EUROPEAN UNION – SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

(DS595)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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TABLE OF REPORTS

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India – Iron and Steel Products (Panel)	Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, WT/DS518/R, circulated 6 November 2018
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
US – Fur Felt Hats	GATT Working Party Report, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, adopted 22 October 1951, GATT/CP/106
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 – 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

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel.

2. In this submission, the United States will present its views on certain WTO safeguard disciplines and, in particular, the proper interpretation of Article XIX:1(a) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and its interplay with the *Agreement on Safeguards* ("Safeguards Agreement").

II. THE FRAMEWORK AND REQUIREMENTS UNDER ARTICLE XIX:1(A) OF THE GATT 1994

A. Unforeseen Developments

3. The phrase "unforeseen developments" appears only once in the covered agreements, in Article XIX:1(a) of GATT 1994:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a {WTO Member} under this Agreement, including tariff concessions, any product is being imported into the territory of that {WTO Member} in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products…

4. The ordinary meaning of "unforeseen" refers to something not anticipated or predicted. The "as a result" phrase sets out a temporal and logical connection between the developments that were not anticipated or predicted and the "obligations incurred" by a Member. That is, had the developments been anticipated or predicted, the Member might well *not* have incurred the obligation, and Article XIX of the GATT 1994 affords a right for a Member to take emergency action with respect to the commitment.

5. Accordingly, "unforeseen developments" are those that a Member did not foresee at the time of undertaking a commitment. A showing that a Member might have predicted particular developments in response to facts that did not exist at that time or based on economic argumentation goes to the separate question of whether that development was foresee*able*. As such, those arguments are not relevant to the proper identification of unforeseen developments.

6. The working party in *Fur Felt Hats* similarly found that the proper focus was on the knowledge of a Contracting Party's negotiators at the time they undertook a particular obligation or tariff concession:

> {T}he term 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country

> making the concession could and should have foreseen at the time when the concession was negotiated.[1]

7. As the Appellate Body also observed with regard to the ordinary meaning of "unforeseen":

> {T}he dictionary definition of "unforeseen," particularly as it related to the word "developments," is synonymous with "unexpected." "Unforeseeable," on the other hand, is defined in the dictionaries as meaning "unpredictable" or "incapable of being foreseen, foretold or anticipated." Thus it seems to us that the ordinary meaning of the phrase "unforeseen developments" requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected."[2]

8. In Article XIX of the GATT 1994, there are important differences between the first and second clauses of Article XIX:1(a). While both clauses modify the main verb "is being imported," the first clause is triggered "as a *result* of" unforeseen developments, while the sub-clause in the second clause is triggered by "as to *cause* serious injury." This difference has interpretive significance that must be considered with respect to the Safeguards Agreement's explicit obligations on analysis of serious injury and causation, and contrasted with the absence of such obligations in regard to unforeseen developments and obligations incurred. The Appellate Body recognized a similar point in stating that "{a}lthough 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."[3]

9. Accordingly, Article XIX:1 differentiates between the factual circumstances in which a Member may take a safeguard measure (set out in the first clause of Article XIX:1) and the conditions that must be established ***before*** applying the safeguard measure (set out in the second clause of Article XIX:1). In other words, the first clause of Article XIX:1(a) does not create "prerequisites" coequal with the conditions of the second clause. Rather, "as a result of unforeseen developments and of the effect of the obligations concurred" are circumstances that must be shown to exist, whereas "any product is being imported . . . in such increased quantities

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[1] *US – Fur Felt Hats*, para. 9.

[2] *Korea – Dairy (AB)*, para. 84. The *US – Lamb* panel, in a finding that the Appellate Body did not address, found that "the distinction drawn by the Appellate Body between *unforeseen* and *unforeseeable* {is} important. In our view, the former term implies a lesser threshold than the latter one. . . . {W}e must consider what was and was not actually 'foreseen', rather than what might or might not have been theoretically 'foreseeable.'" *US – Lamb (Panel)*, para. 7.22. *But see also India – Iron and Steel Products (Panel)*, para. 7.88 (citing *US – Steel (Panel)* in ascribing both "objective" and "subjective" elements to unforeseen developments).

[3] *Korea – Dairy (AB)*, para. 85.

and under such conditions as to cause or threaten serious injury" are "conditions" that must be met.

10. The Safeguards Agreement provides additional confirmation of this interpretation. 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) 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 applies "in accordance with" the Safeguards Agreement, which provides "rules" for application of a measure.

