

***TURKEY – ADDITIONAL DUTIES ON IMPORTS OF AIR CONDITIONING
MACHINES FROM THAILAND***

(DS573)

**RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THIRD PARTIES**

January 31, 2020

1. This submission contains the U.S. responses to written questions 1.1, 1.2 (a-c), 1.3, 1.4, 1.5, 2.3, 3.3, 3.5, 3.6, and 3.7 from the Panel.

QUESTIONS POSED BY THE PANEL

ARTICLES 8.2 AND XIX:3 “AFFECTED” MEMBERS

Q. 1.1. To all third parties: Article 8.1 requires a Member proposing to apply or extend a safeguard measure to maintain a substantially equivalent level of concessions with "the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12". Article 12.3 states that the Member proposing to apply or extend a safeguard shall provide adequate opportunity for prior consultations with those Members having a "substantial interest" as exporters.

a. To what extent does the fact that the obligation to consult is limited to the Members with a "substantial interest" define the class of Members that should be considered to be "affected" within the meaning of Article 8.1? Does that obligation impose a procedural requirement only or does it, and if so how, inform the meaning that must be given to "affected" Members?

b. Are the "affected" Members in Articles 8.1 and 8.2 the same? Why or why not?

Please explain your answers with reference to the relevant provisions of the Agreement on Safeguards.

2. The United States will address the subparts of this question in a combined response. The text and structure of the relevant provisions of both Article XIX of the GATT 1994 and the Safeguards Agreement suggest that the term “substantial interest” found both in Article XIX:2 of the GATT 1994 and Article 12.3 of the Safeguard Agreement qualifies which Members are considered “affected” Members as that term is used in Article XIX:3 of the GATT 1994 and Articles 8.1 and 8.2 of the Safeguard Agreement.”

3. According to GATT XIX:2, “[b]efore any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action.” (emphasis added).

4. Article 12.3 of the Safeguards Agreement states that a “Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the

measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.” (emphasis added).

5. This text highlights the emphasis on Members having a “substantial interest” taking part in the consultations process and the importance of the consultation provision. In fact, Article 8.1 instructs that the application of a safeguard measure be made “in accordance with the provisions of paragraph 3 of Article 12.” The consultation provision comes first in the safeguards adoption process. The consultations alert the Member taking the measure whether it can reach an accommodation with Members, or whether the Member will face the suspension of substantially equivalent concessions.

6. The consultations are only held with Members with a substantial interest. It would not make sense if a Member went through the consultation process, satisfied all members in the consultation process (which is those with a substantial interest), but then faced suspension of concessions with other Members, who did not have a substantial interest.

Q. 1.2. To all third parties:

- a. *What is the class of Members entitled to agree to "trade compensation" under the terms of the second sentence of Article 8.1?*
- b. *Is the class of Members entitled to such compensation under Article 8.1 limited to those entitled to Article 12.3 consultations with the importing Member?*
- c. *If not, what is the class of Members entitled to such compensation, and how (in the absence of Article 12.3 consultations) would such Members agree on a level of trade compensation with the importing Member?*

7. 1.2.a. The structure of the paragraph indicates that “Members concerned” in the second sentence refers back to “affected” Members in the second sentence. As explained in the prior answer, that term should be understood to mean Members with a substantial interest.

8. 1.2.b. Yes. Reading Articles 8.1 and 12.3 together, the class of Members entitled to “trade compensation” are those Members who have a “substantial interest” as identified in Article 12.3.

9. 1.2.c. See U.S. Response to Panel Q.1.2.b.

Q. 1.3. To all third parties:

- a. *If you consider that "affected" Members are all exporting Members including those without a "substantial interest", do you agree that Article 8.2 establishes that their right to suspend concessions is dependent upon the failure by a subset of Members (i.e., those with a "substantial interest") to reach an agreement in the Article 12.3 consultations with the importing Member?*

b. If so, what would be the implications of this interpretation for the right of those "affected" Members without a "substantial interest" to suspend concessions in the following situations:

- i. The importing Member and the Members with a "substantial interest" all reach an agreement after consultations conducted under Article 12.3.*
 - ii. The importing Member reaches an agreement with only certain Members with a "substantial interest" after consultations held under Article 12.3.*
10. 1.3.a. See U.S. Response to Panel Q. 1.2.
11. 1.3.b. See U.S. Response to Panel Q. 1.2.

