Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric

(DS415, DS416, DS417, DS418)

Third-Party Submission of the United States of America

May 16, 2011

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United States – Lamb Meat (AB)	Appellate Body Report, *United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
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United States – 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

I. Introduction

1. The United States welcomes the opportunity to present its views in this proceeding on *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric* (DS415, DS416, DS417, and DS418). The United States is limiting its comments to certain issues relating to the proper legal interpretation of the *Agreement on Safeguards* (the "Safeguards Agreement").[1]

II. The Complainants Propose the Wrong Approach for Determining Causation of Serious Injury

2. Article 2.1 of the Safeguards Agreement states that a Member may apply a safeguard measure only if the Member finds that the product in question is being imported "in such increased quantities . . . as to cause or threaten to cause serious injury to the domestic industry." In their first written submission, Costa Rica, El Salvador, Guatemala, and Honduras (collectively "complaining parties") argue that, under Article 2.1, the increase in imports of the product in question must be "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry.[2] The complaining parties rely upon the Appellate Body's report in *Argentina – Footwear (EC)* in support of their interpretation of Article 2.1.[3] As shown below, and contrary to the complaining parties' assertion, the Safeguards Agreement does not require such an approach to determine the causation of serious injury under Article 2.1.

3. In *United States – Steel Safeguards (AB)*, the Appellate Body referenced the same passage from the Appellate Body report in *Argentina – Footwear (EC)* that the complaining parties rely upon in their first written submission. The Appellate Body clarified that the statement in question was about "the entire investigative responsibility of the competent authorities under the Safeguards Agreement" and that "whether an increase in imports is recent, sudden, sharp and significant enough to cause or threaten serious injury are questions that are answered as the competent authorities proceed with the remainder of their analysis (*i.e.*, their consideration of serious injury/threat and causation)."[4]

4. Consequently, there is no basis for the complaining parties' assertion that Article 2.1 of the Safeguards Agreement requires the competent authorities to conduct a separate analysis of the volume of imports to determine whether it is "recent enough, sudden enough, sharp enough, and significant enough" to cause serious injury to the domestic industry before proceeding to the rest of the analysis. It is sufficient to find that they have increased, and then address through the

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[1] The United States has not had an opportunity to review fully the Dominican Republic's first written submission in this dispute and is therefore limiting itself to addressing the complaining parties' first written submission at this time. The United States will address the Dominican Republic's first written submission, as appropriate, at the third party session of the first Panel meeting.

[2] Complaining Parties' First Submission, paras. 239-248.

[3] Complaining Parties' First Submission, para. 241.

[4] *United States – Steel Safeguards (AB),* para. 346.

remainder of the analysis whether those increased imports cause serious injury or threat of serious injury.

III. The Method of Production Can Be Relevant for Determining the Like or Directly Competitive Product

5. Article 4.1(c) of the Safeguards Agreement defines the "domestic industry" for purposes of the injury analysis as the "producers . . . of the like or directly competitive products." The complaining parties argue that the Dominican Republic incorrectly defined the like or directly competitive product under Article 4.1(c) in the course of its investigation. They argue that the competent authority for the Dominican Republic, the Department of Investigations of the Regulatory Commission for Unfair Trade Practices and Protection Measures of the Dominican Republic ("DEI"), defined the like or directly competitive product based, in part, on the production process used – *i.e.*, tubular fabric and polypropylene sacks made *from virgin resin*.[5] According to the complaining parties, DEI did not treat polypropylene sacks made from a different production process (*e.g.*, polypropylene sacks made from tubular fabric rather than virgin resin) as a like or directly competitive product. The complaining parties contend that the exclusion of producers who did not use virgin resin from the domestic industry is inconsistent with Article 4.1(c) of the Safeguards Agreement.

6. The United States takes no position regarding the adequacy of the Dominican Republic's approach to this issue in the challenged investigation, especially in light of the fact-intensive nature of the analysis. It is helpful, however, to consider certain observations regarding the determination of like or directly competitive products under the Safeguards Agreement.

