Ukraine – Definitive Safeguard Measures on Certain Passenger Cars

(DS468)

Responses of the United States of America

to the Questions from the Panel to the Third Parties

October 15, 2014

TABLE OF REPORTS

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Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001
Argentina – Footwear (EC)(AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Argentina – Footwear (EC)(Panel)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Chile – Price Band System (Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R
EC – Export Subsidies on Sugar (Australia)(Panel)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
EEC – Bananas I (GATT)	GATT Panel Report, *EEC – Member States' Import Regimes for Bananas*, DS32/R, 3 June 1993, unadopted
Guatemala –Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000
US – Lamb (AB)	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

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US – Line Pipe (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, adopted 10 December 2003
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

ADVANCE QUESTIONS SENT TO THIRD PARTIES ON 25 SEPTEMBER 2014

C. Questions for the United States

5. The United States observes at paragraph 9 of its third party submission that "the SGA does not specify how soon a safeguard measure must be put into place, either relative to the data underlying the investigation or the date a decision is taken".

a. In the view of the United States, does the absence of any explicit obligation imply that the Member imposing SG measures has discretion as to when to impose the measures?

b. If so, is there any limitation for exercising such discretion?

c. Does the SGA authorize or require a Member that has postponed application of a SG measure to prepare and notify supplemental analyses demonstrating that its initial determinations remain valid?

1. The United States considers that the Member imposing safeguard measures has "discretion" in the sense that a Member has discretion where its behavior is not disciplined by a particular obligation in a covered agreement. That said, the United States observes that the *Agreement on Safeguards* (SGA) sets out no explicit obligation that fixes a specific time, either relative to the data in the underlying investigation or the date the decision is taken, by which a safeguard measure must be put into force.

2. However, the U.S. position does not imply that, because no explicit obligation on timing exists, any action, however far removed from the end of an investigation, is consistent with the SGA. It may well be that in a specific dispute, the complaining party will demonstrate that one or more SGA obligations has been breached under the particular facts and circumstances of that dispute. Indeed, it is entirely possible that a delay in putting a safeguard measure into place may be relevant to an assessment of whether a Member breached an SGA obligation.

3. For example, Article 7.1 of the SGA provides:

> 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 four years, unless it is extended under paragraph 2.

Thus, a Member's discretion to apply a safeguard measure is at all times limited by the requirement that such application be necessary to prevent or remedy serious injury and to facilitate adjustment. A long delay in applying a safeguard measure may be a relevant factor to consider in assessing whether a safeguard measure is indeed necessary to prevent or remedy the serious injury found by the competent authorities and to facilitate adjustment. This is true both because the long absence of the measure undercuts the supposedly urgent nature of the safeguard measure, and because, as the conditions that caused the serious injury determined by the competent authorities become more remote, it becomes more difficult to determine that a measure is necessary to prevent or remedy the particular serious injury that was previously found.

4. Because the SGA does not establish a bright line rule as to the time for putting a safeguard into effect, it would not be appropriate to create such a rule through dispute settlement.[1]

5. With regard to the Panel's question on notice requirements, the U.S. position is similar: the SGA does not explicitly require supplemental analyses or notices thereof after application of a safeguard measure has been postponed for a particular amount of time. Rather, any delay in the application of a safeguard measure, and any supplemental analysis relied upon as a basis for a safeguard measure, should be considered in the context of a particular dispute to the extent that such facts are relevant to the obligations contained in the covered agreements.

ADDITIONAL QUESTIONS FOR ALL THIRD PARTIES

1 FACTUAL OR GENERAL QUESTIONS

6. In the third parties' view, which, if any, of the documents discussed in the parties' first submissions (e.g., the Notice of 14 March 2013, the Key Findings, etc.) constitute the relevant "report"/"analysis" within the meaning of Articles 3.1 and 4.2 (c)?

6. As indicated in footnote 2 of the U.S. Third Party Written Submission, the United States does not take a position on this issue. The Panel will be best placed to apply the legal concepts (report and analysis) to the facts in this dispute. We do note that such a report/analysis need not be issued in a single document or all at once, pursuant to the terms of the relevant provisions.

2 CLAIMS UNDER ARTICLES 3.1 AND 4.2(C) OF THE SGA (CONDUCT OF INVESTIGATION & INVESTIGATION REPORT)

7. With reference to Japan's claim that not including the year 2012 in the period of investigation is a breach of Articles 3.1 and 4.2(c) of the SGA, Ukraine at paragraph 60 of its first written submission states that:

> **"[…] *When* a Member is to impose the measure – whether immediately following termination of the investigation or at a later date is not determined and is a matter that does not concern the "investigation" but only the application of the measure. Japan failed to raise the issue under the potentially relevant provisions relating to the application of the measure, like Articles 5 or 7 of the Agreement on Safeguards, and is trying to read obligations into Article 3.1 that are simply not there. Japan's claim under Article 3.1 is without merit."**

Could the third parties please comment on this statement?

