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1 ARTICLE 12

1.1 Text of Article 12

Article 12

Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:
 - (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
 - (b) making a finding of serious injury or threat thereof caused by increased imports; and
 - (c) taking a decision to apply or extend a safeguard measure.
2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.
3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.

5. The results of the consultations referred to in this Article, as well as the results of mid-term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.

7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.

8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.

9. Any Member may notify the Committee on Safeguards of any non-governmental measures referred to in paragraph 3 of Article 11.

10. All notifications to the Council for Trade in Goods referred to in this Agreement shall normally be made through the Committee on Safeguards.

11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

1.2 General

1. The Panel in *Dominican Republic – Safeguard Measures* noted that Article 12 of the Agreement on Safeguards "is linked to the obligations to notify and give Members the opportunity to hold consultations provided by Article XIX of the GATT 1994."¹ Therefore, the requirements of Article XIX:2 of the GATT 1994 should be analysed in conjunction with Article 12 of the Agreement on Safeguards.² According to the Panel, these two provisions "have to be interpreted together and giving meaning to the terms in both provisions."³

1.3 Article 12.1

1.3.1 General

2. The Panel in *Ukraine – Passenger Cars* noted that the notification requirements in the three paragraphs of Article 12.1 correspond to the three steps preceding application of a safeguard measure:

"As regards the events described in the three subparagraphs of Article 12.1, we note that they reflect a logical sequence in the internal decision-making process preceding the application of a safeguard measure: first initiation, then making a determination on the conditions that must be satisfied before a safeguard measure may be applied, and finally the decision to apply or extend a safeguard measure. We note that the

¹ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.419.

² Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.420.

³ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.428.

final step in the process envisaged by Article 12.1 – the taking of a decision to apply – may in the legal system of some Members coincide with the second step. In the system of other Members, it may come after the second step.

In the case of Members whose internal decision-making process provides for a gap between, on the one hand, a finding of serious injury or threat thereof caused by increased imports and, on the other hand, the decision to apply a safeguard measure, the relevant events may, of course, be notified separately and successively. In the case of Members where these events occur at the same time, nothing precludes notification of the relevant events simultaneously, whether in a single or separate notifications."⁴

1.3.2 "shall immediately notify"

3. The Panel in *Ukraine – Passenger Cars* pointed out that in some cases it may be difficult to identify the date on which the event that triggered a notification obligation under Article 12.1 occurred:

"To assess whether or not a notification under Article 12.1 was 'immediate', it is necessary to establish both the date on which the relevant triggering event occurred and the date of the notification. The latter is generally taken to correspond to the date on which the notification was sent to the Committee on Safeguards, but the position is less clear with regard to the former. An issue may arise as to whether the Panel should assess the immediacy of the notifications under Article 12.1 by reference to: (i) the date of adoption of the relevant decision on the action concerned (i.e. the decision to initiate, the decision to make a finding or the decision to apply or extend a safeguard measure), (ii) the date of publication of that decision, or (iii) the entry into force of that decision. We observe in this regard that in some domestic legal systems, for some relevant actions and in some situations, some or all of these dates may coincide, such that there may be no need to distinguish between these dates."⁵

4. The Panel in *Korea – Dairy* read a notion of "urgency" into the phrase "shall immediately notify" in Article 12.1, but acknowledged that there is a need under this provision to balance the requirement for "immediate" notification against the requirement for some minimum level of information in a notification:

"The ordinary meaning of the term 'immediately' introduces a certain notion of urgency. As discussed above, we believe that the text of Article 12.1, 12.2 and 12.3 makes clear that the notifications on the finding of serious injury and on the proposed measure shall in all cases precede the consultations referred to in Article 12.3. We note finally that no specific number of days is mentioned in Article 12. For us this implies that there is a need under the agreement to balance the requirement for some minimum level of information in a notification against the requirement for 'immediate' notification. The more detail that is required, the less 'instantly' Members will be able to notify. In this context we are also aware that Members whose official language is not a WTO working language, may encounter further delay in preparing their notifications."⁶

5. The same Panel also noted that "[t]here is no basis in the wording of Article 12.1 to interpret the term 'immediately' to mean 'as soon as practically possible'.⁷

6. The Panel in *US – Wheat Gluten* reiterated the statements of the Panel in *Korea – Dairy* and emphasized the need of all Members to be kept informed, in a timely manner, of the different steps in a safeguard investigation:

"We consider that the text of Article 12.1 SA is clear and requires no further interpretation. The ordinary meaning of the requirement for a Member to notify

⁴ Panel Report, *Ukraine – Passenger Cars*, paras. 7.463-7.464.

