

13 February 2012 - 3

Final Report of the Panel

DOMINICAN REPUBLIC – SAFEGUARD MEASURES ON IMPORTS OF POLYPROPYLENE BAGS AND TUBULAR FABRIC

(WT/DS 415/R; WT/DS 416/R; WT/DS 417/R; WT/DS 418/R)
(Circulated on 31 January 2012)

Parties:

Complainants: Costa Rica, Guatemala, Honduras & El Salvador
Respondent: Dominican Republic
Third Participants: Colombia, Nicaragua, United States, European Union, China, Guatemala, Honduras, Panama, Turkey, Costa Rica & El Salvador

Panellists:

Pierre Pettigrew (Chairman), Enie Neri de Ross (Member), Gisela Bolivar (Member)

I. INTRODUCTION AND BACKGROUND

The dispute concerns provisional and definitive safeguard measures imposed by the Dominican Republic on imports of polypropylene bags and tubular fabric and the investigation that led to the imposition of those measures. The measures at issue were imposed pursuant to an investigation conducted by the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic (hereinafter "the Commission").

Initiation of the safeguard investigation

On 15 December 2009, at the request of the company Fersan S.A. (hereinafter "FERSAN"), the Commission declared the initiation of an investigation for applying safeguard measures on imports from all origins of polypropylene bags and tubular fabric classified under subheadings 5407.20.20, 6305.33.10 and 6305.33.90 of the Tariff of the Dominican Republic (hereinafter "the initiating resolution").¹ On

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**This issue can also be accessed online at <http://wtocentre.iift.ac.in/DisputeAnalysis.asp> . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

¹ Commission Resolution CDC-RD-SG-046-2009 of 15 December 2009.

17 December 2009, a notice of initiation of an investigation was published.²

In its Initial Technical Report³, the Commission indicated that during the initial phase of the investigation it would examine the trends for polypropylene bags and tubular fabric jointly, since according to FERSAN, the domestic producer, the two products constituted one and the same final product. Moreover, the Commission pointed out that the domestic industry was made up solely of producers that manufactured both polypropylene bags and tubular fabric as part of the same production process.

Preliminary determination

On 16 March 2010, the Commission decided to impose a provisional safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic for a period of 200 days.⁴ On 25 March 2010, the Commission published a notice of application of provisional measures on imports of polypropylene bags and tubular fabric.⁵

Final determination

On 5 October 2010, the Commission decided to impose a definitive safeguard of 38 per cent on imports of polypropylene bags and tubular fabric classified under subheadings 5407.20.20 and 6305.33.90 of the Tariff of the Dominican Republic.⁶ In the final resolution issued by the Commission, imports from Mexico, Panama, Colombia and Indonesia were excluded from the purview of safeguard measures under Article 9.1 of the Agreement on Safeguards. (*See Table I below*)

El Salvador, Guatemala, Honduras and Costa Rica (also referred to as “Complainants”) have raised various issues with respect to the final determination. According to Complainants, based on the Final Technical Report⁷, the Commission assumed that polypropylene bags and tubular fabric constituted a single product under investigation; that the Commission accepted the view that FERSAN constituted the entire domestic industry, since it was the only company manufacturing the product under investigation starting with the resin⁸; that the Commission assumed that the unforeseen development that led to the alleged increase in imports was the tariff reductions resulting from the Free Trade Agreement between Central America and the Dominican Republic and from DR-CAFTA, etc. According to the Complainants, the Commission also considered that the accession of China to the WTO was a development that “could not have been foreseen by the domestic industry at the time when the Dominican Republic subscribed to the measures contained in Article XIX of the GATT 1994”.⁹ Finally, in the determination of serious injury to the domestic industry, the Commission pointed out that the domestic industry “suffered significant financial losses during the period under investigation, as evidenced by the increase in stocks, the decrease in cash flow, and the sharp decline in production,”¹⁰ while a number other factors indicate

² Notice, general safeguard investigation concerning textiles of man-made filament yarn and bags of polyethylene and polypropylene, dated 15 December 2009.

³ Initial Technical Report of the Commission dated 20 November 2009.

⁴ Resolution CDC-RD-SG-061-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic dated 16 March 2010 (“Preliminary Resolution”).

⁵ Notice, general safeguard investigation concerning tubular fabric and polypropylene bags, 25 March 2010.

⁶ Resolution CDC-RD-SG-089-2010 of the Regulatory Commission on Unfair Trade Practices and Safeguard Measures of the Dominican Republic, dated 5 October 2010 (“Final Resolution”).

⁷ Final Technical Report of the Commission, dated 13 July 2010.

⁸ Final Technical Report, page 47.

⁹ Final Technical Report, page 66.

¹⁰ Final Resolution, Para. 38.

“favourable conditions” to the industry.