[1] *See* DSU, arts. 3.2 ("Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."), 19.2 ("in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements").

7. Ukraine argues that "Japan is in fact complaining about the fact that there was a gap between the date of the termination of the investigation and the date of application of the measure."[2] The United States has expressed a similar understanding of the complaint underlying many of Japan's arguments.[3] One way to look at the purported problem is that the application of a safeguard measure cannot be valid (*i.e.*, consistent with the covered agreements) when it is untimely—that is, so much delay follows even a valid investigation. Another way of looking at the same purported problem is that a safeguard measure, even if not untimely, cannot be supported by an investigation that fails to consider the most recent information. These are essentially two sides of the same coin, and the United States does not consider that one or the other way of looking at it is the only correct way; rather, Japan is entitled to formulate its claims and arguments at it chooses (and bears the burden of proving those claims). Finally, the United States takes no position on whether Ukraine breached its obligations under Articles 3, 5, or 7 of the SGA in this dispute.

8. Could an unpublished investigation report that otherwise meets the requirements of Articles 3.1 and 4.2(c) serve as a basis for a panel's analysis of claims under other provisions of the SGA?

8. Yes, the United States considers that an unpublished report that otherwise meets the requirements of Articles 3.1 and 4.2(c) can serve as a basis for a panel's analysis of claims under the provisions of the SGA. The United States notes that the failure to publish the report would be inconsistent with the obligations to publish under Articles 3.1 and 4.2(c). But in that situation, a reviewing panel would not be required to proceed as if the competent authorities undertook no analysis, which would effectively ensure consequential breaches of many substantive obligations.

9. Reasoning similarly, in *Chile – Price Band System*, the panel found that a series of minutes were not "published" and therefore were not consistent with the obligation to publish a report in Article 3.1. Nevertheless, the panel found that it could examine Argentina's substantive claims on the basis of the unpublished but public minutes and did just that.[4]

10. However, this does not mean that a Member in the context of litigation can point to any unpublished document as part of the report of the competent authorities under Articles 3.1 and 4.2(c). A fact-specific inquiry is required to determine whether a document genuinely served as a part of the report of the competent authorities.

9. With reference to the March 2012 hearing, could the third parties which participated in the public hearing please comment on:

a. whether, as suggested by the agenda provided in January 2012 (Exhibit UKR-2), they were granted the opportunity to present evidence and views, and to submit

[2] Ukraine First Written Submission, para. 60.

[3] *See* U.S. Third Party Written Submission, paras. 8-9.

[4] *Chile – Price Band System (Panel)*, paras. 7.127-7.131.

their views, *inter alia*, as to whether or not the application of a safeguard would be in the public interest;

b. whether other parties were present at the meeting and presented evidence and views and whether the relevant third parties to this dispute had an opportunity to respond to the presentations of other interested parties; and

c. whether the hearing was the only occasion on which the relevant third parties received evidence and views from other parties and could respond to the presentations of other parties?

11. The United States did not participate in the March 2012 hearing. Accordingly, the United States has no comments on this question at this time.

10. The record suggests that between 2 July 2011 and 16 August 2011 Ukraine's Ministry of Economic Development and Trade considered written comments on the initiation of investigation. Could those third parties which were interested parties during the investigation please provide further information about any opportunities granted to them to provide comments in writing and receive written comments provided by other interested parties? Could the third parties also address how these written comments relate to Ukraine's obligations under Article 3.1 of the SGA? Were there any subsequent opportunities for the parties to receive and provide written comments?

12. The United States did not participate as an interested party during the investigation. Accordingly, the United States has no comments on this question at this time.

11. At paragraph 58 of its first written submission, Ukraine argues that there is no obligation under the SGA to continue to update the information following the end of the period of the investigation and certainly not following the end of the investigation. Could the third parties please comment on this statement?

13. The United States agrees that there is no obligation under the SGA to continue to update information following the end of the period of investigation or more specifically following the conclusion of the investigation.

12. With reference to paragraph 62 of Ukraine's first written submission, could the third parties please comment on Ukraine's statement that the publication requirement in Article 3.1 arises only at the time of adoption of a SG measure, and not before that time?

14. As Ukraine recognizes,[5] Article 4.2(c) provides that "competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined." Ukraine further recognizes this "express link" between Articles 3 and 4.2(c).[6] Similarly, the Appellate

[5] Ukraine First Written Submission, para. 63.