⁵ Panel Report, *Ukraine – Passenger Cars*, para. 7.465.

⁶ Panel Report, *Korea – Dairy*, para. 7.128.

⁷ Panel Report, *Korea – Dairy*, para. 7.134.

immediately its decisions or findings prohibits a Member from unduly delaying the notification of the decisions or findings mentioned in Article 12.1 (a) through (c) SA. Observance of this requirement is all the more important considering the nature of a safeguards investigation. A safeguard measure is imposed on imports of a product irrespective of its source and potentially affects all Members. All Members are therefore entitled to be kept informed, without delay, of the various steps of the investigation."⁸

7. The Appellate Body in *US – Wheat Gluten* confirmed this approach and added that "immediate notification" is notification that allows the Committee on Safeguards as well as WTO Members the "fullest possible period" to consider and react to a safeguard investigation:

"As regards the meaning of the word 'immediately' in the chapeau to Article 12.1, we agree with the Panel that the ordinary meaning of the word 'implies a certain urgency'. The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages. Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify 'immediately'.

'Immediate' notification is that which allows the Committee on Safeguards, and Members, the *fullest possible period* to reflect upon and react to an ongoing safeguard investigation. Anything less than 'immediate' notification curtails this period. We do not, therefore, agree ... that the requirement of '*immediate*' notification is satisfied as long as the Committee on Safeguards and Members of the WTO have *sufficient* time to review that notification. In our view, whether a Member has made an 'immediate' notification does not depend on evidence as to how the Committee on Safeguards and individual Members of the WTO actually use that notification. Nor can the requirement of 'immediate' notification depend on an *ex post facto* assessment of whether individual Members suffered actual prejudice through an insufficiency in the notification period."⁹

1.3.3 Notification under Article 12.1(a)

8. The Panel in *Korea – Dairy* noted the limited explicit requirements of Article 12.1(a) with respect to the content of notifications:

"Regarding the 'content' of notifications under Article 12.1, we note that with regard to the notification of the initiation of an investigation, the terms of Article 12.1(a) only refer to the obligation to notify 'initiating an investigatory process relating to serious injury or threat thereof and the reasons for it.'¹⁰

9. The Panel in *Korea – Dairy* rejected the argument that a notification should necessarily include a discussion of all of the legal requirements for a safeguard action to be taken, such as market conditions:

"We note that initiation is the beginning of the process, and the Agreement on Safeguards does not establish specific standards for the decision to initiate, as do Article 5 of the Agreement on the Implementation of Article VI of GATT 1994 and Article 11 of the Agreement on Subsidies and Countervailing Measures. Thus, to require a discussion in the notification of initiation of evidence regarding the elements that must be found to exist to impose a measure at the end of the investigation would impose a requirement at the initiation stage that is not required by the Agreement on Safeguards itself. We note in the first instance that whatever the relationship between the requirements of Article 12.2 regarding the contents of notifications and the

⁸ Panel Report, *US – Wheat Gluten*, para. 8.194.

⁹ Appellate Body Report, *US – Wheat Gluten*, paras. 105-106.

¹⁰ Panel Report, *Korea – Dairy*, para. 7.122.

contents of the investigation reports published pursuant to Articles 3.1 and 4.2, this question is not relevant to Article 12.1(a) notifications, as Article 12.2 specifically and exclusively addresses 'notifications referred to in paragraphs [12.]1(b) and [12.]1(c)'.

...

Although Korea's notification could usefully have included a reference to allegations of serious injury and a cross-reference to any domestic publication(s) in Korea, we think that this notification was sufficient to inform WTO Members adequately of Korea's initiation of an investigation concerning a particular product, so that Members having an interest in the product could avail themselves of their right to participate in the domestic investigation process."¹¹

10. Regarding whether the notification in *Korea – Dairy* was sufficiently "immediate", within the meaning of Article 12.1(a), the Panel ultimately concluded that:

"[T]he 14-day period between Korea's initiation of the investigation and its presentation of the notification related thereto, does not respect the requirements for 'immediate' notification and is in violation of Article 12.1 of the *Agreement on Safeguards*."¹²

11. The Panel in *US – Wheat Gluten*, in a finding upheld by the Appellate Body¹³, similarly determined that:

"[T]he delay of 16 days between the initiation of the investigation and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(a) SA."¹⁴