Table I

Date	Tariff line	Applicable Rate	Origin
18 Oct, 2000 to 18 Apr. 2011	5407.20.20	14 %	Applicable to imports from Colombia, Indonesia, Mexico and Indonesia
		38 %	Applicable to all other origins
	6305.33.90	20 %	Applicable to imports from Colombia, Indonesia, Mexico and Indonesia
		38%	Applicable to all other origins
19 Apr. 2011 to 19 Oct. 2011	5407.20.20	14%	Applicable to imports from Colombia, Indonesia, Mexico and Indonesia
		28%	Applicable to all other origins
	6305.33.90	20%	Applicable to imports from Colombia, Indonesia, Mexico and Indonesia
		28%	Applicable to all other origins
20 Oct. 2011 to 20 Apr. 2012	5407.20.20	14%	Applicable to imports from Colombia, Indonesia, Mexico and Indonesia
	6305.33.90	20%	Applicable to all other origins

Legal Claims of Complainants

1. That the preliminary and final determinations do not contain reasoned and adequate findings and conclusions with respect to:
 - a. the determinations relating to the product under investigation, the domestic like product, and the domestic industry and were inconsistent with Dominican Republic’s obligations under Articles 2.1, 3.1, 4.1(a), 4.1(c), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994. Further according to the Complainants, the preliminary and final determinations do not contain reasoned and adequate findings and conclusions to substantiate the alleged unforeseen developments and to explain how those developments resulted in increased imports of the specific products covered by the safeguard measure and accordingly were inconsistent with Articles 3.1, 4.2(a) 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
 - b. the alleged effect of the obligations incurred under the GATT 1994, and how that effect would have resulted in increased imports of the specific products covered by the safeguard measure. According to the Complainants, these omissions appear to be inconsistent with Articles 3.1, 4.2(a), 4.2(c), 6 and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
 - c. the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. These omissions would amount to inconsistency with the obligations under Articles 2.1, 3.1, 4.2(a), 4.2(b), 4.2(c), and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
 - d. the existence of the alleged serious injury, understood as significant overall impairment

of the domestic industry. These omissions appear to be inconsistent with Articles 2.1, 3.1, 4.1(a), 4.2(a), 4.2(b), 4.2(c) and 6 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

2. That the measures at issue are applied only to products imported from certain countries of origin. That the required parallelism between the substantive evaluation of the determinations on the one hand, and the coverage of the measures at issue on the other, was not respected. These omissions would constitute inconsistency with the obligations under Articles 2.1, 2.2, 4.2, 5.1, 6 and 9.1 of the Agreement on Safeguards, and Article XIX:1(a) of the GATT 1994.
3. That the Dominican Republic failed to provide the Members having a substantial interest as exporters of the products concerned adequate opportunity for consultations prior to the adoption of the definitive measure. This omission appears to be inconsistent with the obligations under Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994.

II. KEY ISSUES AND PANEL FINDINGS

A. Applicability of Article XIX of GATT 1994 and the Agreement on Safeguards

The Complainants alleged that the impugned measures should be considered as safeguard measures on the basis of harmonious reading of Article XIX of the GATT 1994 with the Agreement on Safeguards. Complainants asserted that the impugned measures suspended obligations of the Dominican Republic under Article 1:1 and II: 1(b), second sentence of the GATT. The Complainants also argued that the impugned measures involve the suspension of the MFN principle provided by Article 1:1 of the GATT 1994, since they selectively excluded imports from specific origins (namely, Colombia, Indonesia, Mexico and Panama) under the cover of Article 9.1 of the Agreement on Safeguards, thus granting those imports an advantage, favour, privilege, or immunity not accorded immediately and unconditionally to the imports of the like product from the other WTO Members.

The Dominican Republic contended that the provisional measure and the definitive measures consisted in the adoption of “38 percent [ad valorem] tariff” on imports of tubular fabric and polypropylene bags, which was progressively reduced. These measures constituted neither a surcharge, nor a second tariff, nor an additional or alternative tariff, but rather an increase in the MFN tariff, in accordance with Article 73 of *Law 1-02*, replacing the previously applicable MFN tariff. The Dominican Republic further contended that at no time did these measures violate the Dominican Republic’s obligation under Article II of the GATT 1994, through its schedule of concessions, not to impose tariffs above 40 percent ad valorem on the products in question, or result in duties other than ordinary customs duties. It was further contended that Article XIX of the GATT 1994 would not apply in this case, as the object and purpose of this provision is to temporarily rebalance the level of its concessions when faced with specific unforeseen developments. According to Dominican Republic, the impugned measures did not affect the level of tariff concessions accepted by the respondent in the WTO. The Dominican Republic contended that the negotiating history of Article XIX of the GATT 1994 and the Agreement on Safeguards confirmed that these provisions would only apply to measures involving the suspension of obligation under the GATT 1994 or the withdrawal or modification of concession. In its view, the impugned measures were “safeguard measures within the meaning of Law 1-02”¹¹ and were adopted in compliance with its domestic legislation, Article 73 which authorizes increasing tariffs without referring to the suspension of obligations or a withdrawal or modification of concessions within the meaning of GATT 1994. Dominican Republic contended that “not every safeguard adopted under law 1-02 constitutes a safeguard

¹¹ Law No. 1-02 on Unfair Trade Practices and Safeguard Measures

measure within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards.

