Ukraine – Definitive Safeguard Measures on Certain Passenger Cars

(DS468)

Executive Summary of the Arguments of
the United States of America

October 23, 2014

I. VIEWS EXPRESSED IN THE U.S. THIRD PARTY SUBMISSION

1. The report that must be published by the competent authorities pursuant to SGA Articles 3.1 and 4.2(c) serves an essential role in the review of safeguard measures. It allows other Members to understand why a safeguard measure has been adopted, and—in the event of a WTO dispute settlement proceeding—allows a WTO panel to assess whether a safeguard action complies with the substantive obligations contained in GATT Article XIX and the SGA. Not surprisingly then, published reports must address in considerable detail a broad range of issues, including unforeseen developments under GATT Article XIX:1(a), the rationale for finding the requisite increased imports based on consideration of the entire period of the investigation rather than simply comparing end points. The published report must set out in equal detail the competent authority's evaluation of all relevant factors and a reasoned explanation for concluding that the domestic industry suffered serious injury or the threat thereof, that the increased imports ***caused*** the serious injury or threat thereof, and that other factors causing injury to the domestic industry are not attributed to the increased imports.

2. The report published by Ukraine is concise in the extreme. Furthermore, in many instances, Ukraine's written submission provides justifications for its determinations that appear nowhere in its published report. The Appellate Body has rejected a panel's reliance on supplemental information provided during dispute settlement proceedings.

3. Having recognized the considerable importance of a thorough, reasoned published report, the United States notes that some conclusions and sets of facts require more explanation than others, and the length of an explanation with respect to any single issue should not be dispositive. Although panels should not be put in the position of having to infer the competent authority's reasoning, they also need not ignore reality or invent ambiguity or complexity where none exists.

4. The SGA does not specify how soon a safeguard measure must be put into place. If a Member were within its rights to impose a safeguard measure for four years, it would be odd to suggest that delaying application of the measure for a year and putting it in place for three years in and of itself creates an inconsistency. Delay following a decision to impose safeguard measures may in some instances reflect desirable behavior. A Member may be working to address concerns raised in consultations following notification of the proposed measures. Thus, requiring a Member to choose between (1) implementing a safeguard measure during a very short window after the decision is taken, or (2) losing the right to impose it at all, could cause a Member to take more restrictive measures than it would otherwise. On the other hand, significant delay in imposing safeguard measures tends to undercut the notion that such measures constitute an "emergency action" necessary to prevent or remedy serious injury and to facilitate adjustment. This is equally true where an investigation has resulted in a finding of a threat of serious injury, which requires that the anticipated serious injury be "imminent," or "on the very verge of occurring." Extended uncertainty as to the timing and degree of the final safeguard measure may disrupt trade more than actual imposition of a measure.

5. It is not clear that a Member can hold Article 12.3 consultations after sharing the ***information*** that Article 12.2 requires in notifications under Article 12.1(b) and (c), even if it has not actually submitted its Article 12.1(b) and (c) notifications. Article 12.2 allows the Council for Trade in Goods or the Committee on Safeguards to request such additional information as they may consider necessary. Thus, the "information provided under paragraph 2" presumably would include any information provided in response to such a request. However, Ukraine gives

no indication of how any such request could be made in the absence of Article 12.1(b) and (c) notifications. Therefore, even if documentation provided to interested Members (such as the Key Findings) did contain all pertinent information, including the listed mandatory components, it is still not clear that it would contain "the information provided under paragraph 2."

6. In addition, Japan argues that the information shared by Ukraine prior to April 19, 2012, (*i.e.*, the Key Findings) lacked much of what is required under Article 12.2. Japan appears to be correct that neither Ukraine's written submission, nor the Key Findings that spurred the April 19, 2012, consultations, indicate that the proposed date of introduction of the safeguard, the expected duration of the safeguard, or the timetable for progressive liberalization was provided to Japan in advance of those consultations.

7. The United States has concerns with Japan's challenge to the validity of the April 19, 2012, consultations on the basis of the change in one duty rate from 15.1 percent (the rate for cars with larger engines proposed prior to consultations) to 12.95 percent (the rate for those cars that was eventually applied). The proposed measure on which the Members consult need not be identical in every respect to the one that is eventually applied. Prior consultations allow interested Members to seek, *inter alia*, modification of the measure. Indeed, Ukraine implies that it lowered the duty rate as a result of the consultations it held with Japan. Precluding modification of a measure in response to concerns expressed by interested Members (or always requiring one additional round of consultations that leads to no changes) would diminish rather than preserve or enhance the value to interested Members of Article 12.3 consultations. Because modification of a measure would subject the Member implementing the safeguard to either a finding that it breached its Article 12.3 obligations, or the delay and expense of additional consultations, Japan's interpretation would create a significant disincentive to modification of measures in the interested Member's favor, including a reduction of duty rates. Thus, the modification of the duty rate should not support a finding that the April 19, 2012, consultations were inconsistent with Article 12.3.