12. In *Ukraine – Passenger Cars*, the Panel found that:

"As Ukraine has not posited any other justification for the 11-day period between publication of the Notice of Initiation and its notification under Article 12.1(a) in this case, we consider that the notification was not 'immediate' and therefore conclude that Ukraine acted inconsistently with Article 12.1(a) in this regard."¹⁵

1.3.4 Notification under Article 12.1(b)

13. Regarding whether a notification of a determination of serious injury was sufficiently "immediate", within the meaning of Article 12.1(b), the Panel in *Korea – Dairy* stated that:

"[A] delay of 40 days ... between the domestic publication of the injury finding and the date of that notification to the Committee on Safeguards ... does not satisfy the requirements for an immediate notification and therefore is in violation of Article 12.1 of the *Agreement on Safeguards*."¹⁶

14. The Panel in *US – Wheat Gluten*, in a finding upheld by the Appellate Body¹⁷, found that:

"[A] delay of 26 days between the finding of serious injury and the notification thereof does not satisfy the requirement of immediate notification of Article 12.1(b) SA".¹⁸

15. In *Ukraine – Passenger Cars*, the Panel found that:

¹¹ Panel Report, *Korea – Dairy*, paras. 7.131 and 7.133.

¹² Panel Report, *Korea – Dairy*, para. 7.134.

¹³ Appellate Body Report, *US – Wheat Gluten*, para. 112.

¹⁴ Panel Report, *US – Wheat Gluten*, para. 8.197.

¹⁵ Panel Report, *Ukraine – Passenger Cars*, para. 7.476.

¹⁶ Panel Report, *Korea – Dairy*, para. 7.137.

¹⁷ Appellate Body Report, *US – Wheat Gluten*, para. 116.

¹⁸ Panel Report, *US – Wheat Gluten*, para. 8.199.

"Having found that in the circumstances of this case the event triggering the obligation under Article 12.1(b) occurred on 28 April 2012, we must assess whether Ukraine's notification under Article 12.1(b) of 21 March 2013 was 'immediate'. We recall that more than ten months passed after the competent authorities made the relevant finding and before submission of the notification to the Committee on Safeguards. Even factoring in the undisputed need for translation and the fact that the notification under Article 12.1(b) was more technical than the notification under Article 12.1(a), the notification is only four pages long and counts just over 1,800 words, its translation could not therefore have required several months. Ukraine has not made any argument to that effect. As Ukraine has not pointed to any other circumstances to be taken into consideration, it clear to us in view of the substantial delay that Ukraine in this instance did not proceed with the required degree of urgency and failed to keep the delay in notifying the Committee on Safeguards to a minimum. We therefore conclude that Ukraine did not notify the Committee on Safeguards immediately upon making the finding referred to in Article 12.1(b) and that it consequently acted inconsistently with Article 12.1(b)."¹⁹

1.3.5 Notification under Article 12.1(c)

16. Regarding whether a notification of a proposed safeguard measure was sufficiently immediate, within the meaning of Article 12.1(c), the Panel in *Korea – Dairy* stated:

"[W]e note that this notification took place more than 6 weeks after the decision on the proposed measure was taken ... We consider that this delay does not meet the requirements for an 'immediate' notification and therefore is in violation of Article 12.1 of the Agreement on Safeguards."²⁰

17. With respect to notification of a final decision to take a safeguard measure, the Panel in *Korea – Dairy* stated:

"[W]e note that Korea notified on 24 March 1997 that on 1 March 1997 a final decision had been taken to impose a quota as a safeguard measure. We fail to see how this can be viewed as an immediate notification. As far as it covers Korea's final decision to take a safeguard measure, we find that the timing of the Korean notification of 24 March 1997 does not meet the requirements of Article 12.1 of the *Agreement on Safeguards*."²¹

18. The Appellate Body in *US – Wheat Gluten* reversed the Panel's finding that the notification of a decision to apply a safeguard measure after the implementation of that decision was inconsistent with Article 12.1(c) of the Agreement on Safeguards.²² The Panel had considered that Article 12.2 provides relevant context in determining the timeliness of notifications under Article 12.1(c), and reasoned that a notification under Article 12.1(c) must be of a "proposed measure" and its "proposed date of introduction". On this basis, the Panel concluded that a notification under Article 12.1(c) must be made before the implementation of the "proposed" safeguard measure. The Appellate Body reasoned as follows:

"In examining the ordinary meaning of Article 12.1(c), we observe that the relevant triggering event is the '*taking*' of a decision. To us, Article 12.1(c) is focused upon whether a 'decision' has *occurred*, or has been '*taken*', and not on whether that decision has been *given effect*. On the face of the text, the timeliness of a notification under Article 12.1(c) depends only on whether the notification was immediate."

