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1 ARTICLE 8

1.1 Text of Article 8

Article 8

Level of Concessions and Other Obligations

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.

3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

1.2 Article 8.1

1.2.1 "in accordance with the provisions of paragraph 3 of Article 12"

1. In *US – Wheat Gluten*, the Appellate Body upheld a finding by the Panel in that dispute that the United States had failed to endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure, in accordance with Article 12.3:

"Article 8.1 imposes an obligation on Members to 'endeavour to maintain' equivalent concessions with affected exporting Members. The efforts made by a Member to this end must be 'in accordance with the provisions of' Article 12.3 of the *Agreement on Safeguards*.

In view of this explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, 'endeavour to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure. We have upheld the Panel's findings that the United States did not provide an adequate opportunity for consultations, as

required by Article 12.3 of the *Agreement on Safeguards*. For the same reasons, we also uphold the Panel's finding, in paragraph 8.219 of its Report, that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*.¹

2. In *US – Line Pipe*, the Appellate Body, referring to its Report in *US – Wheat Gluten*, upheld the Panel's finding that the obligation under Article 8.1 to "maintain a substantially equivalent level of concessions" is linked with the Members' consultation obligation under Article 12.3:

"As we stated in *US – Wheat Gluten*, there must be sufficient time 'to allow for the possibility ... for a meaningful exchange'.² This requirement presupposes that exporting Members will obtain the relevant information sufficiently in advance to permit analysis of the measure, and assumes further that exporting Members will have an adequate opportunity to consider the likely consequences of the measure before the measure takes effect. For it is only in such circumstances that an exporting Member will be in a position, as required by Article 12.3, to 'reach[] an understanding on ways to achieve the objective set out in paragraph 1 of Article 8' of 'maintain[ing] a substantially equivalent level of concessions and other obligations to that existing under GATT 1994'. We see this specific textual link between Article 12.3 and paragraph 1 of Article 8 as especially significant.

...

In our view, our reasoning in *US – Wheat Gluten* is also applicable in this case. Therefore, we agree with the Panel that the United States, 'by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions' We, therefore, uphold the Panel's finding that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*.³

3. In *Ukraine – Passenger Cars*, the Panel held that Ukraine acted inconsistently with Article 8.1 because it failed to provide a proposed timetable for progressive liberalization as required under Article 12.3 of the Agreement on Safeguards:

"Consequently, we conclude that, to the extent that Ukraine failed to provide adequate opportunity for prior consultations to review a proposed timetable for progressive liberalization, Ukraine cannot be said to have 'endeavoured to maintain' a substantially equivalent level of concessions and other obligations, because without a proposed timetable for progressive liberalization, exporting Members such as Japan were unable to form an accurate understanding as to what might constitute a substantially equivalent level of concessions and other obligations.

For the reasons set out above, the Panel therefore concludes that Ukraine acted inconsistently with its obligations under Article 8.1 because it has failed to endeavour to maintain a substantially equivalent level of concessions and other obligations."⁴

1.2.2 Relationship with other provisions of the Safeguards Agreement

4. The Panel in *US – Lamb*, after making findings of inconsistency with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards (and with Article XIX:1(a) of GATT 1994), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the Agreement on Safeguards.⁵

¹ Appellate Body Report, *US – Wheat Gluten*, paras. 145-146.

² (footnote original) Appellate Body Report, *US – Wheat Gluten*, para. 136.

³ Appellate Body Report, *US – Line Pipe*, paras. 108 and 119.

⁴ Panel Report, *Ukraine – Passenger Cars*, paras. 7.552-7.553.

⁵ Panel Report, *US – Lamb*, para. 7.280.

1.2.3 Relationship with other WTO Agreements

5. The Panel in *US – Lamb*, after making findings of inconsistency with Article XIX:1(a) of the GATT 1994 (and with Articles 2.1, 4.1(c), and 4.2(b) of the Agreement on Safeguards), exercised judicial economy with respect to claims raised under Article 8 (and Articles 2.2, 3.1, 5.1, 11 and 12) of the Agreement on Safeguards.⁶

1.3 Article 8.3

1.3.1 "absolute increase in imports"

6. Regarding the analysis of absolute or relative increases in imports, see the Section on Article 2.1 of the Agreement on Safeguards.

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⁶ Panel Report, *US – Lamb*, para. 7.280.