The Panel noted that the both the provisional and definitive measures exclude imports originating in Colombia, Indonesia, Mexico and Panama and therefore result in a more favourable treatment for these imports. The Panel found that the respondent had not rebutted the fact that the measures were inconsistent with the general MFN obligation of Article I:1 of the GATT 1994; further, the respondent had not expressly invoked Article 9 of the Agreement on Safeguards as a legal justification for this inconsistency. The Panel found that the impugned measures, therefore, meant a suspension of the MFN obligation within the meaning of Article I:1 of the GATT 1994 and further represent a suspension of obligation within the meaning of Article XIX: 1(a) of the GATT 1994. (Para. 7.73)

The Panel also went on to consider whether the measures constituted a suspension of obligations of the Dominican Republic under Article II: 1(b), second sentence of GATT 1994, although it was not strictly required in view of a finding of suspension of obligation in respect of the MFN treatment obligation (Para. 7.74). The Panel referred to the text of Article II: 1(b) and noted that this provision in principle prohibits two categories: (i) the levying of ordinary customs duties in excess of the ceilings set forth in the Schedule of the importing Member (first sentence); and (ii) the levying of other duties or charges of any kind imposed on or in connection with importation (second sentence), in excess of those imposed on the date of entry into force of the GATT 1994 or those mandatorily required to be imposed thereafter by legislation in force in the importing Member on that date. The Panel noted that the *Understanding on the Interpretation of Article II: 1(b) of the General Agreement on Tariffs and Trade 1994* provides that the importing Member had to record in its Schedule of Concessions the *other duties or charges* applied on the date of entry into force of the GATT 1994 or which had to be applied directly or mandatorily under legislation in force on that date. The Panel therefore considered that the relevant question was whether the measures could be categorized as “ordinary customs duties” within the meaning of Article II:1 of the GATT 1994 or whether, on the contrary, the measures constituted “other duties or charges.” (Paras. 7.74-7.85)

The Panel noted the findings of the Appellate Body in *Chile - Price Band System*¹², where it made clear that what determines whether “a duty imposed on an import at the border” constitutes an ordinary customs duty is not the form which that duty takes. The Panel noted that while the impugned measures were duties levied at customs, considering their design and structure, they are “extraordinary” or “exceptional” and not “ordinary” measures. The Definitive Resolution whereby the Commission issued its final decision and imposed the impugned definitive measure speaks of a “tariff of the order of thirty eight percent (38%) ad-valorem” applied “definitively”. However, the Resolution, stated that the measure shall be applied only for a period of 18 months, and that the duty was subject to six-monthly reduction process and that in practice the measure did not replace, but on the other hand, coexisted with MFN tariff. The Panel noted that neither did the impugned measures constitute ordinary tariff that was normally applicable, nor did they replace that tariff by a new tariff applied under the MFN treatment. The Panel noted that the impugned measures replaced the ordinary tariff temporarily and only for imports originating in certain Members. (Para. 7.86)

The Panel therefore found that the impugned measures are not “ordinary customs duties” nor any of the measures provided for in Article II:2 of the GATT 1994, they must by definition be other “duties or charges ... imposed in connection with the importation”. The Panel also noted that the impugned measures were not recorded in the Dominican Republic’s Schedule of Concessions and did not correspond to duties or charges that the Dominican Republic applied at the date of the entry into force of

¹² Appellate Body Report, *Chile- Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Para. 216, WT/DS 207 /AB/R, adopted on 23 October 2002.

the GATT 1994 or was required to apply as a direct and mandatory consequence of legislation in force on that date. For these reasons the Panel concluded that the impugned measures had resulted in suspension of obligations incurred by the Dominican Republic under the GATT 1994. (Para. 7.89)

The Panel concluded as follows:

“[t]he impugned measures were taken by Dominican Republic with the objective of remedying a situation of serious injury to the domestic industry brought about by an increase in imports... and were notified by the Dominican Republic as safeguard measures to the WTO Committee on Safeguards and under the procedures provided for in Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination it has to make of the claims raised in the present dispute.” (Para. 7.89)

The Panel, however, noted that the finding given above does not affect the flexibility which the WTO Members enjoy under the GATT 1994 to freely change their tariffs by adopting new measures that remain under the rate bound in their schedule of concessions. (Para. 7.91)

B. Whether the competent authorities acted consistently with GATT 1994 obligations in determining “unforeseen developments” under GATT Article XIX: 1 (a)?