...

Article 12.2 is related to, and complements, Article 12.1 of the *Agreement on Safeguards*. Whereas Article 12.1 sets forth *when* notifications must be made during an investigation, Article 12.2 clarifies *what* detailed information must be contained in

¹⁹ Panel Report, *Ukraine – Passenger Cars*, para. 7.494.

²⁰ Panel Report, *Korea – Dairy*, para. 7.140.

²¹ Panel Report, *Korea – Dairy*, para. 7.145.

²² Panel Report, *US – Wheat Gluten*, paras. 8.200-8.207.

the notifications under Articles 12.1(b) and 12.1(c). We do not, however, see the content requirements of Article 12.2 as prescribing *when* the notification under 12.1(c) must take place. Rather, in our view, timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified 'immediately'. A *separate* question arises as to whether notifications made by the Member satisfy the content requirements of Article 12.2. Answering this separate question requires examination of whether, in its notifications under *either* Article 12.1(b) *or* Article 12.1(c), the Member proposing to apply a safeguard measure has notified 'all pertinent information', including the 'mandatory components' specifically enumerated in Article 12.2."²³

19. The Appellate Body in *US – Wheat Gluten* also found that, although the obligations under Article 12.1(c) and 12.2 are "related", they constitute discrete obligations:

"Thus, the obligations set forth under Articles 12.1(b), 12.1(c) and 12.2 relate to different aspects of the notification process. Although related, these obligations are discrete. A Member could notify 'all pertinent information' in its Articles 12.1(b) and 12.1(c) notifications, and thereby satisfy Article 12.2, but still act inconsistently with Article 12.1 because the relevant notifications were not made 'immediately'. Similarly, a Member could satisfy the Article 12.1 requirement of 'immediate' notification, but act inconsistently with Article 12.2 if the content of its notifications was deficient.

In our view, in finding that the United States acted inconsistently with Article 12.1(c) *solely because* the decision to apply a safeguard measure was notified after that decision had been implemented, the Panel confused the separate obligations imposed on Members pursuant to Article 12.1(c) and Article 12.2 and, thereby, added another layer to the timeliness requirements in Article 12.1(c). Instead of insisting on 'immediate' notification, as stipulated by Article 12.1(c), the Panel required notification to be made *both* 'immediately' *and* before implementation of the safeguard measure. We see no basis in Article 12.1(c) for this conclusion."²⁴

20. The Appellate Body in *US – Wheat Gluten* further found that the notification at issue was consistent with the requirement of immediate notification under Article 12.1(c). The United States had made the notification five days after the President of the United States had "taken the decision" to apply the safeguard measure, a period the Appellate Body considered sufficient, taking into account that the notification was made the day after the decision of the President of the United States had been published in the United States Federal Register.²⁵

21. In *Ukraine – Passenger Cars*, the Panel found that a seven-day delay in notifying the imposition of a safeguard measure was not inconsistent with the requirements of Article 12.1(c):

"Ukraine's notification was sent to the Committee on Safeguards on 21 March 2013, seven calendar days after the decision to apply a safeguard measure. In *US – Wheat Gluten*, the Appellate Body found that a delay of five calendar days in notifying a decision to apply a safeguard measure was not inconsistent with Article 12.1(c). The notification in question in that case was approximately 790-words long. The delay in the present dispute is greater, but unlike in *US – Wheat Gluten*, the Notice of 14 March 2013 in this case required translation into one of the WTO's working languages. Ukraine's joint notification under Articles 12.1(b) and (c) provides considerably more substantive information than the notification under Article 12.1(a). This is evidenced by the fact that it is four pages long and contains just over 1,800 words. In our view, the need (i) to prepare and finalize the original document, which is more than twice as long as the one at issue in *US – Wheat Gluten*, and (ii) to have it translated after it had been finalized, can justify a longer delay than five days. In the absence of specific arguments and evidence to the contrary, and taking account of the length of the document, we see no basis to conclude that by notifying the WTO seven days after publication of the Notice of 14 March 2013, Ukraine in this case did not proceed with

²³ Appellate Body Report, *US – Wheat Gluten*, paras. 120 and 123.

