

Unforeseen Developments and the Effect of GATT Obligations

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Applicability of Clause

All relevant provisions of Article XIX and the Agreement on Safeguards must be given legal effect.

“Unforeseen developments” and “effect of [GATT] obligations are “circumstances that must be demonstrated as a matter of fact....”

Linked to the “extraordinary nature” of safeguard measures.

Appellate Body, *Argentina–Footwear*, *Korea–Dairy*.

Unforeseen Developments

- ▶ “Logical connection” between the “circumstances of unforeseen developments” and the “conditions” (increased imports, injury, causation). Appellate Body, *US–Lamb*.
- ▶ Authorities must demonstrate that the unforeseen developments *resulted* in the increased imports of the *specific products*. Appellate Body, *US–Steel*.

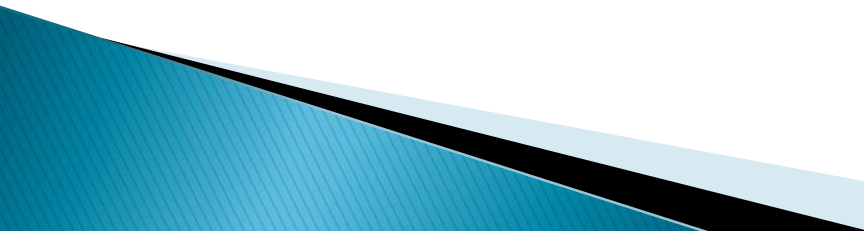
Unforeseen Developments

- ▶ Unforeseen means “unexpected”, not unforeseeable. *Argentina–Footwear, Korea Dairy.*
- ▶ Could be a “confluence” of developments. Panel, *US–Steel.*
- ▶ Timing – Unforeseen “when it incurred the obligation”. *Argentina – Footwear.*
 - Parties agree it refers to date of entry into force of URD Agreements. *US – Steel.*

Unforeseen Developments

- ▶ Report must contain a “finding” or “reasoned conclusion” on unforeseen developments.
Appellate Body, *US–Lamb*, *US–Steel*.

Unforeseen Developments: Cited Examples

- ▶ Economic crises (Asian, Euro-zone)
 - ▶ Overcapacity, capacity increases
 - ▶ Political crisis/war (USSR, Crimea)
 - ▶ Economic sanctions
 - ▶ Demand surges (increased fast food restaurants, shift from wood construction, oil exploration surge).
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Unforeseen Developments: Cited Examples

- ▶ Trade diversion (e.g., trade remedies)
- ▶ Currency depreciation/appreciation
- ▶ Lower applied tariffs
- ▶ FTAs/preferential arrangements
- ▶ Disrespect of WTO rules (e.g. AG export subsidies)
- ▶ Export taxes on inputs

- ▶ Typically, a combination of circumstances are cited.

Effect of Obligations

- ▶ “This phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under GATT 1994.” *Korea–Dairy, Argentina–Footwear.*

Effect of Obligations

- ▶ Like unforeseen developments, effect of obligations is a “circumstance” that must be demonstrated in the public report.
- ▶ “Pursuant to Article XIX:1(a), it is not just the obligation per se that is to be identified, but also its effect”.
- ▶ Authorities must be “clear as to which of the applicable obligations they find to have resulted in imports in increased quantities”.

Panel Report, *Ukraine–Passenger Cars*.

Effect of Obligations

- ▶ A safeguard involves suspension of a GATT obligation or concession that “precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury”.
- ▶ A measure that does not suspend an obligation – such as a duty in a case where there is no binding – is not a safeguard measure.
- ▶ An FTA obligation not to impose duties is not an Article XXIV obligation.
- ▶ Panel does not decide whether suspended obligations must have resulted in increased imports.

Panel Report, *Indonesia–Iron & Steel Products*