GATT Article XIX: 1(a) provides in relevant part that a safeguard measure may be imposed, “[i]f, as a result of **unforeseen developments** and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic producers in that territory of like or directly competitive products...” (emphasis added). Complainants claimed that the provisional and definitive measures violated Article XIX: 1(a) of the GATT 1994. The Complainants also alleged the determinations relating to increased imports, serious injury and causality as well as the imposition of provisional and definitive measures were inconsistent with Dominican Republic’s obligations under Articles 2.1, 3.1, 4.2 and 11.1(a) of the Agreement on Safeguards.

Dominican Republic contended that the “unforeseen development” claim was not relevant within the context of the Agreement on Safeguards and that it did not constitute a binding obligation. However, during the Panel process, Dominican Republic identified two development which could be characterised as “unforeseen developments”:(i) the entry of China into the WTO and the effect that this had on international trade; and (ii) the process of tariff reduction accompanying the entry into force of the DR-CAFTA and the Central America- Dominican FTAs. Complainants on the other alleged that, some of the developments pointed out by Dominican Republic cannot be classified as unforeseen or unexpected developments. (Para. 7.119)

The Panel referred to the Appellate Body report in *Korea- Dairy*¹³ and stated that Article XIX of the GATT 1994 and the Agreement on Safeguards must be applied cumulatively, because the unforeseen developments condition is one whose existence must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with Article XIX of the GATT 1994. The Panel also noted that unforeseen developments must be demonstrated before the safeguard measure is applied and the demonstration must feature in the published report of the competent authority. The Panel, however, observed that neither the Commission’s Definitive Resolution nor the Preliminary Resolution make any

¹³ Appellate Body Report, *Korea- Definitive Safeguard Measures on Imports of Certain Dairy Products*, Para. 85, WT/DS98/AB/R, adopted on 12 January 2000.

reference to or offer any findings or explanation concerning the unforeseen developments. The Panel further stated that it must be in the published report of the competent authority that it should provide reasoned conclusions concerning the existence of unforeseen developments in accordance with Article XIX: 1(a) of the GATT 1994. (Para. 7.128)

The Panel therefore concluded that neither the resolutions nor the technical reports contain reasoned and adequate explanation of by the competent authority of how the **entry of China into the WTO** and the effect that had on international trade or the process of tariff reduction that followed the entry into force of the **DR-CAFTA** and **Central America- Dominican Republic FTAs** constituted an unforeseen development within the meaning of Article XIX:1(a) of the GATT 1994. (Para. 7.150)

Further, as a matter of fact, the importing Member, namely, Dominican Republic should have incurred obligations under the GATT 1994, for example, tariff concession with respect to the product in question. It is undisputed that Dominican Republic granted a tariff concession of 40 percent *ad valorem* on the products of tariff lines 5407.20.20 and 6305.33.90. The Panel found that in the absence of any indication in the resolutions of the Commission, or any other relevant document, it is not possible to conclude that the report of the competent authority contains reasoned and adequate explanation of how the Dominican Republic incurred obligations under Article XIX: 1(a) the GATT 1994 with respect to tubular fabric and polypropylene bags. The Panel found that with respect to provisional and definitive measures, Dominican Republic has also violated Article 3.1 last sentence, 4.2 (c) and 11. 1(a) of the Agreement on Safeguards. (Paras. 7.150- 7.152)

C. Whether the competent authorities acted consistently with the obligations under the Agreement on Safeguards in determining “domestic industry”?

The text of Article 4.1(c) of the Agreement on Safeguards establishes the elements for the definition of the industry. First, Article 4.1 (c) of stipulates that *domestic industry* must be defined with reference to producers of the *like or directly competitive products*; second, Article 4.1(c) states that domestic industry must be defined to consist of the producers as a *whole* of the like or directly competitive product or, alternatively, of those producers of that product whose collective output constitutes a *major proportion of the total domestic production* of the product in question. (italics added)

In the underlying investigation, the **product under investigation** was defined as “**polypropylene bags of strip or the like and woven fabric of synthetic filament yarn, manufactured from strip or the like.**”

The Complainants contended that the Commission failed to define the domestic industry properly, based on two considerations: (i) that the Commission did not properly define the product under investigations; and (ii) that the Commission did not demonstrate that the imported and the domestic products were directly competitive. In essence, the Complainants argued that despite the information put forward by the parties that tubular fabric and polypropylene bags are separate products, the Commission persisted in treating them as a single product under investigations (Para. 7.155). The Complainants relied on the Appellate Body decision in *US- Lamb* that inputs (tubular fabric) can be included in the definition of ‘domestic industry’ only if they are ‘like’ the end product (polypropylene bags) or ‘directly competitive’ with them. (Para. 7.159)

The Panel noted that the Agreement on Safeguards “does not contain guidelines on how to define the product under investigation” (Para. 7.177). The Panel also noted that there is no provision in the Agreement on Safeguards that governs the selection, description, analysis and the determination of the ‘product being imported’. The Panel, therefore, held that Complainants were not able to identify a provision of the Agreement that restricts the inclusion of imported products within the scope of the

investigation solely to those products that are *like* or *directly competitive* with each other. The Panel found that the Complainants had failed to show why the explanations of the competent authority concerning the product under investigation were not adequate and reasoned.