[6] Ukraine First Written Submission, para. 63.

Body expressed its view that Article 4.2(c) is "an elaboration of the requirement set out in Article 3.1, last sentence, to provide a 'reasoned conclusion' in a published report."[7]

15. On the basis of the link between Articles 3 and 4.2(c), Ukraine argues that the obligation to publish the relevant "report promptly is triggered only by the adoption of the measure."[8] However, Ukraine offers no support or reasoning for that position, and the United States finds none.

16. Neither Article 3 nor Article 4 addresses adoption of a measure. Rather, Article 3 is entitled "Investigation" and Article 4 is entitled "Determination of Serious Injury or Threat Thereof." Article 5, entitled "Application of Safeguard Measures," makes no mention of any obligation to publish a report. Thus, the United States is not aware of any link in the text of the SGA between the obligation for competent authorities to publish a report—or the particular obligation that the report be published "promptly"—and the application of the safeguard measure.

17. Moreover, Ukraine's position implies that a Member could conduct an investigation and never publish a report of its competent authorities' findings if it opted not to apply a safeguard measure, whether because the investigation determined that the conditions necessary to impose a safeguard measure were not present or for some other reason. But SGA Articles 3.1 and 4.2(c) do not condition the obligation to "publish" a report and to do so "promptly" on whether the competent authorities made affirmative findings or whether the Member subsequently decided to impose a safeguard measure. It is also worth noting that the pendency of an investigation and uncertainty as to the outcome may themselves distort trade. If the competent authorities could withhold their report indefinitely, the trade distorting effects of their silence would last equally long.

18. In the U.S. view, "promptly" in Article 4.2(c) is best understood as referring to the determination of whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of the SGA. Article 4.2(a) provides obligations in the investigation for this purpose (*i.e.*, "to determine whether increased imports…"). Subparagraph (b) then sets out requirements (and prohibitions) regarding "[t]he determination referred to in subparagraph (a)." It is in this context that subsection (c) requires prompt publication of a detailed analysis of the case under investigation. Thus, the determination described in Article 4 resulting from the investigation described in Article 3 must be supported by a promptly published report. Accordingly, the term "promptly" is best understood as with reference to the determination following the investigation.

19. The United States does not take a position on whether Ukraine's publication of the relevant report was sufficiently prompt in this case. Whether publication is sufficiently prompt in any case is necessarily a fact-specific inquiry that must take account of the various

[7] *US – Steel Safeguards (AB)*, para. 289.

[8] Ukraine First Written Submission, para. 63.

circumstances of the dispute, including the potential need to undertake an analysis of whether a safeguard measure is necessary in conjunction with the serious injury determination.

14. Do the third parties agree with Ukraine that in relation to an injury analysis, publication of indexed figures rather than absolute ones is sufficient to meet the requirements of Articles 3.1 and 4.2(c) of the SGA in a situation where there are concerns about the confidentiality of information concerning the domestic industry?

20. Yes, the United States considers that figures that have been indexed to protect confidential information can be sufficient to meet the requirements of Articles 3.1 and 4.2(c).

3 CLAIMS UNDER ARTICLE XIX: 1(A) OF THE GATT 1994 AND ARTICLES 3.1, 4.2(C) 11.1(A) OF THE SGA (DETERMINATION ON UNFORESEEN DEVELOPMENTS)

16. With reference to paragraph 112 of Japan's first written submission, do the third parties agree that in order to apply a SG measure, a Member must demonstrate that an increase in imports has taken place as a result of an unforeseen development "modifying the competitive relationship between the imports and domestic products", and that any corresponding decrease in domestic sales must also have been caused by the change in the competitive relationship?

21. The United States does not agree that a Member must demonstrate that an increase in imports has resulted from an unforeseen development "modifying the competitive relationship between the imports and domestic products." In addition, the United States does not agree that any corresponding decrease in domestic sales must also have been caused by the change in the competitive relationship.

22. The requirement that the increased imports result from unforeseen developments stems from Article XIX of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"); the SGA does not reference unforeseen developments. Article XIX contains no requirement that the unforeseen developments modify the competitive relationship between the imports and domestic products. Furthermore, the Appellate Body has not in past reports examined whether the identified unforeseen developments modify the competitive relationship between imports and domestic products.

