indiscreet operation of safeguard measures taken against the threat of injury, which are in harmony with the above provisions of the WTO Safeguard Agreement.

Herewith, a question might be raised about the intensity of the causal link between the import increase and the injury or the threat of injury. Regarding this question, the provision of the Act on the Investigation shall be construed to mean that the import should be the most important cause when there are several factors affecting the domestic industry. This corresponds to the provision of the United States Act of 1974, which defines import increase as a cause which is important and not less than any other cause,[105] and to the provision of the WTO Agreement, stipulating that when

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of exports of other markets. Additionally, it must consider the factors stipulated in Korea's Act in the Investigation. 19 U.S.C.A. § 2252(c) (2001).

102. Uruguay Round Agreement on Safeguards art. 4(2)(b).

103. *See* Uruguay Round Agreement Act of 1994, art. 301(d) (2)(i) (stipulating with respect to the threat of serious injury that "... there is clear evidence that increased imports (either actual or relative to domestic production) of the article are substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article lice or directly competitive with the imported article").

104. *See* Council Regulation (EC) No. 3285/94, arts. 6(1), 8(1) (stipulating that "[w]here after consultation referred to in Article 3, it is apparent to the Commission that there is sufficient evidence to justify the initiation of an investigation, the Commission shall (a) initiate an investigation . . ." and ". . . provisional safeguard measures shall be applied: . . . where a preliminary determination provides clear evidence that increased imports have caused or are threatening to cause serious injury").

105. *See* BRUCE E. CLUBB, *supra* note 39, at 741-42 n. 4 (explaining that the House Ways and Means Committee explained the meaning of the term "substantial cause" in its report on the 1974 [Trade] Act). The definition was stated as follows:

> The second major change is the substitution of "substantial cause" for "major cause." "Major" has been understood to mean greater than all other factors combined. The bill defines "substantial cause" as "a cause which is important and not less than any other cause." The Committee intends that a dual test be met—imports must constitute an important cause and be no less important than any other single cause. For example, if imports were just one of many factors of equal weight, imports would meet the test of being " not less than any other cause," but it would be unlikely that any of the causes would be deemed an "important" cause. If there were any other cause more important than imports, then the second test of being "not less than any other cause" would not be met. On the other hand, if imports were one of two factors of equal weight and there were no other factors, both tests would be met. H.R. Rep. No. 571, 93d Cong., 1st Sess. 46-47 (1973). *See also* the Senate Finance Committee Report on the 1974 Act, where the Finance Committee stated that the change to "substantial cause" was being made because the "major cause" test of the 1962 Act "has proved in many cases to be an unreasonably difficult standard to meet," and it was not intended that the escape clause criteria "go from one extreme of excessive rigidity to complete laxity." S. Rep. No. 1298, 93d Cong., 2d Sass. 120-21 (1974).

Id.

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.[106]

Some suggestions can be made to improve the investigation process. The investigation criteria specified in the Act on the Investigation differ from the categories of threat of injury used in other advanced countries, such as the United States.[107] With respect to the investigation into threat of injury, the potential situation needs to be considered in greater detail; however, in the escape clause proceedings in the Act on the Investigation, there seems to be no difference between evaluating potential and actual injury. Referring to the legislative cases in the United States[108] and the provisions of Korea's Customs Act,[109] investigation criteria in the Act on the Investigation need to be expanded to include the following:

a) the rate of increase of the exports to Korea;
b) the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development;
c) the extent to which there is diversion of foreign exports to the Korean market by reason of foreign countries' restraints.[110]

Indiscreet applications may especially be followed by the trade disputes among the trading partner countries.

D. Provisional Safeguard Measures

The Act on the Investigation regulates provisional safeguard measures,[111] reflecting the WTO safeguard measures.[112] The provisional safeguard measures are not allowed to be in effect for more than two hundred days.[113] The provisional safeguard measures lose effect when the head of the related administrative organ determines that the industry is not seriously injured or when the regular safeguard measures take effect based on a final decision.[114] The processing period of a provisional safeguard measures' recommendation and enforcement for agricultural and manufactured

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106. Uruguay Round Agreement on Safeguards art. 4(2)(b).

107. *See supra* note 100 and accompanying text.

108. *Id.*

109. Enforcement Decree of the Customs Act, *supra* note 32, art. 63(2) (in Korean) 관세법시행령.

110. For the agricultural and fishery goods, as well as in the case of provisional safeguard measures, the investigation criteria includes factors such as the seasonal characteristics and difference in price, the degree of perishableness and substitution, etc.

111. Act on the Investigation, *supra* note 18, art. 17 (in Korean) 불공정무역행위조사및산업피 해구제에관한법률 시행령.

112. Uruguay Round Agreement on Safeguards art. 6.

113. *Id.*; Act on the Investigation, *supra* note 18, art. 17(2) (in Korean) 불공정무역행위조사및산업 피해구제에관한법률.

114. *Id.* art. 19(4) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

products are forty-five days and sixty days, respectively.[115]

Referring to the suggestion, when the article subject to the measures is perishable and seasonable, the following should be decided in consultation with the authorities concerned: whether or not the import has increased significantly during a short period of time or threatens to do so owing to its perishability, and whether or not economic activities of a domestic industry, such as production, sales, and employment are concentrated in a specific period owing to its seasonal characteristics.

