

## WTO Panel Rules Against Ukraine on Numerous Issues Regarding Its Safeguard Measure on Certain Passenger Cars

On June 26, 2015, a World Trade Organization (WTO) dispute settlement panel circulated its decision in *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars* (WT/DS468/R). Japan, the complainant, had challenged numerous aspects of Ukraine’s safeguard measure on imports of certain passenger cars and the investigation that led to imposition of this measure. The panel upheld most of Japan’s substantive claims, finding Ukraine in violation of its obligations under the relevant provisions of the WTO Agreement on Safeguards and the General Agreement on Tariffs and Trade 1994. Panels normally only recommend that a WTO Member (“Member”) bring a measure into compliance with its WTO obligations. However, in “light of the nature and number of inconsistencies” with the Safeguards Agreement and GATT 1994 in this case, the panel suggested that Ukraine revoke its measure on passenger cars in its entirety.

GATT Article XIX sets out the general authority for Members to apply safeguard measures to counteract injurious increases in imports. The Safeguards Agreement establishes additional rules for the application of such measures. The panel in this case first upheld Japan’s claim that the Ukrainian investigating authorities improperly identified the relative increase in imports as the “unforeseen development,” contrary to the requirement of GATT Article XIX:1(a), rather than identifying and explaining any unforeseen developments that resulted in

that relative increase in imports. The panel also found that, pursuant to Article XIX:1(a), a Member must demonstrate that the product has been imported in increased quantities as a result of the effect of GATT 1994 obligations of the Member concerned. According to the panel, Ukraine similarly failed to comply with this requirement.

The panel next examined Japan’s claims against Ukraine’s determination of increased imports. In particular, Article 2.1 of the Safeguards Agreement requires that, to support applying a safeguard measure, the product in question must have been imported into the Member’s territory “in such increased quantities,” either in absolute terms or relative to domestic production, as to cause or threaten to cause serious injury or threat thereof to the domestic industry. Japan did not contest Ukraine’s finding of a 37.9 percent increase in imports relative to domestic production over the entire period of investigation (POI), 2008-2010.

However, according to the panel, the Ukrainian authorities did not satisfy the separate “in such increased quantities” requirement, under which a Member must conduct a proper qualitative analysis of the import data with regard to import trends. The panel found that Ukraine acted in a manner inconsistent with Article 2.1 by not explaining how intervening trends in imports relative to domestic production supported the determination of a relative increase in imports during the POI. Article 2.1 also requires, in

accordance with previous Appellate Body decisions, that the relative increase in imports has been “sudden enough, sharp enough, and significant enough.” Ukraine failed to provide any analysis of this requirement. Upon examining the record itself, the panel found that the evidence did not support a finding that the increase in imports was either “sharp”, “sudden” or “significant” enough.

Article 2.1 next provides that a safeguard is appropriate only if a product “is being imported” in increased quantities. Thus, as the panel explained, the increase in imports must be “recent” enough to cause or threaten serious injury, both in relation to the date of the determination and the date of the decision to apply a safeguard measure. “This minimizes the potential of ‘emergency action’ being taken outside emergency situations by ensuring that any time gap between the determination and the application of a safeguard measure remains appropriately limited.” The question of precisely where to draw the line between proper and improper time gaps must be addressed, according to the panel, on a case-by-case basis. Here, there was a 16-month gap between the end of the POI (2010) and the determination date (April 28, 2012), which the panel found was not long enough to call into question the finding of a “recent” increase in imports. By contrast, the panel found that the gap of more than two years between the end of the POI and the date of the decision to apply the safeguard measure (March 14, 2013) was such that the authorities could no longer maintain, based on data from 2008 to 2010 alone, (1) that passenger cars were “being imported” in increased quantities within the meaning of Article 2.1, and (2) that the determination of increased imports continued to rest on a sufficient factual basis.

The panel next examined Japan’s claims related to the manner in which the Ukrainian authorities made their findings regarding serious injury or threat thereof, under Article 4.2(a) and numerous other provisions of the

Safeguards Agreement. The panel first determined that Ukraine had found a threat of serious injury, which, pursuant to Article 4.2(a), requires the authorities to establish (i) the clear imminence of (ii) significant overall impairment in the position of the domestic industry. The panel highlighted the “very high standard of injury embodied by the concept of serious injury.” Moreover, while the concept of “threat of serious injury” implies a lower threshold for establishing the “*right to apply* a safeguard measure,” the Safeguards Agreement does not make threat of serious injury easier to establish than actual serious injury. In both contexts, the Member must be able to demonstrate the same elements regarding serious injury. In the threat context, it must also be demonstrated that such injury is “clearly imminent,” which requires showing that serious injury is highly likely in the very near future, unless protective action is taken.