However, the second limb of the argument was whether the Commission failed to show that the imported and domestic products were directly competitive and importantly whether the domestic product was inadequately defined for the purposes of determining likeness or direct competition. Based on the information provided by FERSAN, the domestic industry applicant, the Commission's Preliminary Resolution referred to the **like domestic product** as “**polypropylene bags made from tubular woven fabric manufactured from resin and tubular woven fabric made of synthetic filaments manufactured starting from virgin resin.**” Complainants alleged that by restricting the scope of directly competitive domestic product to a particular phase in the production process, the competent authorities excluded the domestic product manufactured from an input with degree of processing different from that of resin, namely, polypropylene bags manufactured from tubular fabric (Para. 7. 183). In other words, the gravamen of Complainants' contention is that while the *product under investigation* is tubular fabric and polypropylene bags in general, the *directly competitive domestic product* is restricted to the product manufactured from a particular stage of the production, namely the processing of *virgin resin*.

The Dominican Republic claimed that it is consistent with Article 4.1 (c) of the Agreement on Safeguards to exclude from the domestic industry producers that do not engage in significant production operations, as would be the case with converters that only cut and sew the tubular fabric which they purchase. The Dominican Republic also relied upon an observation of the Panel in *EC- Salmon (Norway)*¹⁴, to the effect that in certain circumstances in which an enterprise whose product was within the scope of the like product may be found to have engaged in an activity so low as to justify the conclusion that it did not, in fact, “produce” the product. The Panel however found that an argument similar to the one raised by the Dominican Republic was rejected in *EC- Salmon (Norway)* -- apparently a decision relied upon by the Dominican Republic. The Panel further held that if a product is like or directly competitive with respect to the imported product, then that product must be considered for the purposes of defining the domestic industry.

The Panel, therefore, concluded that in excluding from the definition of domestic industry certain like or directly competitive products, the Dominican Republic acted inconsistently with Article 4.1(c) of the Agreement on Safeguards.

D. Whether the determination of the Commission concerning increase in imports is consistent with GATT Article XIX:1 and the Agreement on Safeguards?

Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994 predicate the existence of an increase in imports, absolute or in relative terms, as a prerequisite for the application of safeguard measures. The Appellate Body in *Argentina- Safeguards*, pointed out that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.¹⁵

The Complainants claimed that the Commission concluded that there had been such an increase in imports in absolute terms despite having determined that there was a “marked decrease” in imports

¹⁴ Panel Report, *European Communities- Antidumping Measures on Farmed Salmon from Norway*, WT/DS 337/R, adopted on 15 January 2008.

¹⁵ Appellate Body Report, *Argentina- Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Para. 131, adopted 12 January 2000.

towards the end of the period and that the Commission did not provide an adequate and reasoned explanation as to why it considered that such an increase was sufficiently recent, sudden, sharp and significant.

The Panel noted that the Commission's evaluation took into account the import data corresponding to each of the years of the period of investigation, as well as trends in imports over that period. The Commission found a global increase in imports of 956,399.89 kg (50.06 percent) over the period investigated (2006-2009). There was increase in imports of 1, 160, 748.39 kg during the period 2006-07 and an increase of 288, 747.63 (9.40 percent) during the 2007-08 period. However, there was a decrease in imports of 493, 096.13 kg (14.68 percent) at the end of the period 2008-09 (Para. 7. 231). The Panel noted as follows, “[i]t cannot be assumed that an increase of 9.4 percent in the intermediate period constituted a decrease in imports, especially when the increase was calculated on the basis of an absolute volume of imports that had already increased significantly in the immediate period” (Para. 7.235). The Panel quoted the Appellate Body's statement in paragraph 131 of *Argentina- Footwear (EC)*, which observed that, “the determination of whether a product ‘is being imported in such increased quantities’ is not a ‘mathematical or technical’ determination, but rather an evaluation that must be made case-by-case.”¹⁶

In conclusion, **the Panel rejected the claim that the Commission's finding of an absolute increase in imports was inconsistent with Article 2.1 of the Agreement on Safeguards and Article XIX: 1(a) of the GATT 1994.** The Panel did not consider it necessary to make additional findings with respect to the behaviour of imports in relative terms. (Para. 7.242)

E. Whether the determination of the Commission concerning “serious injury” is inconsistent with GATT Article XIX: 1(a) and the Agreement on Safeguards?