In the case of the United States, the provisional safeguard measures are enforced in two ways: monitoring and investigation. For instance, the import monitoring system is employed for perishable produce[116] and it is stipulated that provisional safeguard measures should rapidly be taken upon request of the United States Trade Representative when a serious injury or the threat thereof is reasonably indicated due to the rapid increase in imports.[117] Namely, the International Trade Commission must finalize the petition case within twenty-one days of the petition's filing date,[118] and the President must decide whether or not the measures should be enforced within seven days of his receipt of the International Trade Commission's decision.[119]

Similarly, in the case of the EU, the surveillance measure may be imposed before the enforcement of the safeguard measure or instead of imposing a safeguard measure directly. This does not limit the import by itself, but requires the documents necessary for import supervising to be submitted to the authority concerned, which has the indirect effect of import restraints.[120] The surveillance measure is grouped into the retrospective measure and prior measure.[121] The retrospective measure is to supervise the trends of importation of the goods to be liberalized completely[122] from the

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115. *Id.* art. 19(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률; Enforcement Decree of the Act on the Investigation, *supra* note 45, art. 19(3), (4) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

116. When the Trade Representative makes an affirmative determination that the imported product is a perishable agricultural product; and there is a reasonable indication that such product is being imported into the United States in such increased quantities as to be, or likely to be, a substantial cause of serious injury, or the threat thereof, to such domestic industry, the Trade Representative shall request the Trade Commission to monitor and investigate the imports concerned. The monitoring and investigation may include the collection and analysis of information that would expedite an investigation. *See* Tariff Act of 1930 art. 202(d).

117. *Id.*

118. *Id.* art. 202(d)(1)(C).

119. *Id.* art. 202(d)(1)(G).

120. *See* IVO VAN BAEL & JEAN-FRANCOIS BELLIS, INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY 169 (1995) (noting that:

> There may be several reasons why a surveillance measure is adopted. Apart from the obvious aim of gathering information on import trends, surveillance measures may be adopted in order to signal concern over the trend of exports of a particular product into the Community to the exporting countries concerned. Another possible motive behind the adoption of a surveillance measures may be to monitor the application of a voluntary restraint arrangements with third countries [before the WTO mechanism is applied]).

121. EC Council Regulation No. 3285/94 art. 11(1).

122. Particularly, in the case in which a surveillance measure is taken simultaneously with the liberalization of importations, the decision to impose it must be by the Council, and in other cases the power to adopt surveillance measures lies with the Commission. *Id.* art. 10(2).

restricted import items without the specified provisions in the Council Regulation. In the case of prior measure, the goods under prior surveillance may be put into free circulation within the member countries when the required documents from the authorities concerned of the member country are secured.[123] The investigation procedure of the surveillance measure shall be applied in like manner when conducting safeguard investigation; however, the EC Commission can impose the surveillance measure at any time, regardless of the investigation procedure, when it is deemed immediately necessary.[124] Alternatively, in Korea, the reasonably supervising measure is required to be provisioned in the Act on the Investigation to work harmoniously with the current safeguard measures, which could be lessened from the legislative case of the EU.[125]

The Act on the Investigation stipulates tariff increases as a provisional safeguard measure,[126] fully reflecting the WTO Safeguard agreements.[127] However, the United States Tariff Act specifies not only tariff increases, but also restriction of import quantity as a provisional safeguard measure.[128] In addition, the Council Regulation of the EU[129] indirectly stipulates that the tariff increase measure may be taken if it is likely to relieve the serious injury provisionally. This, however, does not necessarily exclude the possibility of taking the import quantity measures. Therefore, in the case of Korea also, the provisional safeguard measures need to be expanded by introducing the import quantity restrictions. Furthermore, the import of perishable and seasonal produce should be thoroughly monitored to allow prompt enforcement of safeguard measures, considering the difficulty of recovering the injury.[130]

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123. *Id.* art. 12.

124. *Id.* arts. 8(1), 11(2). In practice, however, these provisions have never been used for mere surveillance measures.

125. In the current Act on the Investigation the Trade Commission can investigate the effect of the import of goods or the supply of services from foreign countries on the competitiveness of domestic industry. The Trade Commission is authorized to require the documents necessary for investigation to be submitted to the head of administrative organ concerned. Act on the Investigation, *supra* note 18, arts. 25, 26 (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

126. *Id.* art. 29(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

127. *See* Uruguay Round Agreement on Safeguards art. 6 (stating that "... such measures should take the form of tariff increases 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 ...").

128. *See* Tariff Act of 1930 art. 202(d)(5)(B) (noting that "... the Commission shall give preference to increasing or imposing a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury or threat thereof").

129. Council Regulation (EC) No. 3285/94 of 22 December 1994 in the Common Rules for Imports and Repealing Regulation (EC) No. 518/94, art. 8(3) stipulates that provisional safeguard measures should take the form of an increase in the existing level of customs duty (whether the latter is zero or higher) if such action is likely to prevent or repair the serious injury.

130. *See, e.g.*, Tariff Act of 1930 art. 202(d)(1)(A) (providing that an entity representing a domestic industry that produces a perishable agricultural product that is like or directly competitive with an imported perishable agricultural product may file a request with the Trade Representative for the monitoring of imports of that product).