²⁴ Appellate Body Report, *US – Wheat Gluten*, paras. 124-125.

²⁵ Appellate Body Report, *US – Wheat Gluten*, paras. 128-130.

the required degree of urgency or failed to keep the delay in notifying the Committee on Safeguards to a minimum. We therefore conclude that Japan has not established that Ukraine failed to notify the Committee on Safeguards immediately upon taking a decision to apply a safeguard measure within the meaning of Article 12.1(c)."²⁶

1.4 Article 12.2

1.4.1 "all pertinent information"

22. The Panel in *Korea – Dairy* while analysing the meaning of the expression "all pertinent information" observed that the standard of what must be notified to the Committee under Article 12 differs from what must be published domestically pursuant to Articles 3 and 4 of the Agreement on Safeguards.²⁷ The Panel found that the information contained in the notifications at issue was in conformity with Article 12.2.²⁸ In respect of one of these notifications, the Panel noted that "this notification contains sufficient information on what Korea considered to be evidence of injury caused by increased imports" and concluded that the measure was consistent with Article 12.2.²⁹ The Appellate Body reversed this finding³⁰, stating that:

"[I]tems listed ... as mandatory components of 'all pertinent information', constitute a minimum notification requirement that must be met if a notification is to comply with the requirements of Article 12.

We do not agree with the Panel that 'evidence of serious injury' in Article 12.2 is determined by what the notifying Member considers to be sufficient information. What constitutes 'evidence of serious injury' is spelled out in Article 4.2(a) of the *Agreement on Safeguards*. ...

We believe that 'evidence of serious injury' in the sense of Article 12.2 should refer, at a minimum, to the injury factors required to be evaluated under Article 4.2(a). In other words, according to the text and the context of Article 12.2, a Member must, *at a minimum*, address in its notifications, pursuant to paragraphs 1(b) and 1(c) of Article 12, all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation. We believe that the standard set by Article 12 with respect to the content of 'all pertinent information' to be notified to the Committee on Safeguards is an objective standard independent of the subjective assessment of the notifying Member."³¹

23. The Appellate Body elaborated that, while the standard for determining "all pertinent information" could not be a subjective assessment by the notifying Member, Article 12.2 does not require that all details contained in the report of the national authorities should be included:

"In concluding that there is a minimum objective standard, we do not mean to suggest that 'evidence of serious injury' should include all the details of the recommendations and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the *Agreement on Safeguards*, they would have simply referred back to Articles 3 and 4 when requiring 'evidence of serious injury' in Article 12.2. There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.

²⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.502.

²⁷ Panel Report, *Korea – Dairy*, paras. 7.125-7.127.

²⁸ Panel Report, *Korea – Dairy*, paras. 7.136, 7.139 and 7.144.

²⁹ Panel Report, *Korea – Dairy*, para. 7.136.

³⁰ Appellate Body Report, *Korea – Dairy*, para. 113.

³¹ Appellate Body Report, *Korea – Dairy*, paras. 107-108.

We are aware that the last sentence of Article 12.2 provides that the Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply a safeguard measure. ... Contrary to what Korea argued and the Panel reasoned, such a request is not meant to fill in gaps created by omitting elements required under 'all relevant information' or 'evidence of serious injury'.³²

24. The Appellate Body in *Korea – Dairy* accordingly reversed the Panel on this point and made the following general statement regarding the object and purpose of the notification requirements at issue:

"We believe that the purpose of notification is better served if it includes all the elements of information specified in Articles 12.2 and 4.2. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3, than they would otherwise be if the notification did not include all such elements. And, the Committee on Safeguards can more effectively carry out its surveillance function set out in Article 13 of the *Agreement on Safeguards*. At the same time, providing the requisite information to the Committee on Safeguards does not place an excessive burden on a Member proposing to apply a safeguard measure as such information is, or should be, readily available to it."³³

25. Following the Appellate Body's statements in *Korea – Dairy*, the Panel in *Ukraine – Passenger Cars* pointed out that notifications made under Article 12.2 must contain all of the 14 items listed in the text of that Article as well as in Article 4.2 of the Agreement on Safeguards:

"Accordingly, notifications of 'all pertinent information' under Article 12.2, must, at a minimum, provide information about all of the items listed in Article 12.2, namely (i) evidence of serious injury or threat thereof caused by increased imports; (ii) precise description of the product involved; (iii) the proposed measure, (iv) proposed date of introduction, (v) expected duration and (vi) timetable for progressive liberalization. In addition, so far as evidence of serious injury or threat thereof caused by increased imports is concerned, the relevant notification must include information about each of the eight factors listed in Article 4.2 that are required to be evaluated, namely (i) the rate and amount of the increase in imports of the product concerned in absolute and relative terms; (ii) the share of the domestic market taken by increased imports, (iii) changes in the level of sales, (iv) production, (v) productivity, (vi) capacity utilization, (vii) profits and losses, and (viii) employment.