8. Japan claims that Ukraine breached its obligations under Article 7.4 because it did not provide for a progressive liberalization of the measure when the safeguard was initially imposed as reflected in the March 14, 2013, published notice of the decision. Japan relies on the same facts to claim that Ukraine breached its notification obligations under Article 12.2 of the SGA. Ukraine argues that the substantive obligation under Article 7.4 to progressively liberalize the safeguard measure is distinct from the procedural obligation under Article 12 to notify the timetable for liberalization. Ukraine maintains that it complied with its obligations under Article 12.1(b) and (c) through its March 21, 2013, notifications, but it acknowledges that it did not notify any timetable for progressive liberalization until March 2014. The United States notes that Article 12.2 explicitly states that notifications under Article 12.1(b) and (c) "shall include," *inter alia*, a "timetable for progressive liberalization." These requirements serve an import transparency and information purpose, including by allowing for meaningful consultations.

II. VIEWS EXPRESSED IN THE U.S. ORAL STATEMENT

9. The EU suggests that BCI procedures should be substantially similar across disputes under the AD Agreement, the SCM Agreement, and the SGA. These panel proceedings are not an appropriate forum for pursuing such an objective. Any systemic solution should be sought through the WTO bodies designed to solicit and reflect the views of all Members.

10. The critical point with respect to paragraph 1, sentence 3 of this Panel's BCI procedures is whether the competent authorities treated the information as BCI, either because they accepted the submitter's designation or because they resolved a challenge in favor of confidentiality. If that is the case, a panel should, in the first instance, follow the designations of the competent authorities. Accordingly, this sentence could be clarified by substituting the words "treated by" for the words "submitted to" so that it reads, in relevant part: "BCI shall include information that was previously treated by the investigating authorities of Ukraine…as BCI in the safeguard investigation at issue in this dispute."

III. VIEWS EXPRESSED IN U.S. RESPONSES TO QUESTIONS FROM THE PANEL

11. The 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. 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.

12. For example, 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 measure may be a relevant factor to consider in assessing whether it is necessary because the long absence of the measure undercuts the supposedly urgent nature of the safeguard measure, and it becomes more difficult to determine that a measure is necessary to prevent or remedy the particular serious injury that was previously found. 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.

13. The SGA also 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.

14. 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 failure to publish a report would be inconsistent with these obligations, 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. A fact-specific inquiry is required to determine whether a document genuinely served as a part of the report of the competent authorities.

15. 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.

16. 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. Whether publication is sufficiently

prompt in any case is necessarily a fact-specific inquiry that must take account of the various 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.

17. 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).

18. A Member need not demonstrate that an increase in imports has resulted from an unforeseen development "modifying the competitive relationship between the imports and domestic products." Further, any corresponding decrease in domestic sales need not also have been caused by the change in the competitive relationship.

19. The requirement that the increased imports result from unforeseen developments stems from GATT Article XIX. Article XIX contains no requirement that the unforeseen developments modify the competitive relationship between the imports and domestic products. 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." Indeed, there is not even a requirement in the SGA that there be a "decrease" in domestic sales.

20. "Unforeseen developments" must be unforeseen at the time the tariff concessions were made. 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."

21. 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—the date of the beginning of the investigation, the date of the completion of the investigation, the date of adoption of a safeguard measure, and the date of its entry into force—may be relevant to determining 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.

22. In the United States, after 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.

23. An increase in imports relative to consumption will not, alone, satisfy the increased imports condition in SGA Article 2.1. 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."

24. 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 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.

25. 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 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. SGA Article 7 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.

26. 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." "[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." End points must be understood in context, and without evaluating the intervening data, there is no way of understanding the proper context, and no way of establishing confidence in the accuracy of the meaning or importance ascribed to the end points. 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.

27. Neither the SGA nor GATT Article XIX: 1(A) provide any particular methodology that competent authorities must use in examining factors other than increased imports. 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). The Appellate Body has stated that it leaves "unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b)," and it has recognized that the SGA leaves the development of appropriate analytical methodologies under Article 4.2(b) to the discretion of the competent authorities.

28. 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. 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.

29. SGA 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 determination referenced in SGA 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).

30. 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. However, nothing prevents a Member from rendering these decisions in the same document or at the same time. 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. 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 under the particular circumstances of the case.

31. The DSU contains no mention of estoppel or harmless error. Alleged breaches of the covered agreements must be assessed based on their text, 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, contrary to DSU Article 3.2. Thus, 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*." 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, including in *EEC – Bananas I (GATT)* and *EC – Asbestos* and *Guatemala – Cement II*. 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.

32. 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. 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." 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.

33. Ukraine argues that, by virtue of having itself failed to comply with Article 12.5, Japan is estopped from claiming a violation on the part of Ukraine. 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. There is no basis in the text of the DSU or the covered agreements for either argument.