E. Administrative Facts Related to Relief Measures

1. Validity of the Recommendation of Relief Measures

The Act on the Investigation stipulates that, within one month of the date of the final decision on an injury case, the Trade Commission shall recommend the relief measures to the head of the relevant administrative organ.[131] However, relief measures proposed by the Trade Commission have often not been accepted by the head of the relevant administrative organ.[132] To confer persuasive power to the relief recommendation, the Trade Commission shall prepare the proposal thoroughly by analysing not only the relief measures themselves but other factors[133] such as competitiveness of the industry, international trade relations, and consumers' interests, so that the head of the relevant administrative organ will likely accept the proposal.[134] As a short-run step, considering that the Trade Commission is a quasi-judicial and quasi-independent organ, the relief measures recommended should be examined objectively and comprehensively by the Adjustment Committee on International Economy or the Council of the Ministers of Economic Affairs.[135]

The validity of the Trade Commission's recommendation to the head of the relevant administrative organ or the President should be stipulated clearly, which is in harmony with the Commission's legal status as the quasi-judicial organization. The substantial and procedural stipulations also need to be made against the cases in which the head of the relevant administrative organ denies or modifies the measures recommended by the Trade Commission.

In both Korea and the United States, the Trade Commission's report to the President is advisory. However, the U.S. Congress can override any presidential denial of escape clause relief recommended by the International Trade Commission, and it may override any decision of the President that differs from the type of relief recommended by the Commission. Congress can do so by adopting a joint resolution of disapproval.[136] Those provisions in the United States may be instructive to Korea's

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131. Act on the Investigation, *supra* note 18, art. 17(1) (in Korean) 불공정무역행위조사및산업피해 구제에 관한법률; *see* BRUCE E. CLUBB, *supra* note 39, at 764 (explaining that in the United States:

> Within 180 days of the date on which the petition was filed, the Commission must 'recommend the action that would address the serious injury, or threat thereof, to the domestic industry and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition').

132. *See* YU KEUN SHIN, 신유근, *supra* note 22, at 168-69 (in Korean) 와 주요국의 세이프가드제도.

133. *See* Act on the Investigation, *supra* note 18, art. 17(3) (in Korean) 불공정무역행위조사및산업피해 구제에관한법률.

134. One of the reasons why the relief proposal of increase in the emergency tariff rate was not accepted by the Ministry of Economy and Finance seems to be that it levied the Adjustment Duties on a number of imports instead of the Emergency Duties recommended by the Commission.

135. The Adjustment Committee and the Council, which are composed of the ministers of economic and industrial affairs and the high-level officials, deliberate the implementation of economic and trade policy and regulations without being bound to the President.

136. *See* FOLSOM & GORDON, *supra* note 82, at 321 (explaining that "[o]nce [a joint resolution of disapproval]

decision to stipulate them in the Act.

Finally, the Trade Commission's recommendation should be made directly to the President who should eventually be in charge of implementation of the measures,[137] instead of the head of the relevant administrative organ. This issue, together with the fairness and objectivity of the decision proceedings by the Trade Commission, would also be related to the trade conflicts with other partner countries that have criticized the lack of fairness and objectivity of operating the safeguard measures of Korea.

2. *Implementation of Relief Measures*

Upon receiving the recommendation of time-limited import restrictions, the head of the administrative agency concerned may implement the relief measure as recommended by the Trade Commission. In implementing a relief measure, the head of the administrative organ concerned shall take into account the opinions of the other head of the administrative organ concerned about its impact on international trade relations and the national economy.[138]

The system would be more efficient if the President, like in the United States,[139] rather than the head of the administrative agency concerned, were charged with implementing the relief measures. The President could evaluate the recommendations of the Trade Commission with respect to the economy as a whole more effectively than could the head of a particular administrative agency. In Korea, particularly, egoism of the administrative agencies has often been indicated, which may affect the objective evaluation of the recommendation made by the Commission.

In addition, the specific criteria to be used by the President in determining the course of the action should be stipulated by the Act on the Investigation.[140] In deciding whether to undertake escape clause relief, for example, the President may be required to take into account the report of the Commission, the extent to which the workers and firms in the industry are benefiting from adjustment assistance, the efforts being made

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is enacted, the President is required to adopt the import relief previously recommended by the Commission. However, the President may veto the joint resolution, in which case an override of the President's veto is required to obtain relief").

137. For more details, *see infra* Part III.E.2.

138. Act on the Investigation, *supra* note 18, art. 19(2) (in Korean) 불공정무역행위조사및산업피해구제에관한법률.

139. *See supra* note 63 and accompanying text.

140. *See supra* note 64 and accompanying text. With regard to the lack of transparency and specificity in Korea's trade law, the United States Trade Representative has indicated as follows:

> The lack of transparency in rulemaking and in Korea's regulatory system continues to hamper foreign firms' ability to compete on the Korean market. Many Korean trade-related laws and regulations lack specificity. Korean officials exercise a great deal of discretion in applying broadly drafted laws and regulations, resulting in inconsistency in their application uncertainty among business. International guidance, developed by relevant ministers but rarely published, directs their implementation and sometimes the regulations themselves are not made public.

United States Trade Representative, *2001 National Trade Estimate Report on Foreign Trade Barriers, available at* http://192.239.92.165/html/2001_contents.html (on file with *The Transnational Lawyer*).

by the industry to make a positive adjustment to import competition, the likelihood of effectiveness of relief in facilitating such adjustment, and the short and long term economic and social costs of the relief relative to their short and long term economic and social benefits. The President should also consider: factors related to the national interest of Korea, not limited to the economic and social costs if relief is not granted; the impact on consumers and on competition in domestic markets; and the impact of other countries' compensatory action on the domestic economy. The President should further be directed to consider the potential for circumvention of any relief taken, the national security interests, and those factors the commission is required to consider in reaching its recommendations.[141] A President who stands apart from the egoism of the administrative agencies could evaluate these criteria comprehensively. The issue of reassigning the responsibility for implementing the measures should be considered concurrently with the issue of reorganizing the Trade Commission as a quasi-judicial and independent organ for both formal and practical purposes.