As these fourteen items all form part of the minimum content to be included in a notification under Articles 12.1(b) and (c), this necessarily means that if any one of these items is missing, the notification concerned fails to meet the requirements of Article 12.2."³⁴

26. The Panel in *Ukraine – Passenger Cars* found that Ukraine had acted inconsistently with Article 12.2 because its notification did not include one of the mandatory elements identified in that provision, namely, a proposed timetable for progressive liberalization:

"Furthermore, we recall that this Panel was established on 26 March 2014, i.e. two days before Ukraine's supplementary notification of 28 March 2014. Therefore, as of the date of the Panel's establishment, Ukraine had not notified any timetable for progressive liberalization to the WTO Committee on Safeguards. Accordingly, the Panel finds that Ukraine's notification of 21 March 2013, the only notification submitted as of the date of this Panel's establishment, does not satisfy the requirement to provide 'all pertinent information', since it failed to provide one of the

³² Appellate Body Report, *Korea – Dairy*, paras. 109-110.

³³ Appellate Body Report, *Korea – Dairy*, para. 111.

³⁴ Panel Report, *Ukraine – Passenger Cars*, paras. 7.509-7.510.

mandatory elements identified in Article 12.2 as being part of 'all pertinent information', i.e. a proposed timetable for progressive liberalization."³⁵

1.5 Article 12.3

1.5.1 "adequate opportunity for prior consultations"

27. The Panel in *Korea – Dairy* rejected a claim that, by not providing "all pertinent information" in its notifications in advance of consultations, a Member had failed to provide "adequate opportunity for prior consultations" within the meaning of Article 12.3. The Panel had found the content of Korea's notifications in conformity with Article 12 (the Appellate Body subsequently reversed this latter finding, but did not address any of the following issues). The Panel then opined that consultations may be "adequate" even if prior notifications are incomplete, since one of the purposes of consultations is to review the content of the relevant notifications.³⁶ The Panel further noted that whether parties eventually reach a mutually agreed solution is not the only criterion for assessing the adequacy of consultations:

"In the present case we note that parties exchanged questions and answers. The European Communities claims that it has always been unsatisfied with the Korean's answers and notifications (together with Korea's determination). This may be the case and would explain why it decided to pursue dispute settlement proceedings, but it does not prove that Korea did not consult in good faith for the purpose of informing interested Members of its investigation, its conclusion and its proposed actions. We note also that Korea did impose a measure at a level and for a duration different, and less restrictive, than initially proposed. Consultations were certainly fruitful in this respect, albeit not sufficient to satisfy the European Communities.

We reject therefore the EC claim that Korea failed to provide adequate opportunity to consult. Moreover, it seems to us that such consultations have led to an important revision of the initial notification and that parties, at some point, entered into very serious negotiations and considered serious elements of a mutually agreed solution. The fact that this proposed settlement was not formalized through the acceptance by the relevant internal authorities of the European Communities is immaterial. What is relevant for the purpose of this EC claim, is the fact that the parties to these consultations were able to negotiate quite effectively, which, in our view, demonstrates that the consultations were adequate. For us, this is the purpose of any consultation process and the scope of the obligation contained in Article 12.3 of the *Agreement on Safeguards*, i.e. to favour efforts by the parties to reach a mutually agreed solution of their disagreement."³⁷

28. In *US – Wheat Gluten*, the Appellate Body held that the Panel erred in concluding that the United States had acted inconsistently with Article 12.3 insofar as the Panel had based this conclusion on an erroneous interpretation of Article 12.1(c).³⁸ Nevertheless, the Appellate Body upheld the Panel's conclusion, on the basis that there was no opportunity for consultations on the final proposed measure. In this connection, the Appellate Body considered that Article 12.3 requires that information on a proposed measure must be provided in advance of the consultations:

"We note, first, that Article 12.3 requires a Member proposing to apply a safeguard measure to provide an 'adequate opportunity for prior consultations' with Members with a substantial interest in exporting the product concerned. Article 12.3 states that an 'adequate opportunity' for consultations is to be provided 'with a view to': reviewing the information furnished pursuant to Article 12.2; exchanging views on the measure; and reaching an understanding with exporting Members on an equivalent level of concessions. In view of these objectives, we consider that Article 12.3 requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through

³⁵ Panel Report, *Ukraine – Passenger Cars*, para. 7.523.