The Complainants claimed that the Commission acted inconsistently with Article 2.1, 3.1, last sentence, 4.1(a) and 4.2(c) of the Agreement on Safeguards and Article XIX: 1(a) in determining “serious injury” to the domestic industry. The Complainants alleged that the Commission did not carry out a disaggregated and complete analysis of the various segments of the domestic industry for the purpose of determining injury. According to the Complainants, the Commission did not carry out separate analyses of the production of tubular fabric and the production of polypropylene bags and that it did not consider information relating to the commercial market for tubular fabric.

The Complainants also alleged that the Commission determined the existence of serious injury in the preliminary and final resolutions, despite the fact that the indicators that showed the contrary were inadequately evaluated. According to the Complainants, indicators corresponding to production and the domestic products' share of domestic consumption had improved and that the performance of other factors such as sales, capacity utilization, productivity, employment, wages and production were “quite favourable”. (Para. 2.746)

The Dominican Republic claimed that there is no requirement to undertake a separate analysis of each segment of the domestic industry for its injury determination. It was further argued that its analysis considered information on both bags and tubular fabric, having based its analysis on the financial statements of the Bags Division which produces both the products.

The Panel stressed the role of two aspects, one formal and the other substantive, in assessing the conformity of the serious injury determination under Article 4 of the Agreement on Safeguards. (Para.

¹⁶ Ibid

7.268)

The formal aspect involves determining whether the competent authority has evaluated all relevant factors contained in Article 4.2 (a). The substantive aspects involve establishing whether the competent authority has given a reasoned and adequate explanation of the way in which the factors corroborate its determination. The Panel noted that in addition to increased imports, the Commission relied on the following factors: (i) the share of domestic market taken by imports; (ii) profits and losses; (iii) inventories; (iv) cash flows; (v) production. The Definitive Resolution was silent on the following factors: (i) changes in the level of sales; (ii) productivity; and (iii) employment. (Para. 7.268)

On an analysis of the above injury indicators, the Panel found that of the seven factors relied upon by the Commission, its determination relating to production, inventories and share of imports and production in apparent consumption are not based on a reasonable and adequate explanation. (Para 7.273-7.303)

The Panel recalled the observation of the Appellate Body that the standard for the existence of *serious injury* under Article 4.1 (a) of the Agreement on Safeguards is very strict and rigorous.¹⁷ The Panel noted as follows:

“Considering that the injury evaluated within the context of the Agreement on Safeguards is serious injury, the Panel does not believe that the fact that four factors evaluated displayed a negative trend, as compared with the evidence of seven factors (including important elements indicative of the position of the domestic industry such as production, sales, installed capacity and capacity utilization, and production’s share of domestic consumption) performed positively, without the competent authority having provided a sufficient explanation, can result in an adequate and reasoned conclusion with respect to the existence of serious injury”. (Para. 7.313)

For these reasons, the Panel found that Complainants have established a case that the indicators of serious injury mentioned under Article 4.2(a) were inadequately evaluated by the Commission and that the explanations provided in the preliminary and final determinations did not support the conclusion that the overall position of the domestic industry indicated *significant overall impairment*.

F. Whether Commission’s determination of causal link between injury and increased imports is inconsistent with GATT Article XIX: 1(a) and the Agreement on Safeguards?

Pursuant to Articles 2.1 and 4.2(b) of the Agreement on Safeguards, it must be demonstrated that there is a causal link between increased imports of the product concerned and the serious injury. As laid down by the Appellate Body in *US- Wheat Gluten*,¹⁸ when factors other than increased imports are causing injury to the domestic industry, such injury shall not be attributed to increased imports.

The Complainants contended that the Commission did not examine the alleged causation by means of any relevant analytical methods. According to the Complainants, the Commission’s analysis of causal link was based on mere assertions; that these assertions did not meet the requirements prescribed in Article 4.2 (b) of the Agreement on Safeguards.

¹⁷ Appellate Body Report, *United States, Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Para. 124, WT/DS 177, 178/AB/R, adopted on 16 May 2001.

¹⁸ Appellate Body Report, *United States--Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Para. 69, WT/DS 166/AB/R, adopted on 19 January 2001.

The Panel relied on the approach of the Panel in *Argentina- Footwear (EC)*¹⁹, a decision that was upheld by the Appellate Body. In terms of this approach, a Panel examining the consistency of a safeguard measure with Articles 4.2 (a) and 4.2 (b) of the Agreement on Safeguards should examine the following points: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided to why, the data shows causation; (ii) whether the analysis of the conditions of competition between the domestic and imported product demonstrate a causal link between imports and injury; and (iii) whether other relevant factors have been analysed and whether it has been established that injury caused by factors other than imports have not been attributed to imports. (Para. 7.346)

The Panel concluded that in the Commission established causal link between increased imports and serious injury **without having analysed the elements to be taken into account in reaching such a conclusion, which constitutes a violation of Article 4.2 (b) of the Agreement on Safeguards**. The Panel also found that the injury section in the technical reports did not provide any explanation concerning causation itself. (Para. 7.354)

G. Whether Commission has acted inconsistently by failing to comply with the principle of parallelism and Article 9.1 of the Agreement on Safeguards?

