EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

(DS595)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

May 28, 2021

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views as a third party in this dispute. The United States will address certain issues of systemic concern regarding the interpretation and application of Article XIX:1(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Safeguards* ("Safeguards Agreement").

II. THE FRAMEWORK UNDER ARTICLE XIX:1(a) OF THE GATT 1994 AND THE SAFEGUARDS AGREEMENT CONCERNING UNFORESEEN DEVELOPMENTS AND OBLIGATIONS INCURRED

2. Turkey (the complainant) asserts that the European Union (the respondent) acted inconsistently with Article XIX:1(a) concerning the respondent's determinations on "unforeseen developments" and on "the effect of the obligations incurred". The United States will address the complainant's arguments with respect to each of these phrases in turn.

a. "Unforeseen Developments"

3. With respect to unforeseen developments, the complainant first argues that the respondent "failed to demonstrate the existence of unforeseen developments" because the developments identified by the respondent in the EU Provisional Measures Regulation and the EU Definitive Measures Regulation *could* have been foreseen by the respondent's negotiators during the Uruguay Round. Thus, the complainant asserts that the developments identified by the respondent "cannot be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994."

4. As the United States explained in the U.S. third party written submission, unforeseen developments are those that are unexpected or unanticipated at the time that the Member took on obligations, including concessions, with respect to the product that is subject to a safeguard measure. The phrase "unforeseen developments" appears only once in the covered agreements, in Article XIX:1(a) of the GATT 1994.

5. The ordinary meaning of the term "unforeseen" is "[t]hat has not been foreseen". The phrase "[i]f, as a result of unforeseen developments and of the effects of the obligations incurred" sets out a temporal and logical connection between the developments that were not foreseen and the "obligations incurred"[1] by a Member. This text thus acknowledges that, had the developments been anticipated or predicted, the Member might not have incurred the obligation.

6. Accordingly, "unforeseen developments" are those that a Member did not foresee at the time of undertaking a commitment. In its first written submission, the complainant appears to agree with this interpretation of Article XIX:1(a) of the GATT 1994. In its written submissions, however, the complainant does not attempt to demonstrate whether the developments listed in the EU Provisional Measures Regulation and the EU Definitive Measures Regulation were actually foreseen by the respondent's negotiators. Instead, the complainant argues that the

[1] For purposes of this Integrated Executive Summary, the United States uses the phrase "obligations incurred" in the sense it is used in Article XIX of the GATT 1994, as "including tariff concessions".

developments were *foreseeable*. These arguments err as a legal matter in focusing on whether the developments listed by the respondent were arguably foreseeable (rather than actually foreseen) by the respondent's negotiators.

7. Next, the complainant errs by asserting that a competent authority has to demonstrate the existence of unforeseen developments before a Member implements a safeguard measure. The text of Article XIX:1(a) differentiates between the factual circumstances in which a Member may take a safeguard measure (set out in the first clause of Article XIX:1(a)) and the conditions that must be established before applying a safeguard measure (set out in the second clause of Article XIX:1(a)). In other words, the first clause of Article XIX:1(a) does not create (to use the complainant's term) a "prerequisite" coequal with the conditions of the second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations incurred" are circumstances that must be shown to exist, whereas "any product is being imported [. . .] in such increased quantities and under such conditions as to cause or threaten serious injury" are "conditions" that must be met.

8. The text of the Safeguards Agreement confirms this interpretation of Article XIX:1(a). Article 1 of that agreement "establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994." And Article 11.1(a) states that a Member shall not take action under Article XIX "unless such action conforms with the provisions of that article applied in accordance with" the Safeguards Agreement. Thus, the Safeguards Agreement requires that a Member apply Article XIX "in accordance with" the Safeguards Agreement, which provides rules for the application of a safeguard measure.

9. Additionally, the United States observes that Article 2.1 of the Safeguards Agreement only includes the conditions referenced in the second clause of Article XIX:1(a). Notably, Article 2.1 does not mention unforeseen developments nor obligations incurred. Instead, the only requirement in Article 2.1 is for a Member applying a safeguard measure to determine that a product is being imported in "such increased quantities" and "under such conditions as to cause or threaten to cause serious injury".

10. Finally, the complainant errs by asserting that a competent authority "must demonstrate" in its published report "that unforeseen developments resulted in increased imports causing or threatening to cause serious injury to the domestic industry of the products concerned." As the United States demonstrated in the U.S. third party submission, the text of the Safeguards Agreement does not require a competent authority to demonstrate the existence of unforeseen developments in the report that contains its findings pursuant to a safeguards investigation. Instead, Articles 3.1 and 4.2(a) of the Safeguards Agreement require only that the report of the competent authorities address whether increased imports have caused or are threatening to cause serious injury to a domestic industry.

b. "[T]he effect of the obligations incurred"

11. Turning to obligations incurred, the United States recalls that Article XIX:1(a) provides that the condition of the increase in imports set out in the second clause of Article XIX:1(a) be a result of the "effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions." GATT 1994 uses the term "obligations" to refer to the substantive commitments that a Member undertakes with respect to the products of another Member under the provisions of the agreement. "Tariff concessions" refers to the Schedule of Concessions granted by a Member under Article II of GATT 1994, and in particular to commitments not to impose ordinary customs duties in excess of the amount set out in the schedule. The ordinary meaning of the term "effect" is "[s]omething accomplished, caused or produced; a result, a consequence." Thus, the "effect of obligations incurred" refers to the consequences of a Member's substantive commitments, including tariff bindings; namely, that the Member cannot take certain trade-restrictive measures.

12. In *Korea – Dairy*, which the complainant cites in its first written submission with respect to obligations incurred, the Appellate Body expressed support for our analytical approach. In that dispute, the Appellate Body reasoned that the phrase "the effect of the obligations incurred" simply means that "the importing Member has incurred obligations under the GATT 1994, including tariff concessions." Pursuant to paragraph 7 of Article II of the GATT, a Schedule annexed to the GATT is an integral part of Part I of that agreement. Thus, the Appellate Body reasoned that a tariff concession or commitment in a "Member's Schedule is subject to the obligations contained in Article II of the GATT 1994."

13. In other words, WTO obligations in the form of tariff concessions bound in a Member's Schedule under Article II of the GATT 1994 represent "obligations incurred" for purposes of GATT Article XIX:1(a). Accordingly, a Member may establish that increased imports are the "effect of obligations incurred" by identifying a commitment, such as a tariff concession, that prevents it from raising duties on the imports in question.

14. For these reasons, the United States disagrees with the complainant's interpretation of the phrase "incurred obligations" in Article XIX:1(a). The complainant's interpretation is inconsistent with the framework above as it does not recognize that a Member may show that increased imports are the "effect of obligations incurred" by simply identifying a commitment that prevents that Member from raising duties on imports. Moreover, the text of Article XIX:1(a) does not require that a Member establish a causal link, in the sense of Article 4.2(a) of the Safeguards Agreement, with the "obligations incurred" and the increased imports.

III. CONCLUSION

15. The United States welcomes the opportunity to present its views in connection with this dispute on the proper interpretation of relevant provisions of Article XIX of the GATT 1994 and the Safeguards Agreement.