³⁶ Panel Report, *Korea – Dairy*, para. 7.150.

³⁷ Panel Report, *Korea – Dairy*, paras. 7.152-7.153.

³⁸ Appellate Body Report, *US – Wheat Gluten*, para. 133.

consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure. Moreover, the reference, in Article 12.3, to 'the information provided under' Article 12.2, indicates that Article 12.2 identifies the information that is needed to enable meaningful consultations to occur under Article 12.3. Among the list of 'mandatory components' regarding information identified in Article 12.2 are: a precise description of the *proposed* measure, and its *proposed* date of introduction.

Thus, in our view, an exporting Member will not have an 'adequate opportunity' under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy."³⁹

29. The Panel in *US – Wheat Gluten* had found that no consultations had been held between the United States and the European Communities on the final measure that was approved by the President of the United States.⁴⁰ Regarding certain recommendations made by the competent authority to the President, the Appellate Body noted that:

"[T]he recommendations made by the USITC did *not* include specific numerical quota shares for the individual exporting Members concerned, and the recommendations imply, without providing details, that the individual quota shares could be less favourable to imports from the European Communities. We consider that these 'recommendations' did not allow the European Communities to assess accurately the likely impact of the measure being contemplated, nor to consult adequately on overall equivalent concessions with the United States.

Accordingly, we see no error in the Panel's conclusion that the United States notifications under Article 12.1(b) did not provide a description of the measure under consideration sufficiently precise as to allow the European Communities to conduct meaningful consultations with the United States, as required by Article 12.3 of the *Agreement on Safeguards*."⁴¹

30. The Appellate Body in *US – Line Pipe* reaffirmed its interpretation in *US – Wheat Gluten*⁴² and also found that failure of the exporting Member to request consultations during an inadequate time period does not excuse the importing Member from its obligation to provide an adequate opportunity for prior consultations:

"The obligation of an importing Member under Article 12.3 is to 'provide adequate opportunity for *prior* consultations'. (emphasis added) That obligation cannot be met if there is insufficient time prior to the application of the measure to have a *meaningful* exchange. The importing Member's failure to provide information about a safeguard measure to an exporting Member sufficiently in advance of that measure taking effect is not excused by the fact that the exporting Member did not request consultations during that inadequate time-period."⁴³

31. In *Ukraine – Passenger Cars*, the Panel found that Ukraine acted inconsistently with the obligation set forth under Article 12.3 because it had not notified prior to the consultations held with Japan all the information that had to be notified under Article 12.2:

³⁹ Appellate Body Report, *US – Wheat Gluten*, paras. 136-137.

⁴⁰ Panel Report, *US – Wheat Gluten*, para. 8.217.

⁴¹ Appellate Body Report, *US – Wheat Gluten*, paras. 141-142.

⁴² Appellate Body Report, *US – Line Pipe*, para. 108. In particular, the Appellate Body addressed the issue of whether the period from the initial Article 12.1(b) notification to the day the measure takes effect is relevant for assessing whether an adequate opportunity was provided for prior consultations. The Appellate Body found that notifications under Article 12.1(b) in this case were not sufficiently precise to allow the exporting Member to conduct meaningful consultation on the measure at issue. The Appellate Body concurred with the Panel's finding, that, as a matter of fact, these proposed measures "*differed substantially*" from the one announced and eventually applied in the *US – Line Pipe*.

⁴³ Appellate Body Report, *US – Line Pipe*, para. 112.

"With these considerations in mind, the Panel now examines whether, in the present dispute, Ukraine provided Japan with adequate opportunity for prior consultations with a view to, *inter alia*, reviewing the information provided under Article 12.2. As mentioned earlier, the only consultations on the proposed safeguard measure that were held prior to the entry into force of that measure were those held on 19 April 2012. Ukraine had provided no notification to the WTO under Article 12.1(b) or (c) at the time. While Ukraine provided the Key Findings to Japan prior to the consultations, on 11 April 2012, those findings do not include information concerning a timetable for progressive liberalization, which is one of the mandatory elements of information to be provided under Article 12.2. Thus, it is clear that Japan was not provided with the information required under Article 12.2 before the consultations were held. Moreover, the Articles 12.1(b) and 12.1(c) notification made on 21 March 2013 similarly failed to provide information regarding a timetable for progressive liberalization. Since Japan was not provided with all pertinent information identified in Article 12.2, it is clear to us that, even assuming Ukraine's interpretation of the relevant provisions were correct, an issue we need not decide, by failing to provide Japan with all pertinent information identified in Article 12.2 prior to the consultations, Ukraine acted inconsistently with Article 12.3.