23. Japan cites no authority for this formulation in paragraph 112 of its first written submission. Elsewhere, Japan asserts that "the Panel in *US – Lamb* suggested that the 'unforeseen developments' in Article XIX:1(a) of the GATT 1994 are events that modify the competitive relationship between imported and domestic products to the advantage of the former."[9] Japan reproduces the panel's observation in *US – Lamb* that:

> [W]hile the Working Party in Hatter's Fur did not view fashion changes over time per se as an "unforeseen development", it nevertheless accepted that the scale of

[9] Japan First Written Submission, para. 62.

> the particular change in fashion and its duration as well as the degree of its impact on the competitive situation was unforeseen in that case.[10]

24. The language relied on by Japan does not support the requirement Japan suggests. Rather, the panel's findings in *US – Lamb* support the notion that events that modify the competitive relationship *may* be considered unforeseen developments within the meaning of Article XIX. This does not mean, however, that *only* events demonstrated to modify the competitive relationship between imported and domestic products can be considered unforeseen developments.

25. Because there is no requirement to demonstrate a change or modification in the competitive relationship as a separate element, there can be no requirement to demonstrate that "the decrease in domestic sales leading to injury also has been caused by the change in the competitive relationship."[11] Indeed, there is not even a requirement in the Safeguards Agreement that there be a "decrease" in domestic sales.[12]

17. With reference to paragraph 78 of Ukraine's first written submission, do the third parties agree that the "unforeseen developments" must be unforeseen at the time when tariff concessions were made?

26. Yes, the United States agrees that "unforeseen developments" must be unforeseen at the time when the tariff concessions were made. The United States agrees with the Appellate Body's statement in *Argentina – Footwear (EC)* that safeguard measures "are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation."[13]

4 CLAIMS UNDER ARTICLES 2.1, 3.1, 4.2(A), 4.2(C) AND 11.1(A) OF THE SGA AND ARTICLE XIX: 1(A) OF THE GATT 1994 (DETERMINATION ON INCREASED IMPORTS)

18. Could the third parties please explain what the relevant stage is in the process leading up to the application of a SG measure by reference to which the Panel should determine whether the POI was the recent past – the date of the beginning of the investigation, the date of the completion of the investigation, the date of adoption of a SG measure, the date of its entry into force, or some other date?

27. Whether a POI was the recent past, and the implication of that inquiry for assessing an alleged breach under the covered agreements, depends on the facts and circumstances of a particular dispute. Any of the dates identified by the Panel may be relevant to determining

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[10] Japan First Written Submission, para. 62 (quoting *US – Lamb (Panel)*, para. 7.24).

[11] Japan First Written Submission, para. 112.

[12] *See* SGA, art. 2.1 (requiring an increase in imports, absolute or relative to domestic production).

[13] *Argentina – Footwear (EC)(AB)*, para. 93.

whether the POI was the recent past in a given dispute. The POI selected by the investigating authority must be sufficiently *recent* to provide a reasonable indication of *current* trends. As the Appellate Body noted in *Argentina – Footwear (EC)* regarding increasing imports:

> [T]he use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine *recent* imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[14]

19. To the extent relevant information is available, could the third parties indicate what in the practice of their competent authorities is the average/a typical time gap between the decision to impose a SG measure and the actual application of the same SG measure?

28. The United States has not imposed a safeguard under the SGA in over a decade, and even before that did so sparingly. An average calculated from relatively few, old data points would not necessarily provide a "typical" time period between a decision to impose a safeguard and application of the safeguard.

29. The United States can offer a general sense of the timelines prescribed by current U.S. law. In the United States, after the U.S. International Trade Commission ("USITC") makes a serious injury determination and, if the determination is in the affirmative, a recommendation regarding a remedy, the President decides whether a safeguard measure will be imposed. Under U.S. law, the safeguard measure generally shall take effect within 15 days after the President proclaims the action. However, where the President seeks to negotiate with foreign counterparts on limitations on exports from foreign countries of the subject product to the United States, the measure can take effect as much as 90 days after the President proclaims the action. Thus, under U.S. law, a safeguard measure would normally take effect between 15 and 90 days after the decision to impose the measure.

20. With reference to paragraph 118 of Ukraine's first written submission, could the third parties please comment on whether it is necessary or appropriate to consider an increase in imports relative to domestic consumption in the context of a SG determination on increased imports?

30. The SGA does not preclude consideration of an increase in imports relative to domestic consumption in the context of an increased imports determination. However, an increase in imports relative to consumption will not, alone, satisfy the increased imports condition in Article 2.1 of the SGA. Rather, in the context of a determination on increased imports under Article 2.1, the competent authorities must find that imports have increased either in "absolute [terms] or relative to domestic production."

