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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*.<sup>1</sup>

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'.<sup>2</sup> 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*.<sup>3</sup>

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."<sup>4</sup>

### 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

<sup>1</sup> Appellate Body Report, *US – Wheat Gluten*, paras. 145-146. See also Panel Report, *US – Safeguard Measure on Washers*, para. 7.276.

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

<sup>3</sup> Appellate Body Report, *US – Line Pipe*, paras. 108 and 119.

<sup>4</sup> Panel Report, *Ukraine – Passenger Cars*, paras. 7.552-7.553.

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.<sup>5</sup>

### 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.<sup>6</sup>

## 1.3 Article 8.2

### 1.3.1 Applicability of Article 8.2 and Article XIX:3(a) of the GATT 1994

6. The measure at issue in *Turkey – Additional Duties (US)* consisted of additional duties imposed by Türkiye on certain products originating in the United States pursuant to Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994, in response to the additional duties imposed by the United States on products originating in Türkiye, which the latter considered to be a safeguard measure.<sup>7</sup> Since the US measures had been imposed under Section 232, the provision of US law concerning the actions to be taken by the United States for safeguarding national security, the United States argued that Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 did not apply to such measures.<sup>8</sup> The Panel started its analysis by the issue whether Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 applied to the challenged measures.<sup>9</sup>

7. The Panel in *Turkey – Additional Duties (US)* stated that "the right under Article 8.2 of the Agreement on Safeguards becomes available only to rebalance the adverse effects of a safeguard measure".<sup>10</sup> The Panel went on to underline that the right to suspend concessions or other obligations pursuant to Article 8.2 is conditioned upon the existence of a safeguard measure adopted by another Member:

"An examination of the text of Article 8.2 of the Agreement on Safeguards shows that the right to suspend concessions or other obligations under the GATT 1994 established in this provision is subject to several requirements, including that: (a) no agreement on adequate means of trade compensation maintaining a level of concessions or other obligations substantially equivalent to those existing under the GATT 1994 is reached between the Member proposing to apply or extend a safeguard measure and other Members having a substantial interest as exporters of the product concerned, within 30 days from the application of the safeguard measure; (b) not more than 90 days have passed from the application of the safeguard measure; and (c) a Member affected by a safeguard measure suspends the application of 'substantially equivalent' concessions or other obligations to the trade of the Member applying the safeguard measure. The Panel observes that all of these requirements are contingent upon a safeguard measure being applied or extended by another Member.

...

Under Article XIX:3(a) of the GATT 1994, for a Member to have a right to suspend concessions or other obligations under the GATT 1994, another Member must have taken or continued an 'action' under Article XIX:1 of the GATT 1994. According to Article 1 of the Agreement on Safeguards, measures provided for in Article XIX of the GATT 1994 shall be understood to be safeguard measures. It follows that, like Article 8.2 of the Agreement on Safeguards, Article XIX:3(a) of the GATT 1994 establishes a conditional right to suspend concessions or other obligations under the GATT 1994 in response to a safeguard measure. Thus, in the Panel's view, the

<sup>5</sup> Panel Report, *US – Lamb*, para. 7.280.

<sup>6</sup> Panel Report, *US – Lamb*, para. 7.280.

<sup>7</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 2.4-2.6.

<sup>8</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 7.2 and 7.5.

<sup>9</sup> Panel Report, *Turkey – Additional Duties (US)*, para. 7.27.

<sup>10</sup> Panel Report, *Turkey – Additional Duties (US)*, para. 7.32.

application of a safeguard measure is a necessary precondition under both Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT 1994 for this right to become available to affected Members."<sup>11</sup>

#### **1.4 Article 8.3**

##### **1.4.1 "absolute increase in imports"**

8. 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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<sup>11</sup> Panel Report, *Turkey – Additional Duties (US)*, paras. 7.33 and 7.43. See also Panel Report, *China – Additional Duties (US)*, paras. 7.66 and 7.76.