7. In *United States – Lamb Meat (AB)*, the Appellate Body concluded that while the focus of the like or directly competitive product inquiry must be on the identification of *the product*, the production process may provide information on the like or directly competitive nature between products.[6] The Appellate Body further observed that "{w}e can . . . envisage that in certain cases a question may arise as to whether two articles are *separate products*. In that event, it may be relevant to inquire into the production processes for those products."[7]

8. Indeed, one can envisage a scenario in which the production process is highly relevant to the like or directly competitive nature between two products due to the qualities the process imparts on the product. For example, customers may demand items produced via a certain method because only that method guarantees the requisite level of quality or adherence to a given tolerance level. Under this scenario, products manufactured according to a different process may not be like or directly competitive.

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[5] Complaining Parties' First Submission, para. 129.

[6] *United States – Lamb Meat (AB),* para. 94, fn 55.

[7] *United States – Lamb Meat (AB),* fn. 55.

IV. There is No General Rule Regarding the Impact of Decreases in Imports Toward the End of the Period of Investigation

9. Under Article 2.1 of the Safeguards Agreement, the competent authority must determine that there are increased quantities of imports, either absolute or relative to domestic production, in order to apply a safeguard measure. In paragraph 247 of their first written submission, the complaining parties argue that, as a general rule, a decrease toward the end of the period of investigation is an indication that there has been no absolute increase in imports.[8] According to the complaining parties, where the record shows a decline in imports toward the end of the period of investigation, only exceptional circumstances justify a finding by the competent authority of increased absolute imports under Article 2.1. The complaining parties purport to base their argument on the Appellate Body's report in *United States – Steel Safeguards (AB)*. But *United States – Steel Safeguards (AB)* does not support the complaining parties' proposed approach, and their position is otherwise unsupportable under the Safeguards Agreement.

10. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports, nor does it place special emphasis on the level of imports at the end of the period of investigation. Article 2.1 states that the competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry." Article 4.2(a), in turn, states that competent authorities shall 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." Neither article provides any reference to the period of time near the end of the period of investigation, nor otherwise indicates any special role for any particular period of time within the overall period of investigation. Accordingly, there is no textual basis in the Safeguards Agreement for the complaining parties' position.

11. Moreover, in *United States – Steel Safeguards (AB),* the Appellate Body has explicitly rejected the argument on decreased imports toward the end of the period of investigation now made by the complaining parties. In that dispute, the Appellate Body stated that "Article 2.1 does *not* require that imports need to be increasing at the time of the determination" and that it did "*not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities.'"[9] Indeed, for a number of the products in question in *United States – Steel Safeguards (Panel),* the Panel found that the investigating authority's

[8] Complaining Parties' First Submission, para. 129.

[9] *United States – Steel Safeguards (AB),* para. 367.

determination of imports in such increased quantities was consistent with Article 2.1 notwithstanding a decline in imports toward the end of the period of investigation.[10]

12. In sum, the Appellate Body did not establish in *United States – Steel Safeguards (AB)* a general rule regarding decreases in imports toward the end of the period of investigation. The Appellate Body found, rather, that given the magnitude of the decrease in imports toward the end of the period of investigation for certain (but not all) products in that particular dispute, the competent authority had not provided a reasoned and adequate explanation of how the facts supported its determination that the product was "being imported in … such increased quantities."[11]

13. Accordingly, the complaining parties' assertion that there is a general rule regarding the impact of decreases in imports toward the end of the period of investigation is erroneous.