31. Separately, in the context of evaluating the relevant factors having a bearing on the situation of the industry, Article 4.2 contemplates evaluation, in particular, of *inter alia* "the

[14] *Argentina – Footwear (EC)(AB)*, para. 130 (emphasis added).

share of the domestic market taken by increased imports." A change in domestic market share generally involves consideration of an increase in imports relative to domestic consumption. However, the United States allows for the possibility that a methodology could potentially exist in a given scenario that would allow for evaluation of the share of the domestic market taken by increased imports without considering an increase in imports relative to domestic consumption (*i.e.*, where the two are not one and the same). At the very least, because Article 4.2(a) requires competent authorities to evaluate "all relevant factors," it may be necessary to consider an increase in imports relative to domestic consumption where it is a relevant factor bearing on the situation of the industry.

21. The facts of this case suggest that Ukraine decided to impose a SG measure well before it brought it into effect, and the parties and third parties have addressed how such a situation could be analysed under the provisions of the SGA. To explore this issue further, the Panel would like to posit a similar scenario and seeks the third parties' views on it. Assuming that the SGA permits suspension of a SG measure, what if a Member brings into force a SG promptly after its adoption, but then immediately suspends it for, say, a year? In its practical effect, a one-year suspension does not appear to differ much, if at all, from a situation where an adopted measure is not brought into effect until after one year has elapsed. Would the legal analysis of a "suspended application" approach present the same or different legal problems under the SGA as/from the "deferred application" approach?

32. As an initial matter, the United States notes that Ukraine has given seemingly inconsistent statements about when it decided to impose a safeguard measure. Article 12.1(c) of the SGA requires a Member to immediately notify the Committee on Safeguards upon taking a decision to apply or extend a safeguard measure. Ukraine argues that publication of the measure constitutes taking a decision to apply a safeguard measure, and that it complied with Article 12.1(c) by notifying the Committee seven days after its March 14, 2013, publication.[15] This implies that it decided to impose a safeguard measure on March 14, 2013. However, a few sentences earlier, Ukraine states:

> The Decision by the Commission No. SP-275/2012/4423-08 of 28 April 2012 on the Application of Safeguard Measures on the Imports of Motor Cars into Ukraine Regardless of the Country of Origin or Export, which outlines the finding of serious injury or threat thereof caused by increased imports as well as the taking of a decision to apply or extend a safeguard measure, was published in the Ukrainian official journal on 14 March 2013.

This statement suggests that Ukraine decided to impose a safeguard measure no later than April 28, 2012.

33. In any event, the United States considers that the Panel's suspended application approach is a useful tool for assessing a scenario in which one year has elapsed between the taking of a decision to apply a safeguard measure and the effective date of the measure. However, the

[15] Ukraine First Written Submission, paras. 209, 213-217.

United States does not dismiss the possibility that the legal problems presented by these two scenarios may not be identical. For example, application of a safeguard measure following a suspension may be viewed as a *de facto* additional application of the measure. Article 7 of the SGA contains certain restrictions on re-applications of safeguard measures on the same products, including preclusion of application where a safeguard measure has been applied on the same product more than twice in the preceding five-year period.[16]

5 CLAIMS UNDER ARTICLES 2.1, 3.1, 4.1(A), 4.1(B), 4.2(A), 4.2(B), 4.2(C) AND 11.1(A) OF THE SGA AND ARTICLE XIX: 1(A) OF THE GATT 1994 (DETERMINATION ON SERIOUS INJURY AND/OR THREAT THEREOF)

22. Japan at paragraph 270 of its first written submission argues that "Article 4.2(a) requires the competent authorities to analyse 'intervening trends' in the injury factors". Could the third parties please address whether, and if so, how Article 4.2(a) can be interpreted to require the competent authorities to analyse intervening trends in the injury factors?

34. Article 4.2(a) requires the competent authorities to "evaluate all factors of an objective and quantifiable nature having a bearing on the situation of that industry." The United States agrees with the panel in *Argentina – Footwear (EC)* that "[a]n end-point-to-end-point comparison, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors."[17] End points must be understood in context, and without evaluating the intervening data,[18] there is no way of understanding the proper context, and therefore no way of establishing confidence in the accuracy of the meaning or importance ascribed to the end points. Finally, the United States notes that, where evaluation of intervening data suggests a different conclusion than the one reached by solely evaluating the endpoints, a "reasoned conclusion" within the meaning of Article 3.1 would need to address the intervening data.

6 CLAIMS UNDER ARTICLES 2.1, 3.1, 4.1(A), 4.1(B), 4.2(A), 4.2(B), 4.2(C) AND 11.1(A) OF THE SGA AND ARTICLE XIX: 1(A) OF THE GATT 1994 (DETERMINATION ON THE CAUSAL LINK)

23. Japan states at paragraph 292 of its first written submission that by "merely stating that serious injury to the domestic industry has not been caused by other factors, without providing an analysis and assessment of what those other factors are, and *a fortiori* the nature and extent of the injurious effects of these other factors", Ukraine failed to carry

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[16] *See* SGA, art. 7.5, 7.6.

