EUROPEAN UNION– SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

(DS595)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THE THIRD PARTIES

May 21, 2021

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
Dominican Republic – Safeguard Measures (Panel)	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
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
US – Lamb (Panel)	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 20012001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R
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
US – Line Pipe (Panel)	Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/R

1 QUESTIONS REGARDING PRODUCT SCOPE

1. The European Union has defined the product(s) under investigation as comprising 28 product categories.

a. In your experience, how common is it to have such as broad based definition of the product(s) under investigation in a safeguard investigation?

b. If you have experience with cases in which the authority defined the product under investigation broadly, did the authority demonstrate the interchangeability of the various subcategories of the product under investigation?

Response:

1. The Agreement on Safeguards ("Safeguards Agreement") does not specify obligations with respect to the definition or the scope of the products under investigation.[1] Thus, a competent authority may, subject to its own domestic laws, determine for itself the definition of the imported articles subject to investigation. Nothing under the Safeguards Agreement would preclude a competent authority from defining the products under investigation to encompass a range of different types of imported articles.

2. Further, nothing in Articles 2.1 and 4.1(c) of the Safeguards Agreement requires a competent authority to ensure the interchangeability among different types of imported articles within the scope of an investigation. As the panel in *Dominican Republic – Safeguard Measures* observed, there is no "provision in the Agreement that restricts the inclusion of imported products within the scope of an investigation solely to those products that are like or directly competitive with each other."[2] Accordingly, a competent authority need not demonstrate the interchangeability of the various subcategories of the product under investigation before including them all within the product under investigation.

2. The Panel refers to Recital 24 of the Regulation imposing provisional safeguard measures (Exhibit TUR 3), Recital 31 of the Regulation imposing definitive safeguard measures (Exhibit TUR 5), and paragraph 16 of Canada's third party submission. In your view:

a. Can a Member exclude from the application of a provisional or definitive safeguard measure a subset of the product(s) under investigation?

b. If so, for the excluded subset, can that Member also not complete the analysis of all the necessary conditions for imposing a safeguard measure?

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[1] *See also Dominican Republic – Safeguard Measures (Panel)*, para. 7.181 (noting that "the Agreement on Safeguards does not impose specific obligations with respect to the definition or the scope of the product under investigation.").

[2] *Dominican Republic – Safeguard Measures (Panel)*, para. 7.181.

Response:

3. With respect to definitive safeguard measures,[3] before imposing a definitive safeguard measure, a Member's competent authority must first conduct an investigation in accordance with Articles 3 and 4 of the Safeguards Agreement and determine that increased imports have caused or are threatening to cause serious injury to a domestic industry.[4] The competent authority must complete this analysis prior to a Member's imposition of a definitive measure, and therefore cannot decide after the fact whether or not to complete this analysis for a subset of imports.

4. Article 2.1 of the Safeguards Agreement sets out the conditions that must be satisfied for a Member to apply a safeguard measure:

> 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.

5. As the United States explained in the response to question 1, the Safeguards Agreement does not impose specific obligations with respect to the definition of the domestic articles "like or directly competitive" with the imported products under investigation. A competent authority, therefore, may apply reasonable methodologies in defining the domestic like product, as with other aspects of their serious injury analyses.[5] A competent authority may define a single domestic like product encompassing different product types, with each type of domestic article included in the definition "like or directly competitive" with a type of imported article among the products under investigation. They may also find more than one domestic like product when clear dividing lines are found to exist between subsets of products.

6. Whichever methodology is selected, once the competent authority defines the domestic like product(s) under consideration, Article 4 of the Safeguards Agreement requires that the competent authority define the domestic industry to include all domestic producers of the like product(s) and determine, on the basis of objective evidence and consideration of relevant factors, that the substantive conditions for imposing a safeguard have been satisfied with respect to that industry. In this regard, Article 4.1(c) provides that "a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member".

7. Consequently, when the competent authority defines a single domestic like product encompassing one or more product types, the competent authority is obligated to conduct a

[3] In this response, the United States is not addressing the imposition of provisional safeguard measures under Article 6 of the Safeguards Agreement.