Q. 1.4. To all third parties: Under Article XXVIII only Members holding a right to negotiate/consult (i.e., Members with an initial negotiating right, a principal supplying interest, and a substantial interest) are entitled to also withdraw concessions. Thus, the right to withdraw concessions under Article XXVIII is co-extensive with the right to participate in negotiations. Are there any reasons for or against following an analogous approach in the safeguards context which could limit the right to suspend concessions to those Members with a right to consultations?

12. The context provided by Article XXVIII of GATT 1994 supports the above interpretation that “affected” Members are those with a substantial interest.

Q. 1.5. To all third parties: Korea argues, at paragraphs 6 and 17 of its third-party submission, that one of the purposes of the suspension of concessions under Articles 8.2 and XIX:3(a) is to deter Members from imposing or extending safeguard measures and to induce the withdrawal of such measures. Do you agree that this is an objective of suspension of concessions in the Safeguards context, and further that such an objective supports a broad interpretation of the "affected exporting Members" entitled to suspend concessions? Please explain your answer.

13. The United States does not agree that one of the purposes of the suspension of concessions is to deter Members from imposing or extending safeguard measures and to induce the withdrawal of such measures. Such objectives are not found in the text of the Safeguards Agreement. The purpose of the right to suspend concessions under Article 8.2 is to allow the affected exporting Member to offset adverse effects from the application of the safeguard measure.

ARTICLES 12.3 AND XIX:2 “SUBSTANTIAL INTEREST”

Q. 2.3. To all third parties: At the oral hearing, the parties identified two factors that could serve as a basis to determine the existence of "substantial interest" for purposes of Article 12.3: share of imports and expression of interest in joining consultations. Are

***there any other factors or considerations that could also guide that determination?
Please explain your answer?***

14. Article XXVIII of GATT 1994 uses the same term “substantial interest,” and would appear to provide relevant context. Under the rules of interpretation reflected in the Vienna Convention, other portions of an agreement can serve as relevant context for interpretive issues. The following agreement text concerning Article XXVIII of GATT 1994 provides helpful guidance.

15. According to *Ad Article XXVIII of GATT 1994*, paragraph 1, note 7: “[t]he expression ‘substantial interest’ is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.”

16. The Understanding on the Interpretation of Article XXVIII of GATT 1994 states: “[w]hen a tariff concession is modified or withdrawn on a new product [i.e. a product for which three years’ trade statistics are not available] the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and *substantial interests* and the calculation of compensation shall take into account, *inter alia*, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member.” (Emphasis added.)

ARTICLES 8.2 AND XIX:3: SUBSTANTIAL EQUIVALENCE

Q. 3.3. To all third parties: What is the purpose of suspending concessions pursuant to Articles 8.2 and XIX:3(a) and does this purpose provide guidance for determining (i) the reference period for calculating the level of, and (ii) duration of suspension of "substantially equivalent concessions"?

17. The purpose of the right to suspend concessions under Article 8.2 is to allow the affected exporting Member to offset adverse effects from the application of the safeguard measure. The reference period for calculating the level of suspension of concessions should result in the affected exporting Member withdrawing a “substantially equivalent” amount in concessions.

Q. 3.5. To all third parties: A safeguard measure is an exceptional measure which addresses a significant increase in imports resulting from the agreed level of concessions. How, if at all, does this inform the identification of the relevant reference period for determining the level of substantially equivalent concessions?

18. The fact that a safeguard measure is to be used under “exceptional” circumstances does not inform the determination of the relevant reference period for calculating the level of substantially equivalent concessions. As discussed above, the relevant reference period chosen should yield a suspension of concessions substantially equal to the effect of the safeguard measure.

Q. 3.6. To all third parties: Of what relevance is the fact that Article 8.2 authorizes rebalancing with respect to the Member "applying" the safeguard measure to determining whether or not the rebalancing measure can extend beyond the end of the safeguard measure?

19. The dictionary defines “apply” as “put to use, employ.”¹ “Applying” suggests an ongoing or active application. Therefore, once a safeguard has expired, that Member would no longer be “applying” the safeguard measure and thus, the rebalancing measure cannot extend beyond the end of the expiration of the safeguard measure.

Q. 3.7. To all third parties: Does the reference to the "affected" exporting Member in Article 8.2 in any way inform the time at which the rebalancing measure must end? Can a Member remain "affected" for the purpose of Article 8.2 after the expiration of the safeguard measure?

20. See U.S. Response to Panel Q.1.1.

¹ New Shorter Oxford English Dictionary, Volume 1, p. 100.