[17] *Argentina – Footwear (EC)(Panel)*, para. 8.217. The United States understands Japan's reference to "injury factors" to mean the factors that must be evaluated under Article 4.2(a).

[18] In previous panel and Appellate Body reports, the term "intervening trends" has been contrasted with a simple endpoint-to-endpoint analysis. *See Argentina – Footwear (EC)(AB)*, para. 129; *US – Steel Safeguards (AB)*, para. 354. Thus, the United States understands these reports to have found that the SGA obligated the competent authorities in those disputes to evaluate data between the end points, including trends exhibited by that data. The United States notes that intervening data may exhibit "trends," but may also have other significance (including by exhibiting no trend).

out the non-attribution analysis required by Article 4.2(b) of the SGA. Do the third parties agree with Japan that Article 4.2(b) imposes an obligation to provide "an analysis and assessment of what those other factors are and … the nature and extent of the injurious effects of these other factors", and if so, could they provide the textual basis for this view?

35. Article 4.2 (b) indicates that "[w]hen 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." According to the Appellate Body, "the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports."[19]

36. Neither the SGA nor Article XIX: 1(A) of the GATT 1994 provide any particular methodology that competent authorities must use in examining factors other than increased imports. In particular, the Appellate Body has not found the SGA to require that a competent authority "quantify" the extent of injury attributed to imports or other injurious factors as part of its non-attribution analysis under Article 4.2(b).[20] In fact, the Appellate Body has specifically stated that it leaves "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)."[21] Accordingly, the Appellate Body has recognized that the SGA leaves the development of appropriate analytical methodologies under Article 4.2(b) to the discretion of the competent authorities.

7 CLAIMS UNDER ARTICLES 3.1, 4.2(C), 5.1, 7.1, 7.4 AND 11.1(A) OF THE SGA AND ARTICLE XIX: 1(A) OF THE GATT 1994 (NECESSITY OF THE SG MEASURE ADOPTED)

24. Could the third parties please comment on Japan's statement at paragraph 305 of its first written submission that "Ukraine did not progressively liberalize the measure in the initial decision imposing the safeguard measures as reflected in the Notice of 14 March 2013 … an *a posteriori* decision does not render the measure consistent with Article 7.4 of the Agreement on Safeguards"?

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[19] *US – Steel Safeguards (AB)*, paras. 451 (internal quotations omitted). *See also ibid.*, para. 487 ("In *US – Line Pipe*, we also found that, in the context of 'non-attribution', competent authorities: (i) 'must "establish explicitly" that imports from sources covered by the measure "satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*"'; and (ii) must provide a 'reasoned and adequate explanation of how the facts support their determination'." (internal citations and footnotes omitted)); *US – Line Pipe (AB)*, para. 217. The Appellate Body, however, has consistently indicated that imports need not be the "sole cause of serious injury" under Article 4.2(b). *US – Line Pipe (AB)*, para. 209. *See also US – Wheat Gluten (AB)*, para. 67; *US – Steel Safeguards (AB)*, para. 488 ("In *US – Wheat Gluten*, we found that 'the term "causal link" denotes … a relationship of cause and effect' between 'increased imports' and 'serious injury'. The former—the purported cause—contributes to 'bringing about', 'producing' or 'inducing' the latter—the purported effect. The 'link' must connect, in a 'genuine and substantial' causal relationship, 'increased imports', and 'serious injury'." (internal citations omitted)).

[20] *See, e.g., US – Line Pipe (AB)*, paras. 200-217; *US – Wheat Gluten (AB)*, paras. 60-92.

[21] *US - Lamb (AB)*, para. 178.

a. Does Article 7.4 preclude liberalization through decisions post-dating the initial decision to impose a SG measure?

37. Article 7.4 requires progressive liberalization but does not reference the initial decision to impose a safeguard measure. Therefore, nothing in Article 7.4 precludes liberalization through a decision post-dating the initial decision to impose a safeguard measure.

b. Would a violation of Article 12.2 of the SGA due to a failure to provide a timetable for the progressive liberalization necessarily result in a consequential violation of Article 7.4?

38. No. The United States considers that the Articles 7.4 and 12.2 contain distinct obligations, and a breach of Article 12.2 does not necessarily result in a consequential breach of Article 7.4.

