India – Certain Measures on Imports of Iron and Steel Products

(DS518)

Responses of the United States of America
to Questions From the Panel
to Third Parties

February 15, 2018

TABLE OF REPORTS

Short Title	Full Case Title and Citation
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
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

QUESTIONS FROM THE PANEL

The United States is pleased to the present its views on certain questions posed by the Panel regarding the interpretation of the Agreement on Safeguards and relevant provisions of the GATT 1994.

Question 1. What is your understanding of the expression used in Article XIX:1 of the GATT 1994: "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions …"? Do these obligations only refer to tariff concessions made by Members in their Schedule of Concessions, or also to other GATT obligations? Which other obligations in the GATT 1994?

1. By their terms, the expression "the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" in Article XIX:1 of the GATT 1994 refers not only to a tariff concession, but also to any obligation a Member assumed at the time the WTO was established or at the Member's accession. The text of Article XIX:1 refers to "obligations incurred by a contracting party" and, as an example of this, "include[es] tariff concessions" expressly. It would be contrary to the text of the provision to limit the type of obligations that may result in the increase of imports to those that are only a result of tariff concessions.

2. Besides tariff obligations, any WTO obligation affecting importation may potentially be a relevant obligation if it results in an unforeseen increase of imports that cause serious injury to a Member's domestic producers. Accordingly, each safeguard measure should be evaluated on a case-by-case basis while taking into consideration the relevant facts and context in which a Member has decided to take action to prevent or remedy an injury.

Question 2. What is the nature of the duties resulting from the application of safeguard measures: are they "ordinary customs duties" or "other duties or charges", or any other type of duties?

3. GATT 1994 Article II:1 provides that an imported product shall be accorded treatment no less favourable than that set out in a Member's Schedule and further contemplates that an imported product shall be subject to scheduled ordinary customs duties and (as set out in the Understanding on Article II) designated other duties or charges. A duty pursuant to a safeguard measure (or "emergency action") would not, in principle, be an ordinary customs duty – for example, set out in the customs tariff of a Member normally corresponding to the Harmonized System.

4. Duties imposed pursuant to a safeguard measure could, in principle, be considered an "other duty or charge" under the second sentence of Article II:1(b). Should those duties be applied consistent with the requirements of Article XIX (and the Safeguards Agreement), a Member would be in conformity with its WTO obligations (including those under GATT 1994 Article II). This is explicit in the text of Article XIX:(1)(a) of the GATT 1994, which provides that a Member "shall be free" to suspend an obligation, in whole or in part, or modify a concession – "including tariff concessions".[1]

[1] GATT 1994 Article XIX:1 ("[T]he contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.").

That is, Article II would not prevent the application of a WTO-consistent safeguard measure because the Member "shall be free" to apply that measure.

Question 4. Please comment on the argument raised by Chinese Taipei in its oral statement about the relevance of the Appellate Body's reasoning in US – 1916 Act with respect to the definition of safeguards measures and, more specifically, on Chinese Taipei's argument that the ordinary meaning of the term "safeguard measure" encompasses all measures taken to safeguard the domestic industry against serious injury arising from increased imports, without any limitation to particular types of measures.

5. The United States agrees, in part, with the argument Chinese Taipei raises with respect to the relevance of the Appellate Body's reasoning in *US – 1916 Act*.[2] The United States acknowledges that the Appellate Body found, for purposes of the Antidumping Agreement, that the phrase "anti-dumping measure" is not immediately clear and that, without an express definition, the phrase could apply to all measures taken to address imported products sold for less than their fair market value. From this, Chinese Taipei extrapolates that a safeguard measure, which also does not have an express definition in the Agreement on Safeguards, is any measure taken to safeguard a domestic industry from increased imports.

6. However, Chinese Taipei does not recognize that, to qualify as a safeguard measure, the measure at issue must be to remedy or protect domestic producers from serious injury or a threat of serious injury and that the action a Member takes must be related to the suspension, withdrawal, or modification of a GATT obligation or concession. This point is addressed in more detail below in the response to Question 5.

Question 5. If the duty on the importation of a product resulting from the application of a safeguard measure is below the bound rate on the same product can the measure be considered a safeguard measure in the sense of Article XIX of the GATT 1994 and Article 1 of the Agreement on Safeguards?