The authorities must examine all relevant injury factors, with the data pertaining to the latter part of the POI being of particular relevance. Among the mandatory injury factors that authorities must evaluate are the share of the domestic market taken by increased imports and the rate and amount of the increase in imports in absolute and relative terms. While finding that domestic production in Ukraine decreased by 35 percent, the authorities failed to properly evaluate the likely development of the import market share and its likely effect on the condition of the domestic industry in the very near future. The panel then concluded that the rate and amount of an increase in imports during the POI may indicate a likelihood of increased importation in the very near future and so are relevant to an analysis of threat of serious injury. However, the Ukrainian authorities failed to properly evaluate the likely development of imports—either in absolute terms or relative to domestic production—or their likely effect on the domestic industry in the very near future. Similarly, the authorities failed

to properly evaluate the likely increase in the very near future of exports to Ukraine, which are anticipated to rise as a result of exporting countries' current or imminent export capacity. Likewise, the authorities provided only a superficial evaluation of the factors relating directly to the situation of the domestic industry, including production volume, capacity utilization, sales, etc.; no projections as to likely developments in these factors in the very near future; and no analysis of intervening trends throughout the POI, including improvements in the condition of the domestic industry toward the end of the POI. Therefore, the panel found that Ukraine had failed to properly evaluate the likely condition of the domestic industry and the likely effect of these developments on the industry in the very near future.

The panel turned next to Japan's claims under Article 4.2(b) of the Safeguards Agreement, beginning with the requirement of a causal link between increased imports and serious injury or threat thereof. The panel agreed that upward movements in imports should normally occur at the same time as downward movements in injury factors. However, contrary to Ukraine's contention, this coincidence, by itself, is insufficient to establish a causal link. In addition, the panel concluded that the conditions under which increased imports occur is an element to be considered as part of the causation analysis, as are the conditions of competition. In this case, the panel found that the authorities did not undertake a proper analysis of the relationship between movements in imports and the injury factors, including whether there was a high degree of likelihood that a causal link would still exist in the very near future. Given the Ukrainian authorities' failure to demonstrate how a relative increase in imports contributed to bringing about a threat of serious injury, the panel concluded that Ukraine had acted inconsistently with its obligations under Article 4.2(b).

Article 4.2(b) also precludes Members from attributing injury caused by factors other than increased imports to those imports. As the panel explained, the Safeguards Agreement does not establish the "method and approach" that Members must use to separate and distinguish the injurious effects of the increased imports from those of other factors causing injury at the same time. However, the authorities must do so explicitly and the "explanation must be clear and unambiguous." In cases involving a threat of serious injury, the authorities must also include a forward-looking assessment of whether other factors currently causing injury will continue to do so in the very near future. In this case, the Ukrainian authorities failed either to identify any other factors causing injury or the nature and extent of the injurious effects of those other factors, as distinguished from the effects of increased imports. The determination also did not explain the nature and extent of the injurious effects of any other factors or the particular method and process used to separate and distinguish other causal factors. Because the determination failed to meet any of these requirements, the panel found that Ukraine acted inconsistently with its obligations under Article 4.2(b).

Japan also made a number of claims under various articles relating to the application, duration and liberalization of the safeguard measure. For one, Japan argued that Ukraine had failed to progressively liberalize the safeguard measure, as required by Article 7.4 of the Safeguards Agreement for any measure with an expected duration of more than one year. The panel first held that, contrary to Japan's claim, Ukraine was not required to provide a timetable for the progressive liberalization before applying its three-year safeguard measure. The panel next explained that the required liberalization must take place "at regular intervals during the period of application." Article 7.4 does not establish any requirements or guidelines as to how long the

regular intervals must be. Ukraine decided to progressively liberalize its measure at regular intervals of 12 months, which the panel found to be reasonable. The panel rejected a number of similar claims by Japan and exercised “judicial economy” by declining to consider certain other claims.

The panel also rejected or exercised judicial economy regarding several other procedural claims by Japan. The panel agreed with Japan, however, that Ukraine acted inconsistently with its obligations under Article 4.2(c) of the Safeguards Agreement. That provision requires that the authorities’ report be published “promptly” once there has been a determination of serious injury or threat thereof caused by increased imports pursuant to Article 4.2(a). In this case, Ukraine’s notice of its determination was the type of report that Ukraine was required to publish “promptly.” The notice was published on March 14, 2013, after the determination was reached and the investigation concluded on April 28, 2012. The panel found that publishing the notice almost 11 months after the determination date was not “promptly,” contrary to Ukraine’s obligations under Article 4.2(c).

The panel went on to find that, by notifying the Committee on Safeguards of the initiation of the investigation 11 days after publication of the initiation notice, Ukraine failed to comply with the requirement of “immediate” notification pursuant to Article 12.1(a) of the Safeguards Agreement. The panel also found that Ukraine was required by Article 12.1(b) to notify the Committee on Safeguards “immediately” of its finding of threat of serious injury on April 28, 2012. However, Ukraine did not provide this notification until March 21, 2013. The panel found that, in view of this “substantial delay,” Ukraine “did not proceed with the required degree of urgency and failed to keep the delay in notifying the Committee on Safeguards to a minimum.” Ukraine thus violated Article 12.1(b).

Finally, Article 19.1 of the WTO Dispute Settlement Understanding (DSU) requires

panels to “recommend” that Members bring their measures into conformity with any relevant agreements. Pursuant to Article 19.1, panels also “may suggest ways in which the Member concerned could implement” a panel’s recommendations. Following such recommendations, Members in most cases revise their measures in an effort to comply. The panel here deviated from that precedent, however, in “light of the nature and number of inconsistencies” with the Safeguards Agreement and GATT 1994. The panel instead “suggest[ed] that Ukraine revoke its safeguard measure on passenger cars” altogether.

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