[4] *See, e.g.,* Article 4.2(a) of the Safeguards Agreement.

[5] *See also US – Lamb (AB)*, para. 137 (noting that "the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof.").

single serious injury analysis on the domestic industry producing the like product. However, when the competent authority determines that there is more than one domestic like product, it must carry out a separate serious injury analysis with respect to each domestic industry corresponding to each like product. For each domestic industry, the competent authority must determine whether increased volumes of imports of the product under investigation is causing or threatening to cause serious injury to that industry.

3. The Panel refers to Recitals 119 and 120, Article 6 and Annex IV of the Regulation imposing provisional safeguard measures (Exhibit TUR 3), and Recitals 190 and 191, Article 5 and Annex III of the Regulation imposing definitive safeguard measures (Exhibit TUR 5). These explain that the European Union excluded developing country Members with *de minimis* exports from the application of the challenged safeguard measures on a product-category specific basis, rather than for all product categories together. Does this suggest that the European Union imposed distinct safeguard measures on each product category, rather than a single safeguard measure on all product categories taken together? Please explain.

Response:

8. As the United States explained in the responses to questions 1 and 2, a competent authority may define the products under investigation to encompass different types of imported articles, and a single domestic like product encompassing different types of domestic articles that are each like or directly competitive with a type of imported article. Having defined a single domestic like product, and thus a single domestic industry comprised of all producers of the product, the competent authority would have to make a single serious injury determination with respect to that industry. However, the Safeguards Agreement does not require that a Member then impose a safeguard measure consisting of a single tariff, quota, or tariff rate quota that covers all imports subject to the measure in the aggregate.

9. The United States recalls that the Safeguards Agreement does not specify the form a safeguard measure must take when covering multiple types of imported articles. The first sentence of Article 5.1 establishes the maximum permissible extent for the application of a safeguard measure. It allows Members to apply safeguards "only to the extent necessary to prevent or remedy serious injury" caused by increased imports and to "facilitate adjustment" of the domestic industry. Under the first sentence of Article 5.1, a Member could impose different types or levels of relief on different types of imported articles subject to a safeguard measure if doing so were reasonably necessary to limit the measure to the appropriate overall level of relief.

10. The last sentence of Article 5.1 – "Members should choose measures most suitable for the achievement of these objectives" – accords Members discretion on choosing the appropriate safeguard measure. First, it is expressed in terms of "should," not "shall," which means that the sentence does not impose an obligation. Second, by using the phrase "suitable" to achievement of objectives, the sentence leaves to a Member's discretion what particular measures may or may not be "suitable" in the particular circumstances. Accordingly, under Article 5.1, Members have the discretion to differentiate between different types of imported articles in designing a

safeguard measure reasonably calculated to prevent or remedy serious injury and facilitate adjustment.

11. When the products under investigation encompass different types of imported articles, it may be appropriate for a Member to impose a safeguard measure consisting of tariffs, quotas, or tariff-rate quotas specific to each type of imported article or to different groupings of imported articles. The suitability of such a safeguard measure will depend upon the relevant facts. For example, if a safeguard measure covers a range of imported articles, from low-end to high-end, the imposition of a single tariff rate quota might encourage increased imports of the more profitable high-end articles, potentially worsening the serious injury experienced by domestic producers of such articles. In such a case, a Member could choose to impose a safeguard measure consisting of separate tariff rate quotas on low-end and high-end imported articles, respectively, to ensure that the measure remedies the serious injury and facilitates adjustment for the domestic industry as a whole.

2. QUESTIONS REGARDING UNFORESEEN DEVELOPMENTS

4. If the products under investigation are a major proportion of steel products, must an investigating authority nonetheless specifically demonstrate the connection between unforeseen developments relating to steel in general and the products under investigation? If so, what are some of the ways in which the investigating authority may make that demonstration?

5. In tying the unforeseen developments to increases in imports into the European Union, the European Commission relied on the proposition that the European Union market was an "attractive" market.[6] Might the attractiveness of a market (e.g. because of its demand size and price levels) be sufficient to establish the logical connection between unforeseen developments leading to increased supply of the product under investigation, on the one hand, and increased imports to the market in question, on the other hand? Please explain.