As established by the Appellate Body in *US- Steel Safeguards*²⁰, the principle of parallelism emerges from the parallel language used in Article 2.1 and 2.2 of the Agreement on Safeguards. This principle also covers the symmetry that must exist between Articles 2.1 and 4.2 of the Agreement on Safeguards. It implies that the imports considered for the purposes of the safeguard investigation and the products to which the measure is applied (in terms of Article 2.2) must be the same.

The Complainants alleged that the Dominican Republic did not comply with the provision because: (i) in its analysis of increased imports, serious injury and causation, the Commission considered all imports that entered the Dominican Republic between 2006 and 2009, including those from Colombia, Indonesia, Mexico and Panama; (ii) based on Article 9.1, the Commission excluded imports from Colombia, Indonesia, Mexico and Panama from the application of provisional measures; and (iii) the Commission did not, however, undertake a new analysis of the increase in imports, serious injury and causation excluding imports from Colombia, Indonesia, Mexico and Panama.

Although the principle of parallelism has been examined in at least four cases (*Argentina- Footwear (EC)*, *US- Wheat Gluten*, *US- Line Pipe* and *US- Steel Safeguards*), this dispute examined for the first time the exclusion of certain WTO Members pursuant to Article 9.1 of the Agreement on Safeguards.

Article 9.1 of the Agreement on Safeguards lays down two requirements in order to be able to exclude products originating from certain developing country Members from the coverage of the safeguard measure, namely: (i) the individual share of the developing country Member which it is sought to exclude from the application of the measure shall not exceed 3 percent of the imports of Member applying the measure; and (ii) the collective share of the developing countries that meet the first requirement shall not exceed 9 percent of total imports of the product concerned.

The Panel therefore considered that Articles 9.1 and 2.2 of the Agreement on Safeguards, read together,

¹⁹ Panel Report, *Argentina- Safeguard Measures on Imports of Footwear*, WT/DS 121/R, adopted 12 January 2000 as modified by the Appellate Body.

²⁰ Appellate Body Report, *United States- Definitive Safeguard Measures on Imports of Certain Steel Product*, Para. 441, WT/DS 248, 249, 251, 252, 253, 254, 258, 259/ AB/R adopted on 10 December 2003.

imposed an obligation to apply the measures to products of any origin, except those origins that meet the requirements set out in Article 9.1. (Para. 7.375)

The Panel noted that when Article 9.1 of the Agreement on Safeguards is applicable, this affects the scope of the obligation contained in Article 2.2. According to the Panel, it entails an obligation to exclude the developing country Members that satisfy the requirements in the provision. The Panel concluded as follows:

“Accordingly, in cases in which exclusion is based on Article 9.1 of the Agreement, the Panel does not consider it necessary to undertake a new analysis of the increase in imports, the injury and causation. In this case, it would be enough for the competent authorities to show in their report that the excluded Members actually satisfied the requirements of laid down in Article 9.1 itself of the Agreement on Safeguards. ...[t]he fact that the Agreement of Safeguards itself, in Article 9.1, imposes the obligation to exclude products from specific origins from the application of the safeguard measure results in a departure from the usual application of the principle of parallelism with regard to such imports.” (Para. 7.385)

The Panel, therefore, found that the Dominican Republic did not act inconsistently with the obligations under Articles 2.1, 2.2, 3.1, 4.2, 6 and 9.1 of the Agreement on Safeguards with respect to compliance of the principle of parallelism.

As regards how a Member must comply with obligations under Article 9.1 of the Agreement on Safeguards, the Panel noted that the Member imposing such measure must ensure that products from origins that fall within the category mentioned in Article 9.1 are excluded. In the instant dispute, Thailand was not specifically excluded although its import share during the period of investigation amounted to only 0.32 percent. The Panel, therefore, held that the Dominican Republic did not take all reasonable measures available to it to exclude from the application of measures all developing countries which export less than *de minimis* levels indicated in Article 9.1 of the Agreement on Safeguards. (Paras. 7.401-7.402)

H. Whether the Dominican Republic failed to provide the Members, having a substantial interest as exporters of the products concerned, adequate opportunity for consultations prior to the adoption of the definitive measure?

