

ANNEX D

ORAL STATEMENTS OF THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX D-1

ORAL STATEMENT OF THE EUROPEAN UNION

Mr Chairman, members of the Panel,

1. The European Union would like to thank the Panel for this opportunity to submit orally its views in this dispute.
2. As already stated in its written observations, the European Union does not wish to take a position on the consistency of the measure in dispute with the requirements of the *Transitional Product-specific Safeguard Mechanism* (the "TPSSM") laid down in Article 16 of the *Protocol of Accession of the People's Republic of China*.
3. The European Union has intervened in this dispute because of its interest in the correct interpretation of the TPSSM. More specifically, the European Union is concerned to ensure that the specific nature of the TPSSM is duly recognised and that no confusion arises between the requirements of that mechanism and those of the extraordinary remedy against injurious imports provided in Article XIX of the *General Agreement on Tariffs and Trade 1994* (the "GATT") and the *Agreement on Safeguards* (the "AS").
4. Contrary to the suggestions made by the complaining party, the TPSSM is not an elaboration of the remedy provided in GATT Article XIX and the AS. The TPSSM lays down a separate and distinct remedy, with its own specific purpose, to be invoked in different circumstances and subject to different conditions.
5. Nor is it correct that the TPSSM seeks to impose "more stringent" requirements than GATT Article XIX and the AS. First, the TPSSM does not provide that the increase of imports must be the result of "unforeseen developments". Second, the TPSSM lays down a lower standard of injury, by requiring that increased imports be such as to cause "material injury", rather than "serious injury". Third, while the requirement of "increased imports" is worded in similar terms, it must be construed differently, having regard to the different context in which those terms appear and, in particular, to the two crucial differences which I have just mentioned.
6. These differences, as well as the other textual differences discussed in the EU written observations, show that the drafters of the TPSSM did not seek to make the adoption of measures under that instrument more difficult, but rather the opposite.
7. Given the specific nature of the TPSSM, and the different requirements stipulated in that mechanism, the Panel should reject any attempt to extrapolate to the TPSSM the case law of the Appellate Body on GATT Article XIX and the AS. For the same reasons, the Panel should be careful to ensure that, whatever interpretation of the TPSSM is reached in the framework of the present dispute, it remains circumscribed to that instrument and does not prejudice in any manner the interpretation of GATT Article XIX and the AS.
8. Thank you for your time and attention.

ANNEX D-2

ORAL STATEMENT OF JAPAN

INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for this opportunity to present Japan's views on this dispute. In this oral statement, Japan would like to address three important systemic issues in this dispute. The first is Reasoned and Adequate Explanation of Importing Members. The second is Implication of the Agreement on Safeguards and Article XIX of the GATT to the Protocol. The third is Paragraph 16.3 and 16.6 of the Protocol.

DISCUSSION

Reasoned and Adequate Explanation of the Importing Member

2. To consider claims, a WTO panel is required to make "an objective assessment" under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Dispute, DSU*. Where the importing Member's examination of facts is in dispute, the Appellate Body in *US – Lamb* clarified this obligation in the context of the *Agreement on Safeguards*: "By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*".¹

3. The rationale under the *Agreement on Safeguards* would provide a good framework for this Panel to consider its standard of review and the importing Member's obligations derived from Article 11 of the *DSU* and specific obligations under Section 16 of the *Protocol*. Paragraph 16.1 sets forth that the importing Member may impose a transitional safeguard measure when the Member found that Chinese products are imported in such state that causes market disruption. Paragraph 16.4 requires the Member to determine that these imports are a significant cause of the material injury to find the existence of the market disruption. Paragraphs 16.3 and 16.6 set the permissible maximum extent and duration of the transitional safeguard measure. In addition to these substantive obligations, Paragraph 16.5 sets forth the importing Member's procedural obligation to provide an explanation of the basis for the decision and the scope and duration of the measure in the written notice under paragraph 16.5, as elaborated in Paragraph 246(e) of the *Working Party Report*.

4. These substantive and procedural requirements under Section 16 of the *Protocol* appear to be analogous to the conditions to apply to a safeguard measure under the *Agreement on Safeguards*, as discussed in more detail in Japan's submission. Article 11 of the *DSU* would require this Panel to examine whether the importing Member satisfied the substantive obligations under Section 16 of the *Protocol* upon reviewing whether the explanation in the written notice was reasoned and adequate.

¹ Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051, para. 105.

Implication of the Agreement on Safeguards and Article XIX of the GATT to the Protocol

5. Findings by the Appellate Body in the context of Article XIX of the *GATT* and the *Agreement on Safeguards* also would provide a useful guidance to consider the substantive obligations of the importing Member under Section 16 of the *Protocol* because the texts of these Agreements are similar. However, they are not identical. Further, the provisions of the *Protocol* are not subordinated to these Agreements, as provided in Paragraph 1.2 of the *Protocol*. In addition, Section 16 of the *Protocol* does not make any reference to these Agreements with respect to substantive obligations. These aspects indicate that the substantive rules to impose a transitional safeguard measure under Section 16 are separate and independent from the provisions of Article XIX of the *GATT* and the *Agreement on Safeguards*. In this light, in referring to the rationale as clarified by the Appellate Body on substantive and procedural obligations under the provisions of these Agreements, this Panel should be careful so as not to incorporate rights and obligations under these WTO Agreements that do not exist in Section 16 of the *Protocol* into the *Protocol*, and at the same time not to diminish rights and obligations provided in the *Protocol*.

Paragraphs 16.3 and 16.6 of the Protocol

6. Paragraphs 16.3 and 16.6 of the *Protocol* set forth that a transitional safeguard measure must be limited to the extent and the duration necessary to prevent or remedy such market disruption. The market disruption is defined in paragraph 16.4 as existing only when there are: (i) imports of Chinese products, which are increasing rapidly; (ii) material injury to the domestic industry; and (iii) a causal link between these imports and the injury. Accordingly, the measure must address these factors, and it may not be taken beyond the extent and duration to make such factors cease to exist or be prevented from recurrence.

7. The importing Member's obligation to limit the period of time to impose a transitional safeguard measure under the first sentence of paragraph 16.6 of the *Protocol* would not be diminished or otherwise modified by its subsequent sentences. The second and third sentences address the right of China when the measure has been imposed for more than two or three years. These provisions do not refer to the importing Member's right or obligation in its imposition of a transitional safeguard measure even after the two or three year period. The Member may continue imposing the measure even after the two or three year period so long as the measure is necessary to prevent or remedy the market disruption. The second and third sentences do not release the importing Member from observing its obligation not to impose the safeguard measure when the measure is no longer necessary to prevent or remedy the market disruption, even though the measure has not yet imposed for two years.

CONCLUSION

8. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments as discussed in its submission and above to ensure the fair and objective application of the provisions of the *Protocol* and would be pleased to respond to any questions that the Panel may have.