For the reasons set out above, we therefore conclude that, although consultations took place in April 2012 prior to the application of the measure at issue, Ukraine acted inconsistently with its obligations under Article 12.3 because it failed to provide Japan, a Member with a substantial export interest in the product subject to the proposed safeguard measure, with adequate opportunity for prior consultations with a view to reviewing *all* pertinent information within the meaning of Article 12.2, which includes the proposed timetable for progressive liberalization."⁴⁴

1.6 Relationship with other provisions of the Safeguards Agreement

1.6.1 Articles 2 and 4

32. The Panel in *Argentina – Footwear (EC)* rejected the view that non-compliance with Article 12 *ipso facto* constitutes a basis for finding a violation of the substantive requirements of Articles 2 and 4, or *vice versa*:

"In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4. Similarly, we consider that the substantive requirements of Articles 2 and 4 do not have implications for the question of compliance with Article 12. Article 12 serves to provide transparency and information concerning the safeguard-related actions taken by Members. We note in this context that notification under Article 12 is just the first step in a process of transparency that can include, *inter alia*, review by the Committee as part of its surveillance functions (Article 13.1(f)), requests for additional information by the Council for Trade in Goods or the Committee on Safeguards (Article 12.2), and/or eventual bilateral consultations with affected Members if application of a measure is proposed (Article 12.3). In this regard, the important point is that the notifications be sufficiently descriptive of the actions that have been taken or are proposed to be taken, and of the basis for those actions, that Members with an interest in the matter can decide whether and how to pursue it further.

...

Articles 12.2 and 12.3 in our view confirm that Members are not required to notify the full detail of their investigations and findings. Article 12.2 specifically provides for the possibility of requests for further information by the Council for Trade in Goods or the Committee on Safeguards. Article 12.3 provides, *inter alia*, for consultations, upon request, with other Members, to review the information contained in the notifications. Thus, these provisions specifically create opportunities for further information to be provided, upon request, concerning the details of the actions summarised in the

⁴⁴ Panel Report, *Ukraine – Passenger Cars*, paras. 7.537-7.538.

notifications. Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation."⁴⁵

1.6.2 Article 7

33. The Panel in *Argentina – Footwear (EC)* concluded that it could not examine under Article 12 a claim regarding a failure to notify a modification of a safeguard measure that increased the restrictiveness of that measure:

"We note that the modifications of definitive safeguard measures foreseen in the Agreement (namely early elimination or faster liberalization potentially resulting from mid-term reviews under Article 7.4, and extension of measures beyond the initial period of application under Article 7. [sic] and 7.4), all are subject to notification requirements under Articles 12.5 and 12.1(c)/12.2, respectively.

In this context, we note that the *only* modifications of safeguard measures that Article 7.4 contemplates are those that *reduce* its restrictiveness (i.e., to eliminate the measure or to increase their pace of its liberalisation pursuant to a mid-term review). The Agreement does not contemplate modifications that *increase* the restrictiveness of a measure, and thus contains no notification requirement for such restrictive modifications.

We note that the modifications of the definitive safeguard measure made by Argentina are not contemplated by Article 7, and thus Article 12 does not foresee notification requirements with respect to such modifications. Any *substantive* issues pertaining to these subsequent Resolutions would need to be addressed under Article 7, but the European Communities made no such claim. Where the situation at issue is primarily one of substance, i.e., modification of a measure in a way not foreseen by the Safeguards Agreement, we believe that we cannot address the alleged procedural violation concerning notification arising therefrom, as no explicit procedural obligation is foreseen. Therefore, we see no possibility for a ruling on this aspect of the European Communities' claim under Article 12."⁴⁶

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Current as of: December 2020

⁴⁵ Panel Report, *Argentina – Footwear (EC)*, paras. 8.298 and 8.300.

⁴⁶ Panel Report, *Argentina – Footwear (EC)*, paras. 8.302-8.304.