Besides, with the recent acceleration of complete liberalisation of trade, Korea's industry relief measures may not have equal impact on all industries because all industries are not equally competitive. Therefore, the relief measures should be taken discriminately depending on the degree to which an industry is exposed to the injury. For instance, when a comprehensive relief measure is taken indiscriminately for an industry having absolute competitiveness, allocation of industrial resources may be distorted by including even uninjured industries in the structural adjustments, which may cause a budgetary burden to the government. In such a case, it is more effective to take a differentiated relief measure targeting the specific injured industry.

3. Promotion of Adjustment Assistance System

The purposes of the safeguard systems in the Act on the Investigation[142] and the Customs Act[143] can be interpreted as prevention, relief, and structural adjustment of industrial injury under the WTO Safeguard Agreement. Korea's adjustment assistance system would aim to protect domestic industry by taking safeguard measures or customs tariff measures to provide job search assistance and technical supports for research and development, and to help adjust the industrial structure through long-term and low-rate financing.[144]

However, the most desirable situation would be to reinforce the legal system to promote the structural adjustment system for more effectiveness of safeguards. The

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141. *See, e.g.*, FOLSOM & GORDON, *supra* note 82, at 322-23 (explaining that the President of the United States decided not to grant escape clause relief because it might have an adverse effect on the bargaining position of the United States in international trade negotiations at a time when there were ongoing GATT negotiations as well as UNCTAD negotiations about commodity trade).

142. Act on the Investigation, *supra* note 18, art. 1 (in Korean) 불공정무역행위조사및산업피 해구제에 관한법률.

143. Customs Act, *supra* note 19, art. 65(1) (in Korean) 관세법.

144. Decree of the Act on the Investigation, *supra* note 45, art. 18 (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

safeguard measures are to be used actively to adjust the industrial structure, rather than simply to relieve the industrial injury caused by imports. Such active use can be accomplished by requiring petitioners to stipulate the purposes of safeguard measures at the time of filing the petition. For this, the safeguard system of Korea should be considerably less protectionist and more adjustment-oriented than in previous years. Thus, Korea needs to complement the current assistance system by evaluating and introducing the adjustment assistance system currently being executed in the United States.[145]

In the United States, there has been a growing trend in escape clause law to provide adjustment assistance to workers and companies impacted by import competition, rather than protective relief through presidential action because the first authority for such assistance was provided in the Trade Expansion Act of 1962.[146] With respect to the application of safeguard measures in the United States, the petition shall include a statement describing the specific purposes for which import relief is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, and enhancing competitiveness or other means of adjustment to new conditions of competition.[147]

In practice, petitioners in the United States normally do not file an escape clause petition seeking adjustment assistance. Instead, they may apply for an escape clause petition directly to the Secretaries of Labor and Commerce without going through an escape clause proceeding. At that point, the President reviews information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance under the Trade Act of 1974, or benefits from other manpower programs.[148]

The United States case suggests the direction for the development of Korea's adjustment assistance system. Korea needs to establish an institutional apparatus to support the adjustment of industrial structure within the boundaries conceded by the WTO agreement. Korea also needs to introduce an industrial adjustment assistance

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145. After the Trade Expansion Act of 1962, the United States introduced the concept of "adjustment-assistance" payments to workers who were dislocated because of imports. The United States has been operating the adjustment assistance system complemented by the Trade Act of 1974, the Omnibus Trade and Competitiveness Act of 1988, and the Uruguay Round Agreements Act of 1994. Economists generally estimate a preference for granting government assistance to the adjusting producers, especially if this assistance is designed to "nudge" the recipients toward effective adjustment policies compared with import restraints, which may be self-defeating in the end. These policies may involve moving completely out of production of particular uncompetitive products, or restructuring the produce plants and organizations so that they can become competitive. However, there is a problem in that many observers believe that the adjustment-assistance programs that have been tried in the United States and elsewhere have failed to accomplish their purpose, and also have been very expensive. In times of budget constraints, persuading political leaders to fund adjustment assistance has become increasingly difficult. In the view of many, this adjustment assistance, although seemingly based on sound economic principles, has failed to achieve its goal of either assisting adjustment or winning additional support for a liberal trade policy. Labor unions have called it "burial insurance," and have refused to be overly impressed by the program. JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 200-02. These problems and criticisms should be taken account in Korea to expand the assistance program in the future.

146. FOLSOM & GORDON, *supra* note 82, at 327.

147. BRUCE E. CLUBB, *supra* note 39, at 757-58.

148. 19 U.S.C.A. § 2252(c)(1) (2001).

system to relieve industrial injury caused by the rapid increase in imports as well as by dumping or subsidy.

F. Operation of Safeguard Measures

The maximum duration of relief measures, which is four years with four additional years extended if necessary,[149] should be applied and interpreted equally for all types of import relief measures in reflection of the WTO Safeguard Agreement.[150] The WTO Safeguard Agreement stipulates that, when the duration of relief measures exceeds three years, a member employing the relief measures shall review the situation not later than the mid-term of the measure, and, if appropriate, withdraw it or expedite the liberalization process.[151] To introduce this stipulation to the domestic legal system, the Act on the Investigation specifies that the Trade Commission should re-examine the relief measures to be relaxed, withdrawn, or extended before the mid-term when the duration of relief measures exceeds three years.[152] The Act further requires the head of the related administrative organ to attempt to phase down the relief measures.[153] Conducting the review to relax or phase down the relief measures is desirable only when relief measures including the tariff rate increase have already taken effect.