Response:

12. Questions 4 and 5 appear to presume that a competent authority is required to demonstrate the *existence* of unforeseen developments, and then *establish* a causal link, in the sense of Article 4.2(a) of the Safeguards Agreement, between such unforeseen developments and the increased imports of products concerned. As the United States explained in the U.S. third party submission[7] and the U.S. third party oral statement,[8] Article XIX:1 of the GATT 1994 and Articles 2.1, 3.1, and 4.2 of the Safeguards Agreement do not require a competent authority to demonstrate the existence of unforeseen developments in the report that contains its findings

[6] E.g. Provisional regulation, (Exhibit TUR-3), Recital 35.

[7] *See* Third Party Submission of the United States of America ("U.S. Third Party Submission"), paras. 3-14 (January 29, 2021).

[8] *See* Third Party Oral Statement of the United States of America ("U.S. Third Party Oral Statement"), paras. 3-10 (May 5, 2021).

pursuant to a safeguards investigation. Nor does the Safeguards Agreement require that a competent authority demonstrate a causal link between unforeseen developments and the increased imports of the product concerned.

13. The United States recalls that there are important differences between the first and second clauses of Article XIX:1(a) of the GATT 1994. While both contain clauses modifying the main verb "is being imported", the first clause is triggered by "as a result of" unforeseen developments, while the sub-clause in the second clause is triggered by "as to cause serious injury". As the *Korea – Dairy (AB)* report reasoned:

> Although we do not view the first clause in Article XIX:1(a) as establishing independent *conditions* for the application of a safeguard measure, additional to the *conditions* set forth in the second clause of that paragraph, we do believe that the first clause describes certain *circumstances* which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the provisions of Article XIX of the GATT 1994.[9]

Another significant point is that the circumstances covered by the first clause occur before the main verb, while the situation covered by the second occur after, and concurrently with, the main verb.

14. Article 1 of the Safeguards Agreement provides that "[t]his 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." Article 11.1(a) of the Safeguards Agreement 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 this Agreement." Thus, Article XIX of the GATT 1994 applies "in accordance with" the Safeguards Agreement, which provides rules for the application of a safeguard measure.

15. Under the heading "Conditions", Article 2.1 of the Safeguards Agreement provides that:

> 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.[10]

Thus, the conditions referenced in Article 2.1 consist exclusively of those contained in the second clause of Article XIX. Article 2.1 requires the Member to determine only that the product is imported in such quantities and under such conditions as to cause serious injury. The omission of any reference to "unforeseen developments" is glaring, and signifies that the

[9] *Korea – Dairy*, (AB) para. 85 (emphasis in original).

[10] Article 2.1 of the Safeguards Agreement.

determination regarding serious injury need not include unforeseen developments. This interpretation is confirmed by the requirement in Article 2.1 that the determination be made "pursuant to the provisions set out below."

16. Prominent among these provisions is Article 4.2(a), which provides that "the competent authorities" make the determination envisaged in Article 2.1, following "the investigation" into whether "increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement". Article 4.2(a) requires that competent authorities "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation" of the domestic industry, and lists several such factors. Article 4.2(b) instructs the competent authorities to demonstrate "the existence of a casual link between increased imports of the product concerned and serious injury or threat thereof", and not to attribute to imports the effects of other factors causing injury at the same time. There is no mention of the circumstances in the first clause of Article XIX:1(a), including unforeseen developments.

17. Further, Article 3 of the Safeguards Agreement sets forth what a competent authority must do in the "investigation" referenced in Article 4. These include, in Article 3.1, the publication of a "report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Like Article 4, Article 3 makes no reference to unforeseen developments. Thus, like the "investigation" and the "determination", the "issues" in question are those "pertinent" to the question whether "increased imports have caused or are threatening to cause serious injury." Since Articles 2.1 and 4 do not require a consideration of unforeseen developments as part of that analysis, the report of the competent authorities need not contain a finding with regard to that "circumstance".