8 CLAIMS UNDER ARTICLES 12.1 AND 12.2 OF THE SGA (IMMEDIACY OF NOTIFICATION & INFORMATION NOTIFIED)

25. Could the third parties please provide their understanding as to what constitutes a "finding" within the meaning of Article 12.1(b) that must be notified to the WTO?

39. Article 2.1 of the SGA provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

Article 4 further describes the requirements surrounding a determination of "whether increased imports have caused or are threatening to cause serious injury to a domestic industry."

40. Article 12.1(b) requires a Member to notify the Committee on Safeguards immediately upon making a finding of serious injury or threat thereof caused by increased imports. The United States considers that the determination referenced in Article 2.1 as a condition for applying a safeguard measure and further elaborated upon in Article 4 serves as the "finding" that must be notified pursuant to Article 12.1(b).

26. Could the third parties please address whether Members are required to make a "finding of serious injury or threat thereof caused by increased imports" that is separate from their "decision to apply or extend" a SG measure?

41. Members must make a finding of serious injury or threat thereof caused by increased imports in order to apply a safeguard measure. If such a finding has been made, a Member must separately decide to apply (or extend) a safeguard measure, which necessarily must consider to what extent, if at all, a safeguard measure is necessary to prevent or remedy serious injury and to

facilitate adjustment.[22] However, nothing prevents a Member from rendering these decisions in the same document or at the same time.[23]

42. Similarly, the Article 12.1(b) obligation to notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports is distinct from the Article 12.1(c) notification obligation upon taking a decision to apply or extend a safeguard measure.[24] However, nothing prevents a Member from complying with both obligations in a single notification if that notification can be characterized as immediate with respect to both occurrences (*i.e.*, the finding of serious injury caused by increase imports and the decision to apply or extend a safeguard measure), under the particular circumstances of the case.

27. In the law and practice of your competent authorities, how does each of the actions as described in Articles 12.1 (b) and (c) of the SGA take place in practical terms? In particular, please describe, briefly, the following:

a. whether the actions as described in Articles 12.1(b) and (c) are undertaken by the same authority;

43. In this response and the responses to the other sub-questions under Question 27, the United States describes as a general matter U.S. practice under applicable domestic law, which is contained mostly in 19 U.S.C. §§ 2252-2253. Under U.S. law, there is not a single authority that takes the actions described in Articles 12.1(b) and (c). The USITC makes the finding of serious injury or threat thereof caused by increased imports. Under U.S. law, the USITC is required to recommend a remedy to the President if it makes an affirmative finding of serious injury or threat thereof caused by increased imports. The President then makes the decision on whether to apply an action and the type, amount, and duration of the action, after taking into account the recommendation of the USITC and certain statutory factors and considerations.

b. whether the actions as described in Articles 12.1(b) and (c) take place at the same point of time during the investigation; if the actions are not taken at the same point of time, what is the legally allowed time-period between these two actions? What is the normal period of time between these actions in practice?

44. Under U.S. law, the actions described in Articles 12.1(b) and (c) take place at different times. The President generally is required to make a decision on whether to apply a safeguard measure within 120 days of the day on which the USITC makes an affirmative determination of serious injury or threat thereof caused by increasing imports. That 120 day period normally consists of (1) the 60 days that the USITC has in which to prepare and transmit its report to the

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[22] SGA, art. 5.1.

[23] *See Dominican Republic – Safeguard Measures*, fn 516 ("Depending on the mechanism used by each Member for the imposition of safeguard measures, the time of the event referred to in [the 12.1(b)] notification (finding of the existence of serious injury or threat of serious injury) may or may not coincide with the moment at which the definitive measure is adopted.").

[24] *US – Wheat Gluten (AB)*, para. 124 (stating that "the obligations set forth under Articles 12.1(b), 12.1(c), and 12.2…[a]lthough related, are discrete").

President after making an affirmative injury determination, and (2) the 60 days that the President has to make his decision after receiving the USITC's report containing an affirmative injury determination. However, this 120-day period may be longer or shorter under certain circumstances.[25]

c. whether the "finding of serious injury or threat thereof caused by increased imports" takes the form of a legally binding decision that has to be published; if the "finding of serious injury or threat thereof caused by increased imports" does not take the form of a legally binding decision that has to be published, does it mean that such a "finding" is considered as confidential as a matter of your domestic law?

45. As a general matter, under U.S. law the USITC must submit a report to the President whenever it makes an injury determination (affirmative or negative) under the U.S. safeguard law, and that report must include the USITC's determination and an explanation of the basis for the determination as well as certain additional findings if the determination is in the affirmative. U.S. law requires that the USITC, after submitting its report to the President, "shall promptly make it available to the public" (with the exception of confidential information) "and cause a summary thereof to be published in the Federal Register."