The relief measures of the WTO Safeguard Agreement include quantitative restrictions, adjustment of tariff rates, and various assistance measures indicated above.[154] In Korea, the import quantity restriction is more effective than the tariff measures because the tariff rate increase does not significantly affect the total price for substantially cheap products, such as those imported from China. The Act on the Investigation should specify the rules pertaining to the allocation of import quotas and deviations from the WTO Safeguard Agreement, like in the EU.[155]

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149. Act on the Investigation, *supra* note 18, art. 17(2) (in Korean) 불공정무역행위조사및산업피 해구제에 관한법률.

150. *See* Uruguay Round Agreement on Safeguards art. 7(1) (specifying that "[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 two years, unless it is extended. . . ."); *see also id.* art. 7(3) (stating that, "[t]he 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").

151. *Id.* art. 7(4). In the United States, the provisions concerning the duration of safeguard measures are in accord with those of the WTO Agreement. U.S. law provides that the protection shall ordinarily be phased down during the period of relief. Section 203 also provides for a "four year period of relief, which can be extended to a total of eight years if the [International Trade Commission] makes a determination that an extension is needed to prevent injury and that a positive adjustment is occurring." JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 647. Thus, the International Trade Commission must undertake a scaled-down version of the original investigation after a few years, known as a "203 review." *Id.*

152. Enforcement Decree of the Act on the Investigation, *supra* note 45, arts. 19(3), 20(1), (2) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

153. Act on the Investigation, *supra* note 18, art. 19(3) (in Korean) 불공정무역행위조사및산 업피해구제에관한법률.

154. *Id.* art. 17(1) (in Korean) 불공정무역행위조사및산업피해구제에관한법률 시행령.

155. Uruguay Round Agreement on Safeguards, art. 5(2)(a), (b). In the United States, whose safeguard remedies are generally in harmony with the WTO Safeguard Agreement, the Act does not provide for the allocation of import quotas and deviations from the Agreement. This is quite different from the EU, which has a specified

The selective imposition of import quotas deviated from the principle of the most-favored-nation treatment should be executed exceptionally when the import of a specific good from a specific country increases at a rate disproportionate to the total increase of imports of the product concerned.[156] The import quota against Korea is likely to be selectively imposed[157] because the Korean economy is highly dependent on exports to advanced countries, such as the United States.[158] Furthermore, Korea maintains a relatively high market share in advanced countries compared to other major competing countries and less developed countries, such as Indonesia and Malaysia.[159] This selective measure is expected to be a large obstacle to Korea's strategy of concentrating major export items because an item may be subject to the selective regulation without rapid increase in export when the export quantities of other competing countries are relatively sluggish or significantly decreased.[160]

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stipulation about import quotas and deviations from the Agreement, without the specified stipulation about tariff measures. For example, with regard to deviation from the Agreement in the EU, the obligation to see that consultations are conducted under the auspices of the WTO Committee on Safeguards is not disregarded. Furthermore, the Community may nevertheless depart from this method of allocation in case of serious injury, if imports originating in one or more supplier countries have increased in disproportionate percentage in relation to the total increase of imports of the product concerned over a previous representative period. EC Council Regulation No. 3285/94 art. 16(3)(b), (4).

156. *See* Uruguay Round Agreement on Safeguards art. 5(2)(b) (explaining that an importing nation may depart from the principles of the most-favored-nation treatment and of the non-discrimination in allocating shares after prior consultation with the Committee on Safeguards). The nation must show that departure is justified because imports from certain nations have increased in disproportionate percentages, and that departure from the principles is justified and equitable. *Id.*

157. *See* IVO VAN BAEL & JEAN-FRANCOIS BELLIS, *supra* note 120, at 170 (observing that in the EU, "while the proceedings have been carried out on a non-discriminatory basis, the targets of [safeguard] cases . . . have generally been products (stoneware, quartz watches, beach slippers) essentially exported by Far Eastern countries such as South Korea, Taiwan, Hong Kong, Japan and the People's Republic of China). This fact implies that Korea will likely be treated disadvantageously compared with the safeguard measures in EU countries.

158. For example, in 1997, the portion of exports to the United States out of Korea's total exports was about 16%; namely, US$21.625 billion out of total export amount of US$136.164 billion. The portion of Korea's total exports to Japan was about 11%; that is, US$14.771 billion out of total export amount of US$136.214 billion. *See, e.g.*, Monthly Bulletin, BANK OF KOREA 106-07 (Feb. 1998) (in Korean) 한국은행, 조사통계월보.

In 2000, the numbers differed slightly. The portion of exports to the United States out of Korea's total exports was 20%, or US$34.032 billion out of total export amount of US$172.621 billion. The portion of exports to Japan out of Korea's total exports remained at about 11%, or US$18.669 billion out of total export amount of US$172.621 billion. *See* Bureau of Statistics, *at* http://www.nso.go.kr (in Korean) 통계청 (copy on file with *The Transnational Lawyer*); *see also* Bank of Korea, *at* http://www.bok.or.kr (in Korean) 한국은행 (copy on file with *The Transnational Lawyer*).