11. Article 2 of the Safeguards Agreement further solidifies the point by embodying only those *conditions* referenced in Article 2.1, which consist exclusively of those contained in the second clause of Article XIX. Notably, Article 2.1 does not mention unforeseen developments or obligations incurred. Instead, the only requirement it describes is for a Member applying a safeguard measure to determine that a product is being imported in such quantities and under such conditions as to cause or threaten to cause serious injury.

12. Additionally, Article 4.2(a) states that "competent authorities" conducting an investigation must determine "whether increased imports have caused or are threatening to cause serious injury." And under the heading of "investigation," Article 3.1 provides that the competent authorities "shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of law or fact." None of these provisions require a competent authority to demonstrate the existence of unforeseen developments or obligations incurred in the report that contains its findings pursuant to the investigation.

13. In this context, the "findings" and "reasoned conclusions" can only be understood as relating to the investigation and determination, which cover only whether increased imports have caused or are threatening to cause serious injury." They cannot be read as covering other issues that may be "pertinent" to application of a safeguard measure. In fact, the Appellate Body recognized that this was the case in *Korea – Dairy*, when it found:

> {W}e do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is not obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with "the average of imports in the last three representative years for which statistics are available".[4]

Moreover, in *US – Line Pipe*, the Appellate Body reiterated this finding, and differentiated the "demonstration" as to whether a safeguard measure was "necessary to prevent or remedy serious

[4] *Korea – Dairy (AB)*, para. 99.

injury and to facilitate adjustment" for purposes of Article 5.1 from the report under Articles 3.1 and 4.2(c) which "should provide a benchmark against which the permissible extent of the measure should be determined."[5] By any standard, compliance with Article 5.1 is a "pertinent" issue within the context of the Safeguards Agreement as a whole. The fact that a Member's conclusions on that issue need not appear in the competent authorities' report on their determination of serious injury signifies that the obligation does not apply to "pertinent issues" outside of those mentioned in Articles 2, 3, and 4.

14. Accordingly, a Member's competent authorities may elect, but are not required, to demonstrate the satisfaction of the first clause of GATT Article XIX:1(a) before that Member applies a safeguard measure. The references in Article XIX to unforeseen developments and the effect of obligations incurred, therefore, are circumstances that must exist for application of a safeguard measure. However, they are not conditions under Article 2 of the Safeguards Agreement that must be demonstrated in a competent authority's report. As noted above, the text of the Safeguards Agreement confirms this understanding.

B. Obligations Incurred

15. Under Article XIX:1(a), a Member may show that increased imports are the "effect of obligations incurred by a Member under this Agreement, including tariff concessions" by identifying an obligation or concession that requires it to allow entry of imports despite the existence of the conditions specified later in the sentence. Therefore, the text does not imply an additional *causation* test, but a reference to the *context* in which a Member finds itself.

16. Article XIX:1 makes this understanding clear by providing that a Member that finds itself in this circumstance "shall be free … to suspend the obligation in whole or in part or to withdraw or modify the concession." The express reference to tariff concessions recognizes that tariff bindings could prevent a Member from taking action in the normal course, such as raising its ordinary customs duties, to modulate the increased imports of a certain article. Therefore, a Member establishes that increased imports are the "effect of obligations incurred" by identifying a commitment, such as a tariff concession, that prevents it from raising duties on imports.

17. The Appellate Body has reached the same conclusion, finding that:

> With respect to the phrase "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions," we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a

[5] *US – Line Pipe (AB)*, para. 236.

> Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.[6]

18. A tariff rate bound at zero percent has significant implications for demonstrating that increased imports are the result "of the effect of obligations incurred." When a Member undertakes an obligation in the form of a tariff concession pursuant to Article II of the GATT 1994, it represents a commitment that, *per se*, prevents that Member from raising its tariffs to ameliorate any harm caused by increased imports. Similarly, where a Member is applying an ordinary customs duty at its bound rate, it has no capacity to increase the applied tariff.

19. Accordingly, a Member may establish that increased imports are the "effect of obligations incurred" simply by identifying a commitment, such as a tariff concession, that prevents it from raising duties on the imports in question. A tariff rate bound at zero percent, while not necessary, is more than sufficient to constitute a restraint on a Member's freedom to raise its duties and thereby qualify as a *per se* commitment that satisfies the requirement in Article XIX:1(a) concerning the "effect of obligations incurred."

III. CONCLUSION

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

[6] *Korea – Dairy (AB)*, para. 84.