46. The USITC injury finding is not confidential. The USITC Commissioners vote on their determination at a previously noticed meeting that is open to the public and held in accordance with the "Government in the Sunshine Act." The USITC also generally issues a news release announcing the decision shortly after the vote and posts the news release on its website.

d. if a separate "finding of serious injury or threat thereof caused by increased imports" is made, whatever its internal legal status may be and whether or not it has been published, would that finding have to be notified under Article 12.1(b)?

47. U.S. practice has been to notify the Committee on Safeguards promptly after the USITC announces its vote on serious injury or threat thereof caused by increased imports. The United States has then provided supplemental notifications thereafter to communicate all pertinent information as the process continues.

9 CLAIMS UNDER ARTICLE 12.5 (NOTIFICATION TO COUNCIL FOR TRADE IN GOODS)

28. With reference to paragraph 244 of Ukraine's first written submission, could the third parties please comment on whether the concept of "estoppel" and the concept of "harmless error" can be used in WTO dispute settlement, and in particular, in this case?

48. There is no basis for attempting to import into WTO dispute settlement proceedings legal concepts with no grounding in the DSU. The DSU contains no mention of estoppel or harmless

[25] For example, it could be shorter if a provisional safeguard measure is in place (so as to meet the 200-day limit on the duration of a provisional safeguard measure), and it could be longer if the President requests a supplemental report from the USITC.

error. Article 3.2 provides that WTO dispute settlement "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." It further provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Neither estoppel nor harmless error is provided for in the DSU or the covered agreements, and neither concept is a customary rule of interpretation of public international law. Accordingly, alleged breaches of the covered agreements must be assessed based on the text of those agreements, and application of a concept of estoppel or harmless error, to the extent it led to a different result, would add to or diminish the rights and obligations provided in the covered agreements.

49. Given this legal framework, it is not surprising that neither the Appellate Body nor any panel has previously applied the concept of estoppel as advocated by Ukraine in this proceeding. Indeed, previous panels have expressed skepticism about whether estoppel is applicable in the WTO dispute settlement context, noting that "it is not mentioned in the DSU or anywhere in the *WTO Agreement*."[26] The lack of any textual basis for importing the principle of estoppel is further emphasized by the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past. In *EEC – Bananas I (GATT)*, for example, the panel stated that estoppel can only "result from the express, or in exceptional cases implied, consent of the complaining parties."[27] In *EC – Asbestos* and *Guatemala – Cement II*, by contrast, the panels stated that estoppel is relevant when a party "reasonably relies" on the assurances of another party, and then suffers negative consequences resulting from a change in the other party's position.[28] Ukraine does not specify its understanding of the concept. These inconsistencies illustrate the dangers of seeking to import legal concepts not contained in the text of the DSU, which reflects the principles agreed to by all Members.

50. Similarly, the United States is not aware of any application by a panel or the Appellate Body of the concept of harmless error as advocated by Ukraine in this proceeding. Indeed, previous panels have refused to apply a theory of harmless error.[29] To the contrary, a panel has previously stated that, "if a Member has violated a WTO obligation which is phrased as a categorical rule, an assertion that the violation was merely a harmless error is irrelevant."[30]

51. Because these concepts are not provided for in the DSU or the covered agreements, they have no use with respect to this dispute, in particular. Ukraine argues that, if it violated Article 12.5 by failing to notify consultations with Japan, then Japan too has violated Article 12.5.[31] According to Ukraine, by virtue of having itself failed to comply with Article 12.5, Japan is

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[26] *EC – Export Subsidies on Sugar (Australia) (Panel)*, para. 7.63.

[27] *See Argentina –Poultry Anti-Dumping Duties*, para. 7.38 (quoting *EEC –Bananas I (GATT) (Panel)*, para. 361).

[28] *See EC –Asbestos (Panel)*, para. 8.60; *Guatemala –Cement II*, paras. 8.23-8.24.

[29] *See Argentina – Ceramic Tiles*, paras. 6.102-6.105.

[30] *Guatemala – Cement II*, para. 5.144.

[31] Ukraine First Written Submission, para. 244.

estopped from claiming a violation on the part of Ukraine. There is no basis in the text of the DSU or the covered agreements for this estoppel argument.

52. Ukraine further argues that, because such notifications are meant for the non-consulting Members rather than the other consulting Member, who presumably is aware of the outcome of the consultations, a failure to notify the Committee constitutes harmless error with respect to Japan. Again, the United States sees no basis in the text of the DSU or the covered agreements for this harmless error argument.