V. Imports Exempted From Application of the Safeguard Measure Under Article 9.1 Are Not Exempted From the Injury and Causation Determinations Under Article 2.1

14. In their first written submission. the complaining parties also allege that the Dominican Republic violated the requirements of "parallelism" under Articles 2.1 and 2.2 of the Safeguards Agreement.[12] The principle of parallelism derives from the use of the same text – "product . . . being imported" – to describe both the investigation conducted by the competent authorities under Article 2.1 of the Safeguards Agreement and the authority to impose a safeguard measure under Article 2.2. The Appellate Body explained that "{i}n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in Articles 2.1 and 2.2."[13]

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[10] *United States – Steel Safeguards (Panel)*, para. 10.224 (rebar), para. 10.233 (welded pipe), and para. 10.253 (stainless steel bar). The Appellate Body did not review the section of the Panel's report regarding increased imports of rebar, welded pipe, and stainless steel bar.

[11] *United States – Steel Safeguards (AB),* para. 368.

[12] Complaining Parties' First Submission, para. 449.

[13] *United States – Wheat Gluten (AB)*, para. 96. The Appellate Body explained that "{t}he same phrase – 'product … being imported' – appears in both these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the same meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of the measure, would be to give the phrase 'product being imported' a different meaning in Articles 2.1 and 2.2 of the Agreement on Safeguards. In Article 2.1, the phrase would embrace imports from all sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted. In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2."

15. The complaining parties assert that (1) the DEI exempted imports from developing country members (*i.e.*, Mexico, Panama, Colombia, and Indonesia) from application of the safeguard measure under Article 9.1 of the Safeguards Agreement,[14] but that (2) the DEI included imports from these countries in its analysis of injury and causation under Article 2.1.[15] According to the complaining parties, the fact that imports from these four countries were exempted from the application of the safeguard measure, but included in the injury and causation analysis, violates the requirements of parallelism between analysis of injury and application of the safeguard measure. The complaining parties' argument is fatally flawed, however, because it compares Article 2.1 of the Safeguards Agreement with Article 9.1, which is not included in the parallelism requirement.

16. Article 9.1 of the Safeguards Agreement states that "{s}afeguard measures *shall not be applied* against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned."[16] Thus, while Article 9.1 acts as an exception to the obligation under Article 2.2 of the Safeguards Agreement to apply safeguards measures to "a product being imported regardless of its source," it does not create an exception from the obligation under Article 2.1 to reach a determination with regard to all of the product. Assuming that the Dominican Republic found that each of the four countries accounts for less than 3 percent of total imports and that it also found that the four countries collectively (and any other developing countries that individually account for less than 3 percent of total imports) do not account for more than 9 percent of total imports, there is no support in the text of the Safeguards Agreement for the complaining parties' argument that exemption from application of the safeguard measure for imports from developing countries under Article 9.1 also necessitates exclusion from the injury and causation analysis under Article 2.1.

17. Indeed, the Panel in *Argentina – Footwear (Panel)* affirmed that an exemption from application of the measure pursuant to Article 9.1 of the Safeguards Agreement does not mandate exclusion from the analysis under Article 2.1. The Panel observed that "Article 9 exempts, subject to certain thresholds and limitations, imports from developing country Members from the imposition of safeguard measures *where the injury and causation fully reflect the effects of those imports from developing countries*."[17] In deciding not to extend the exemption from application of the safeguards measure to the injury and causation analysis, the Panel reasoned "that where the Safeguards Agreement provides for an exception it does so in clear and explicit terms" and that no such exemption was provided for in Article 2.1.

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[14] *See* Complaining Parties' First Submission, para. 54.

[15] Complaining Parties' First Submission, para. 446.

[16] Emphasis added.

[17] *Argentina – Footwear (Panel),* para. 8.85 (emphasis added).

18. Accordingly, there is no basis for the complaining parties' assertion that the requirements of parallelism under Articles 2.1 and 2.2 of the Safeguards Agreement apply to imports exempted from application of the safeguard measure by operation of Article 9.1.

VI. Conclusion

19. The United States thanks the Panel for its attention to these comments on certain issues raised in this proceeding and hopes that these comments will prove to be useful.