7. A Member has, in effect, two bound rates in relation to the charge it may impose on an imported product. The first, under the first sentence of GATT 1994 Article II:1(b), is in relation to the rate it may impose as an "ordinary customs duty". The second, under the second sentence of that provision, is in relation to the rate it may impose as an "other duty or charge". The bound rate for an ordinary customs duty is as set out in a Member's Schedule. Under the Understanding on Article II, a Member was required to specify in its schedule the nature and level of any "other duty or charge" it could apply on an imported product.[3] In the absence of any such scheduled "other duty or charge", a Member would not be able to apply a duty or charge on importation other than an ordinary customs duty.

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[2] WT/DS136/AB/R, WT/DS162/AB/R, at para. 119.

[3] *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*, at para. 1 ("In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply.").

8. If there is a duty or charge resulting from application of a safeguard measure, the issue is whether this duty or charge falls under the first or second sentence of GATT 1994 Article II:1(b). In principle, it would not seem that "emergency action" and application of a duty or charge while suspending, withdrawing, or modifying a concession (Article XIX:1) would normally result in an "ordinary customs duty". Therefore, that a duty or charge resulting from a safeguard measure falls within a Member's bound rate for an ordinary customs duty would not seem relevant. Instead, the proper analysis would seem to be whether the duty or charge resulting from a safeguards measure falls within a Member's bound rate for an "other duty or charge".

Question 6. Is the period of investigation under three years sufficient to examine trends in imports and the existence of serious injury under the Agreement on Safeguards?

9. Most Members use at least three years as a baseline period of investigation. The most important aspect, however, is that the time period is unbiased and fair, and especially that it is not manipulated or otherwise selected to achieve a particular outcome during the investigation. Accordingly, the United States believes that a period of investigation under three years should not always be considered *per se* inadequate, although a reasonable explanation of that choice may be warranted.

Question 7. Is it possible under the Agreement on Safeguards to have findings of both serious injury and threat of serious injury for the same safeguard investigation?

10. Under the Agreement on Safeguards, it is possible to have findings of both serious injury and threat of serious injury for the same safeguard investigation. Under Article 2.1, a Member may impose a measure if imports cause serious injury, and the text does not exclude that both situations may arise.

11. The Appellate Body addressed this issue in the context whether discrete findings were necessary under the Agreement on Safeguards.[4] In *US –Line Pipe*, the Panel found that the Member imposing the measure had breached the Agreement on Safeguards because the Member had determined that increased imports were the substantial cause of serious injury *or* the threat of serious injury and, in the Panel's view, the Agreement on Safeguards required a discrete determination as to one or the other.

12. On appeal, the Appellate Body reviewed the Panel's analysis. As an initial matter, the Appellate Body agreed with the Panel that Article 2.1 of the Agreement on Safeguards necessitates the inclusion of "findings" or "reasoned conclusions" in a published report from the competent authorities. The Appellate Body, however, questioned the kind of findings that must appear in the published report.

In particular, the Appellate Body examined the meaning of the term "or," in the phrase "cause or threaten to cause" serious injury. That is, it examined whether the use of this term required discrete findings or allowed the possibility of finding one (serious injury), the other (threat of serious injury), or both. The Appellate Body focused on the context in which the term "or" is used. The Appellate Body determined that the phrase "or" did not necessarily mean "one or the other, but not both" and

[4] WT/DS202/AB/R, at para. 144.

that the clause could mean "either one or the other, or both in combination" and, as such, it did not see that it matters, for purposes of imposing a safeguard measure, whether the competent authority finds the one (serious injury), the other (threat of serious injury), or the one or the other (serious injury or the threat of serious injury). On this basis, it found that the Member's determination had established the right to apply a safeguard.

Question 9. Article 12.1 of the Agreement on Safeguards requires "immediate" notification of an initiation of the investigation, a finding of serious injury or threat thereof caused by the increased imports, and a decision to apply or extend safeguard measures. As indicated in previous panel and Appellate Body reports, the ordinary meaning of the word "immediately" implies certain urgency. The degree of urgency or immediacy depends on a case-by-case assessment. In your view, what are the circumstances in the present case that should guide the Panel in its evaluation of whether the notifications under Article 12.1 were made by India "immediately"?

13. As noted in the question, the term "immediately" as used in Article 12.1 suggests a certain level of urgency. At the same time, the use of this term would not support a bright line test. Indeed, if the negotiators had intended to adopt a bright line test, they would have included that test in the text of the Agreement. Accordingly, each circumstance must be evaluated on a case-by-case basis. Appropriate considerations would include whether a Member subject to a safeguard received sufficient time to adequately defends its rights and support its position during and after the safeguard investigation.