159. DAE KEUN LEE, INTERNATIONAL TRADE OF KOREA 418-421 (1996) (in Korean),이대근, 한국무역론. Regarding this point, the Safeguard Agreement leaves considerable room for quantitative measures that are more restrictive of imports from nations that have recently increased their market shares. Given the extent to which selectivity has been a problem in the past, it will likely remain a controversial area. JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 650.

160. *See* CHAE OOK, THE SAFEGUARD SYSTEM 26-7 (1991) (in Korean) 채욱, 우리나라 세이프가드제도의 개선과 활용방안.

Referring to tariff measures, according to the Customs Act, adjustment duties may be levied in the following cases:

a) to correct severe imbalance among tax rates caused by changes in the industrial structure,
b) to protect health, consumers' interests, and the environment,
c) to protect a newly developed domestic product for a period of time,
d) to protect the industrial fundamentals and the domestic markets from being devastated by the importing of goods from less competitive industries such as agriculture, forestry, or livestock.[161]

Except in the cases of agriculture, forestry, and livestock, the customs tariff may be levied within the range of concession tariff rates for the WTO tariff concession items and within one hundred percent for the non-concession items.[162] Levying one hundred percent of the adjustment duties on the WTO concession items violates the stipulation of the GATT agreement that customs tariff rates should not be levied over the WTO concession rates.[163] For the WTO tariff concession items, the levying of adjustment duties is very likely to cause trade frictions with the partner countries exporting to Korea. Therefore, the current adjustment duties system, as one kind of flexible tariff system,[164] should be absorbed into the safeguard system, the anti-dumping duties, or the countervailing duties system.[165]

Referring to ex post evaluation of the effectiveness of relief measures, the United States Trade Act of 1974 stipulates that the International Trade Commission should submit the evaluation report of the relief measures to the President and Congress within 180 days of termination of the relief measures.[166] In the case of Korea, the items against which relief measures were taken have rarely been evaluated.[167] In order to apply the safeguard system constructively, the Trade Commission needs to evaluate whether or not the safeguard measures effected positive adjustment. For instance, one alternative may be to institutionalize the submission of the evaluation report to the President, Congress, and the Council of the Ministers of Economic Affairs. This final evaluation system will be able to cooperate with the ex ante supervising system to maximize the efficiency of safeguard measures.

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161. Customs Act, *supra* note 19, art. 69 (in Korean) 관세법.

162. *Id.* (in Korean) 관세법.

163. *See* GATT 1947 art. II(1)(a) (stating that "[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement").

164. The government adjusts the tariff rate of certain goods flexibly within the scope permitted by the law in order to cope promptly with changes in the domestic or foreign economic environment. The flexible tariff rate system is provided in Korea's Customs Act, which includes anti-dumping duty, emergency duty, adjustment duty, and tariff quota system, etc. EUN SUP LEE, INTERNATIONAL LAW 269-70 (1999)(IN KOREAN) 이은섭, 국제통상법.

165. YU KEUN SHIN, 신유근, *supra* note 22, at 176 (in Korean) 와 주요국의 세이프가드제도.

166. United States Trade Act of 1974 art. 204(c).

167. YU KEUN SHIN, 신유근, *supra* note 22, at 184 (in Korean) 와 주요국의 세이프가드제도.

IV. REORGANIZATION OF THE RELATED ORGANS

A. Reorganization of the Trade Commission

Generally, a unified or dual system is employed to relieve the industrial injury. The industrial relief system of a country is influenced by the country's social, cultural, and administrative backgrounds. The unified system is advantageous because the charged organ performs its duty quickly and efficiently by assigning investigation of the facts and judgment of the injury caused by exporters' dumping, subsidies, and increased imports to the same organ. On the other hand, it is disadvantageous because the investigation and the judgment may lack objectivity and fairness by centralizing the authority into the same organ.

The dual system is beneficial because two independent organs conduct the investigation and the judgment of industrial injury. On the other hand, it is detrimental because it is relatively time-consuming and costly to complete the investigation of exporters' dumping, subsidies, or increased imports and also to finalize the decision on whether or not the domestic industry is injured. Korea has adopted the unified system in that the Trade Commission is in charge of all steps of the investigation and the judgment. The dual system may work better for relief of an industrial injury because the procedure for industrial injury relief should be fair and objective. Particularly, for developing countries like Korea, objectivity and fairness in the application of relief measures are essential owing to the lack of experience in applying relief measures compared to advanced countries.

Australia employs the unified system of anti-dumping measures on the surface. However, in practice, Australia employs a plural system in the administrative organ. For example, the Department of Industry, Science, and Tourism is in charge of initiation of the investigation and judgment of the industrial injury. The branch department of the Australian Customs Service initiates the investigation of the industrial injury caused by dumping and subsidies and finalizes the investigation and the judgment. Then, the branch department of the Anti-Dumping Authority is in charge of the review of the final judgment by the Australian Customs Service.

The EU also employs the unified system, even in anti-dumping and countervailing duties investigation and judgment, which reflects the realistic limitation of a community comprising fifteen within-territory countries. In the case of the EU, formally speaking, Commission and European Council are in charge of operating the safeguard system. Any decision about safeguard measures taken by the Commission must be communicated to the Council and to the member states, and any member state may refer the decision to the Council. If a member state refers the Commission's decision to the Council, the Council, acting by a qualified majority, may confirm, amend or revoke that decision.[168]

168. EC Council Regulation No. 3285/94 arts. 16(8), 17.

Additionally, where the interests of the Community so require, the Council, acting by a qualified majority on a proposal from the Commission may adopt appropriate measures to prevent import into the Community in the case of serious injury to Community producers.[169] There has been no case, however, where the Council applied these measures.[170] In reality, this means that the Commission itself operates the EU safeguard system, with the safety valve against potential problems that may result from operation of the unified system.