The Complainants jointly raised the following claims: (i) the Dominican Republic imposed the definitive measure without timely notification in terms of Article XIX: 2 of the GATT 1994; (ii) the Dominican Republic did not afford Members having a substantial interest in the products under the investigation an opportunity for consultations in the terms of provided in Articles XIX:2 of the GATT and 12.3 of the Agreement on Safeguards; and (iii) the Dominican Republic did not give the Complainants the opportunity to obtain an adequate means of trade compensation in accordance with Article 8.1 of the Agreement on Safeguards. (Para. 7.403)

Admittedly, the definitive safeguard measure in this dispute was adopted on 5 October 2010 and was notified on 8 October 2010, three days after the measure had been adopted. The definitive safeguard measure came into effect on 18 October 2010, ten days after the Committee on Safeguards had received the notification from the Dominican Republic. The contentious issue was at which moment the obligation to notify was triggered?

The Panel noted that Article 12 of the Agreement on Safeguards identifies four distinct events of notification whereas Article XIX: 2 of the GATT 1994 only speaks about only type notification, namely

the obligation to notify a definitive measure. The Panel, however, indicated that Articles XIX:2 of the GATT 1994 and 12 of the Agreement on Safeguards have to be interpreted together. Nevertheless, the Panel noted that Article XIX:2 of the GATT 1994 read simultaneously in the three official language versions does not clearly determine at which moment the obligation to notify was triggered. (Para. 7.403)

The Panel referred to the decision in *US- Wheat Gluten*,²¹ where the Appellate Body indicated that the degree of urgency or immediacy depended on a case-by-case assessment and that due account had to be taken of the administrative difficulties involved in preparing the notification. The Appellate Body further noted in *US- Wheat Gluten* that notification within five days (following the adoption of measures) was consistent with the requirement contained in Article 12.1(c) of the Agreement on Safeguards. (Para. 7.437)

The Panel having determined that the Complainants have failed to comply with the notification obligation pursuant to Article XIX:2 of GATT 1994 and 12. 1(c) of the Agreement on Safeguards rejected the Complainant's claim that the Dominican Republic did not give them an opportunity to hold consultations and provide a means of trade compensation before imposing the definitive measures in terms of Articles XIX:2 of the GATT 1994 and 12.3 of the Agreement on Safeguards. (Paras. 7. 439 – 7.440)

III. DISPUTE NOTES ON SELECT ISSUES

The Panel's ruling on at least two aspects merit special mention: (i) the identification of domestic industry for the purpose of safeguard investigation, and (ii) the exemption of developing countries from the application of safeguard measures and the non-applicability of the "parallelism" requirement to exemptions given to developing countries under Article 9.1 of the Agreement on Safeguards.

In the matter of the determination of domestic industry, the Panel noted that the text of Article 4.1 (c) of the Agreement on Safeguards establishes that the domestic industry has to be defined by reference to "products" that are "like or directly competitive" with respect to imported product (Para. 7.191). According to the Panel, there is nothing in the text of the provision that would allow the domestic industry to be defined on the basis of a limited proportion of these products. In the underlying dispute, the domestic industry was defined as manufactures of polypropylene bags starting from a specific production stage, namely the processing of virgin resin. The producers of polypropylene bags who converted from tubular fabric were excluded from domestic industry definition, although it was a directly competitive product. This approach was held as inconsistent with the obligations under Article 4.1(c) of the Agreement on Safeguards. This ruling underscores the importance of identifying as a whole of the domestic producers of the like or directly competitive product and not a portion of it for the purpose of determining the domestic industry.

On the exemption of developing countries from the application of safeguard measures, there was only previous dispute which discussed the nature of obligations under Article 9.1 of the Agreement on Safeguards, namely *US- Line Pipe*. The Appellate Body noted in that case that there is no express obligation in Article 9.1 to require a WTO Member applying a measure to draw up a list of countries either included or excluded from the coverage of the measure. The Panel noted in this case that irrespective of the way in which a Member complies with a decision, such a Member must show that it has made reasonable efforts to exclude those Members covered by Article 9.1 from the application of measures. Although the term, *reasonable measures* may be subject to interpretation, it implies that the country taking the safeguard measure is required to provide substantiation as to why some developing countries are excluded.

²¹ Appellate Body Report, *US- Wheat Gluten*, supra note 18, at Paras. 105-106

The Panel gave an important ruling while holding that the competent authority is not required to conduct a new analysis of the increase in imports, serious injury and causation while excluding imports from developing countries when applying Article 9.1 of the Agreement on Safeguards. In other words, the requirement of “parallelism” is not applicable in the application of Article 9.1, when developing countries which may be investigated upon are excluded from the application of measures. Such an approach would encourage countries to exclude developing countries from the purview of safeguard measures without violating obligations under the GATT 1994 and the Agreement on Safeguards. Any additional requirement of parallelism under Article 9.1 of the Agreement on Safeguards would have the effect of undermining this important special and differential treatment provision.