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## **1 ARTICLE 9**

### **1.1 Text of Article 9**

#### **Article 9**

##### *Developing Country Members*

1. Safeguard 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.<sup>2</sup>

(*footnote original*)<sup>2</sup> A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

2. A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. Notwithstanding the provisions of paragraph 5 of Article 7, a developing country Member shall have the right to apply a safeguard measure again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, after a period of time equal to half that during which such a measure has been previously applied, provided that the period of non-application is at least two years.

### **1.2 Article 9.1**

#### **1.2.1 Exclusion of developing country exporting less than "*de minimis*" levels**

1. In *US – Line Pipe*, based upon the statistical evidence, the Appellate Body upheld the Panel's findings<sup>1</sup> and concluded that the importing Member acted inconsistently with Article 9.1 by failing to "take all reasonable steps it could, and exclude developing countries exporting less than *de minimis* levels in Article 9.1."<sup>2</sup> However, the Appellate Body in *US – Line Pipe* held that Article 9.1 does not indicate how a Member must comply with an obligation to provide specifically for "non-application" of a safeguard measure, and it is possible to comply with Article 9.1 "without providing a specific list of the Members excluded from the safeguard measure":

"There is nothing, for example, in the text of Article 9.1 to the effect that countries to which the measure will not apply must be expressly excluded from the measure. Although the Panel may have a point in saying that it is 'reasonable to expect' an express exclusion, we see nothing in Article 9.1 that requires one.

We agree also with the United States that it is possible to comply with Article 9.1 without providing a specific list of the Members that are either included in, or excluded from, the measure. Although such a list could, and would, be both useful and helpful

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<sup>1</sup> The Panel found that the safeguard measure did not contain any "express exclusion" of those developing countries which fit the description of *de minimis* imports in Article 9.1; and "in the absence of any other relevant documentation," the safeguard measure applied to developing countries with *de minimis* imports. The Panel also concluded that Article 9.1 contains an obligation not to apply a measure, while the safeguard measure in the *US – Line Pipe* "applies" to all developing countries in principle. Thus the United States had not complied with its obligations under Article 9.1 of the Agreement on Safeguards. Panel Report, *US – Line Pipe*, paras. 7.180-7.181.

<sup>2</sup> Appellate Body Report, *US – Line Pipe*, para. 132.

by providing transparency for the benefit of all Members concerned, we see nothing in Article 9.1 that mandates one."<sup>3</sup>

2. In *US – Line Pipe*, concerning the safeguard measure which took the form of a supplemental duty, the Appellate Body clarified that "duties are 'applied [against a product] irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports together". In this case, no evidence had been presented before the Panel that the importing Member made an effort "to make certain that *de minimis* imports from developing countries were excluded from the application of the measures":

"On this point, we start by observing that Article 9.1 obliges Members not to *apply* a safeguard measure against *products* originating in developing countries whose individual exports are below a *de minimis* level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product. ... However, we note that Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be 'applied' to a product. In our view, duties are 'applied against a *product*' when a Member imposes conditions under which that product can enter that Member's market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are 'applied' irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.

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[T]he available documents reveal no efforts whatsoever by the United States – apart from the claimed 'automatic' structure of the measure itself – to make certain that *de minimis* imports from developing countries were excluded from the application of the measure."<sup>4</sup>

3. The Panel in *Dominican Republic – Safeguard Measures* held that "Members which apply safeguard measures are obliged to adopt *all reasonable measures* available to them to exclude all developing countries that meet the requirements in Article 9.1 of the Agreement on Safeguards".<sup>5</sup> While pointing out that there is certain flexibility how an investigating authority must comply with the Article 9.1 obligation, the Panel in *Dominican Republic – Safeguard Measures* stated that "[i]rrespective of the way in which each Member complies with this provision, however, the Member concerned must show that it has made the efforts it can to exclude all those Members covered by the provision in Article 9.1 of the Agreement on Safeguards."<sup>6</sup> Turning to the facts of the investigation before it, the Panel found that the investigating authority of the Dominican Republic had not complied with this obligation:

"As already mentioned, there is a certain flexibility in the manner of complying with the obligations under Article 9.1 of the Agreement on Safeguards. In the present case, the Dominican Republic explicitly excluded imports from four origins, some of them in a similar position to Thailand (as regards imports during the period investigated). Unlike these countries, however, Thailand was not specifically mentioned in the list of countries excluded. It should also be noted that Colombia, Indonesia and Panama did not export to the Dominican Republic either in 2009 and yet these three Members were included by the competent authority in the list of countries excluded.

Bearing this in mind, the Panel does not consider that the Dominican Republic has provided a convincing explanation of the reason why Thailand was treated differently and was not included specifically in the list of countries excluded from the measure's

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<sup>3</sup> Appellate Body Report, *US – Line Pipe*, paras. 127-128.

<sup>4</sup> Appellate Body Report, *US – Line Pipe*, paras. 129 and 132.

<sup>5</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.393.

<sup>6</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.396.

coverage. It is not enough for the Dominican Republic to state without any further substantiation that imports from Thailand were de facto excluded from the measure's application because there are no grounds for the different treatment given to imports from Thailand and no proof that if Thailand had decided to export the product investigated to the Dominican Republic, it would have been exempt from application of the measures."<sup>7</sup>

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<sup>7</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.400-7.401.