In the future, Korea needs to employ the dual system of relief measures, including measures such as anti-dumping duties or countervailing duties. To meet the future demand of relief measures and to guarantee objectivity, efficiency, and specialty, the Trade Commission should be reorganized in terms of its structure and functions. The Trade Commission should be operated as a quasi-judicial independent organ, with a standing Commission chair positioned as a Cabinet minister. If the Trade Commission is operated as an organ independent not only of the Ministry of Commerce, Industry, and Energy but also of the Office of the President, the Trade Commission can not only take advantage of its reinforced power in performing its duty, but also may avoid controversies with other administrative organs involved in Trade Commission decisions by improving objectivity and fairness. Also, reducing administrative discretion in investigation and judgment may obviate trade conflicts with other partner countries.

There is one more reason that the Trade Commission should be organized independently of the Ministry of Commerce, Industry, and Energy. That is, although it is highly probable that the domestic industry will be severely injured by the rapid import increase in not only manufactured goods and agricultural products but also the service industries, the current system does not seem to be efficient to face it. The mechanism of the current Trade Commission, specified in the Act on the Investigation, seems to be pertinent to manufactured products. As for the agricultural or the service industry, the function of the Trade Commission is specified only for the trade and the distribution industries against which relief measures have never been applied. This is because the Trade Commission is associated with the Ministry of Commerce, Industry, and Energy, the minister of which administers only the trade and distribution industries. Therefore, for example, when domestic service industries such as finance, securities, insurance, lease, and tourism are seriously injured, determining which administrative organ should be in charge of the investigation remains questionable.

169. *Id.* art. 17.

170. IVO BAEL & JEAN-FRANCOIS BELLIS, *supra* note 120, at 325.

The Trade Commission should help the domestic industries cope with the increase in imports and examine the impact of imports on the competitiveness of the domestic industry. In addition, the Trade Commission should build up the so-called "Early Warning System"[171] to prevent unnecessary trade conflicts with trade partner countries and to prepare coping strategies. In the United States, the International Trade Commission allocates a substantial portion of the total budget to in-depth research on industrial competitiveness and industrial structure adjustment,[172] which may offer Korea an important hint to improve the injury relief system.

B. Establishment of the Court Specializing in Trade-Related Cases

The WTO Anti-Dumping Agreement requires that each member with legislative provisions on anti-dumping measures maintain the independent judicial, arbitral, or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations.[173] In order to guarantee international public trust in the future, Korea's foreign trade law also needs to specify the judicial relief procedure—so that a petitioner who insists that an industrial injury has occurred due to dumping or a rapid increase in imports—can file for a judicial review even when the Trade Commission rejects the petition.

For international public trust, specifying a legal basis in the Act on the Investigation[174] or the Customs Act is necessary so that the interested parties can refute the decision made by the Trade Commission or relief measures taken by the head of the administrative organ concerned.

To realize this purpose, setting set up a special court similar to the United States Court of International Trade,[175] or a special department in charge of international trade

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171. The Early Warning System provides domestic exporters with ample data and information obtained from thorough research on international trade laws, the trade system, and particular cases of competition.

172. For example, in the United States, while Section 201 cases have been rare in the past few years, U.S. government "adjustment assistance" programs have remained active. JACKSON ET AL., LEGAL PROBLEMS, *supra* note 1, at 660. For example:

> In 1992, [the U.S. government] expended some $42.7 million for assistance to workers, while certifying approximately 50,000 workers as eligible for benefits under the program. In 1991 the amount expended was $115.7 million. Year to year variations are explicable in considerable part by changes in the duration of conventional unemployment insurance benefits. Expenditures on the Commerce Department Program tend to be on the order of $10-15 million per year.

Id.

173. Agreement on Implementation of Article VI of the GATT 1994 art. 13.

174. When established, the Trade Commission Act should specify this provision.

175. The Court of International Trade (CIT) in the United States is an Article court that is to be composed of 9 judges, not more than 5 of whom may be from the same political party. 1980 Act, Pub. L. No. 96-417 § 101, 94 Stat. 1727, *codified at* 28 U.S.C.A. § 251 (1990). This Court was given the same powers of law and equity as a district court of the United States, and was given exclusive jurisdiction over most suits against the United States arising under the tariff and international trade laws.

The matters over which the CIT has jurisdiction include jurisdiction over civil actions filed to protest Customs Bureau determinations as to the classification or valuation of imported goods; to challenge the collector's denial of such a protest; to protest the imposition of duties or valuation as being too low (suits involving American producers or

cases within the court,[176] like the European Court of Justice[177] would be advisable. If the special court is established, the court can not only recruit specialized human resources, but also may take advantage of its reinforced power in performing its judgment by preventing inefficiency of manpower under the current rotating assignment system in the judicature.