3 QUESTIONS REGARDING CAUSATION AND THREAT

6. At paragraph 234 of its first written submission, the European Union states that:

> **The primary objective of the process of establishing the causal link is to determine whether there is a genuine and substantial relationship of cause and effect between the increased imports and the threat of serious injury. It is a projection of what is rational and reasonable to expect if increased imports continue to pour in a similar manner.[11]**

In response, at paragraphs 197 and 198 of its second written submission, Turkey states that the "causal link must be established by reference to the period of investigation", that authorities "must establish that there is a causal link between imports which are increasing over the period of investigation and a domestic industry which is in a situation of threat of serious injury during the period of investigation", and that "it is imports up to the date of determination which must be the cause of the threat of serious injury".[12]

[11] Internal citations omitted.

[12] Internal citations omitted.

Are authorities permitted under Articles 2.1 and 4.2 of the Agreement on Safeguards to take into account import volumes that are expected in the future as part of the threat and/or causation analysis, and if so, how?

Response:

18. The Safeguards Agreement does not impose any particular methodology on a competent authority for assessing threat of material injury. Article 2.1 of the Safeguards Agreement provides that a determination is to be made "pursuant to" other provisions set out in the Safeguards Agreement. Likewise, Article 4.2(a) does not specify any particular analysis or period of investigation, but requires that competent authorities evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms." As long as a competent authority bases its determination concerning increased imports on objective data, it meets the Agreement's requirements concerning the evaluation on import data to address the question of increased quantities of imports.

19. In this regard, to engage in an analysis of threat of material injury a competent authority may have to take into consideration the import volumes that are expected in the future. While it would not be necessary to *demonstrate* that import volumes will continue to increase in the future, the level of expected future volumes certainly would be relevant to projecting the condition of the domestic industry absent imposition of a safeguard measure.[13] It would also be reasonable for a competent authority to consider trends and factors that point towards future serious injury caused by the imports. In addition to evaluating domestic industry indicators, a competent authority's analysis could include an examination of likely changes in import volumes and factors predictive of future import volumes, such as unused capacity and export orientation.[14]

7. If certain imports fall within the product scope of a safeguards investigation and at the same time are subject to anti dumping and/or countervailing duties:

a. can the injurious effects of those particular imports be part of the injurious effects of the increased imports that result from unforeseen developments; or

b. should such injurious effects be differentiated from the effects of the increased imports?

[13] *See U.S. – Lamb (Panel)*, para. 7.187 (finding that "in the particular circumstances of a case, a continuation of imports at an already recently increased level may suffice to cause such threat.").

[14] *See U.S. – Lamb (Panel)*, para. 7.129 (considering "that factual information from the recent past complemented by fact-based projections concerning developments in the industry's condition, and concerning imports, in the imminent future needs to be taken into account in order to ensure an analysis of whether a significant overall impairment of the relevant industry's position is imminent in the near future").

Please also identify any provisions governing the relationship between the Agreement on Safeguards on the one hand, and the Anti Dumping Agreement and the SCM Agreement on the other hand that may be relevant to this question.

Response:

20. As a legal matter, the Safeguards Agreement does not obligate a Member to deal with concurrent safeguard and antidumping or countervailing duty measures in any particular way. First, the Safeguards Agreement does not obligate a Member to take any particular approach to the application of a safeguard measure to products already covered by an antidumping or countervailing duty measure. In this regard, it is worth noting that Article 11.1(c) of the Safeguards Agreement provides that:

> This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.[15]

Thus, the Safeguards Agreement explicitly does not apply to measures under Article VI of the GATT 1994, such as antidumping or countervailing duty measures.

21. Second, unlike a safeguard investigation, antidumping and countervailing duty investigations concern imports from specific countries that are found to be dumped or subsidized and causing or threatening to cause material injury to a domestic industry. In those circumstances, the investigating authority may impose duties to offset the dumping or unfair subsidization.[16] Safeguard investigations, however, require an examination of imports from all sources, and do not require that these imports be dumped or subsidized.[17] The imposition of an antidumping or countervailing duty order would be expected to improve the condition of the domestic industry, and therefore such orders would not be another factor considered to cause injury to the domestic industry.

22. If, for example, imports continue to increase and cause injury to the domestic industry even after imposition of an antidumping or countervailing duty order, there would be no reason a safeguard investigation could not be undertaken to examine whether increasing global imports, including from countries subject to the partially or wholly ineffective antidumping or countervailing duty orders as well as from other countries, are causing serious injury to the domestic industry. To the extent imports examined in the safeguard investigation were previously found to be dumped or subsidized and then subjected to antidumping or

[15] Article 11.1(c) of the Safeguards Agreement.

[16] *See* Articles VI:2 and VI:3 of GATT 1994, Article 11.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*; and Article 21.1 of the *Agreement on Subsidies and Countervailing Measures*.

[17] *See* Article 2.2 of the Safeguards Agreement.

countervailing duty orders, those imports would now be considered fairly traded and thus equivalent to imports from other sources of global imports.

8. If an "other" factor allegedly causing injury appears, on the face of available data, to be insignificant or negligible, is an authority required to engage in a non-attribution analysis of that factor? Is it relevant that the data relating to the alleged "other" factor suggests that it is insignificant or negligible, and if so, how?

Response:

23. A competent authority's consideration of an "other" factor allegedly causing injury, its examination of the data, and its determination that the alleged "other" factor did not cause injury, is consistent with the analysis required under the Safeguards Agreement.

24. The second sentence of Article 4.2(b) of the Safeguards Agreement provides 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." The first clause signals that it introduces an obligation that applies only if the competent authorities have found that a factor different from increased imports is causing injury to the domestic industry, and this is happening simultaneously with the serious injury caused by increased imports. The second clause sets out an obligation that applies when the conditions in the first clause are met: "such injury shall not be attributed to increased imports." Therefore, if the competent authority concludes that other factors are not causing injury, or that they did not cause injury at the same time as increased imports, the obligation in Article 4.2(b), second clause, does not apply.

25. It is worth noting that Article 4 of the Safeguards Agreement imposes no obligation regarding *how* a competent authority complies with the requirement not to attribute injury from other factors. Thus, a competent authority retains a large margin of flexibility. As the Appellate Body has observed, Article 4.2 presupposes a series of "steps" of first distinguishing the effects of increased imports from the effects of other factors, then attributing to each factor its distinct effects, and finally determining whether the causal link between increased imports and serious injury "involves a genuine and substantial relationship of cause and effect between these two elements."[18] But "these three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b)."[19] Thus, a competent authority is free to adopt any approach for the non-attribution analysis so long as it results in a demonstration that injury caused by other factors is not attributed to the increased imports.

26. In summary, a competent authority's examination of the record evidence with respect to other alleged alternative causes of injury and conclusion that none of these factors were in fact causing injury fully satisfies its non-attribution obligation. A competent authority's finding that the "other" factors caused no injury means that there is no injury from the other factors that

[18] *US – Wheat Gluten* (AB), para. 69

[19] *US – Lamb (AB)*, para. 178.

could be attributed to increased imports. Accordingly, no further analysis under Article 4.2(b) is necessary.

4 QUESTIONS REGARDING THE APPLICATION OF SAFEGUARD MEASURES

9. At paragraph 7.74 of its report, the panel in *US – Line Pipe* found that "[since] a tariff quota is not a 'quantitative restriction' (a broader category including quota) within the meaning of Article 5.1 [of the Agreement on Safeguards], it cannot constitute a 'quota' (a narrower category of quantitative restriction) within the meaning of Article 5.2(a) [of the Agreement on Safeguards]". Do you consider that Article 5.2(a) of the Agreement on Safeguards does not apply to tariff rate quotas, but Article XIII:2(d) of the GATT 1994 does?

Response:

27. Article 5.2(a) of the Safeguard Agreement, by its terms, applies to a quota. A tariff-rate quota is not a "quota," which refers to a restriction that specifies the maximum quantity of imports into, or exports from, a territory. In contrast, a tariff-rate quota is simply a two (or more)-tiered tariff, with each rate applicable to a given quantity of imports. Therefore, the United States agrees with the panel report in *US – Line Pipe* that Article 5.2(a) of the Safeguards Agreement does not apply to tariff-rate quotas, but Article XIII:2(d) of the GATT 1994 does, by virtue of paragraph 5 of Article XIII.

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