V. CONCLUSION

Since the 1960s, Korea has utilized both tariff and non-tariff measures to protect domestic industries. Non-tariff measures have included the flexible tariff measures such as anti-dumping duties, countervailing duties and retaliatory duties; implementation of the import supervision system;[178] and implementation of the system to diversify the countries from which it imported, which specifically avoided the countries with which it had an excessive unilateral trade deficit, such as Japan.[179] As a

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manufacturers); to challenge USITC and Treasury decisions relating to antidumping and countervailing duties; to review determinations by the Labor and Commerce Departments relating to eligibility for adjustment assistance; to consider applications for orders directing the USITC or the Treasury Department to disclose confidential information; and to determine any civil action filed against the United States arising out of a U.S. law involving revenue from imports and tonnage, tariffs, fees and other taxes imposed on imported goods for reasons other than to raise revenue, embargoes of restrictions on the importation of merchandise and the administration and enforcement of U.S. custom laws. 28 U.S.C. § 1585 (1988). This last subsection "is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law." H.R.Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980).

In addition, the CIT has jurisdiction over suits brought by the United States to recover civil penalties based on fraud or negligence (relating to imports), bonds relating to imported merchandise, and Customs duties. [28 U.S.C.A. Section 1582(1990)]. Cited in BRUCE E. CLUBB, *supra* note 39, at 293-94, n.4.

176. It is encouraging that the supreme court (March, 1993) designated four collegiate bodies in the Seoul Civil District Court as a grand bench specializing in international cases, followed by the similar ones in other Civil District Courts in Pusan, Incheon, etc.

177. The Court of Justice is regarded as one of the most interesting, and from a judicial point of view, most impressive institutions of the European Union. Thirteen judges, assisted by six Advocates General, form a judicial institution that has been given an impressive array of powers and has exercised them in a remarkably forthright way. The Court's work has on the whole enhanced both the unity and the central powers of the EU institutions. The European community operates within a system of judicial review, which is indicated as very similar to that of the United States, and very different from the judicial systems in some of the major EU member states. Given the relatively subordinate role of the judiciary in many European government systems, it would be striking to find such a strong judicial role played in the EU structure.

178. The import supervision system was introduced as one method to supplement the import-liberalization policy in the Trade Transaction Act of 1967 to help protect infant domestic industries and to achieve balance in international payments. Under this system, the Minister of Commerce, Industry and Energy had the power to take certain measures to restrict the import of specific goods such as agricultural products or luxurious consumer goods nominated as import supervision items, which might have an injurious effect on domestic industries.

However, there have been many problems in the operation of this system because it lacked sufficient criteria for determining the injurious effects on domestic industries. That is, there were no provisions for determining causation between the import and the concerned industries' injury, or for establishing the criteria for implementing the import supervision system. As a result, Korea has incurred protests from its trading partners, including the United States, for undue protection measures. This system has been modified and developed into the system to investigate industrial injury from imports as an import relief mechanism of the current Act on the Investigation. *See* HYUN JONG SHIN, KOREA'S FOREIGN TRADE 608-10 (1992) (in Korean) 신현종, 한국무역론.

179. Korea has had an excessive deficit in bilateral trade with particular counterpart countries such as Japan.

result of these measures, which have not been regarded as being as effective as intended, the import relief provisions were substantially modified in 1996 for the ex post facto protection of domestic industry, with a view to liberalizing international trade rather than protecting infant industries. The Korean government regards the modified provisions as being almost in accordance with the requirements of the WTO Safeguard Agreement and other international regulations concerned.

In Korea, potential petitioners for the relief measures have doubted that an import relief system could be operated in a timely and efficient manner. This fact has been borne out by the historical experiences of the Korean government. The government has rarely depended on import relief measures, even when rapid increases in imports have threatened the stability of domestic industries and markets. This is because the Korean Government, having experienced trade frictions with partner countries, has been very vulnerable to partner countries' negative attitudes toward Korean relief measures. One major reason for such vulnerability is that Korea has a small and open economic system, which makes the economy heavily dependent on international trade. Additionally, Korean export items are not competitive in price and quality with those of other competing countries. Particularly, Korean authorities in charge of the import relief system have not been considered to be objective and fair in their investigations and judgments in the international trade area.

Korean industries are currently in a tremendously volatile state due to increased competition caused by rapid market openings as well as by recent problems in the financial sector, forcing the basic direction of economic development to be confronted with confusion. Meanwhile, Korea is concentrating on the enlargement and development of international trade. To realize its blueprint for harmonization with the liberalized global market system, Korea must improve the operating procedures of the institutions in charge of the investigation and judgment of industrial injury caused by imports.

For example, the trade deficit with Japan was US$8.451 billion in 1993 and US$7.858 billion in 1992, with total deficits (including current account and capital account) of US$1.784 billion and US$5.143 billion respectively. Since 1978, Korea has adopted a trade policy to encourage diversification of importation by regulating imports from countries such as Japan, with which Korea has recorded excessive deficits in bilateral trade, while at the same time expanding imports from countries such as the United States and the EU countries. *Id.* at 606-08 (in Korean) 신현종, 한국무역론. However, this policy, which may have been in conflict with the principle of non-discrimination under the GATT/WTO system, was repealed in 1998.

Many of Korea's foreign trade laws have been enacted and modified passively due to the express or implied pressure from trading partners like the United States and because of the requirements of international organizations like the WTO and OECD. Thus, such modifications are not the Korean government's voluntary response to internal public and private sector concerns. The modifications may have occurred in this manner because during the last forty years, Korea's rapid economic growth and development was influenced by the government's strong export-driven policy, and the Korean economy depended heavily on foreign trade. However, under the WTO mechanism, Korea's foreign trade regulations should be improved voluntarily and continuously to promote free and fair trade without serious injury to its domestic industry.