

UKRAINE – DEFINITIVE SAFEGUARD MEASURES
ON CERTAIN PASSENGER CARS.
WTO DISPUTE SETTLEMENT SYSTEM. REPORT OF
THE PANEL

Anzhela Makhinova*, Oleksandra Brovko** & Victoria Mykuliak***

* Senior associate at the Law Firm *Sayenko Kharenko*

** Associate at the Law Firm *Sayenko Kharenko*, Master of International Law and Economics (MILE 13) of the World Trade Institute, PhD candidate at the Kyiv National Taras Shevchenko University

*** Junior associate at the Law Firm *Sayenko Kharenko*, LL.M.in European and International Law at the Europa-Institut of Saarland University

I. INTRODUCTION

On 30 October 2013, Japan initiated WTO dispute settlement proceedings over the definitive safeguard measures imposed by Ukraine on imports of certain passenger cars. The Panel report in the case *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars* (DS468) was circulated on 26 June 2015.

The objective of this review is the analysis of the Panel report in the case DS468 in line with existing WTO jurisprudence related to safeguard measures, as well as identification of important conclusions of the Panel (*e.g.*, concerning the interpretation of ‘sudden, sharp, significant increase in imports’, qualification of the term ‘is being imported’ in relation to the date of determination and the date of the application of safeguard measures, unforeseen developments, legal status of *ex post facto* explanations, liberalization of safeguard measures applied *etc.*).

II. FACTS OF THE CASE

On 2 July 2011, Ukraine initiated a safeguard investigation on certain passenger cars. Following the investigation, on 28 April 2012 Ukraine imposed safeguard measures for three years in the form of safeguard duty with the following rates:

- i. 6.46% for passenger cars with an engine volume of 1000cm³; and
- ii. 12.95% for passenger cars with an engine volume of 1500-2200cm³.

However, the Notice on the Imposition of Safeguard Measures was published on 14 March 2013 only, *i.e.*, almost a year after the decision to impose the respective measures had been taken. On 12 February 2014, the safeguard measures were subsequently liberalized.

The safeguard measures were applied based on the following key facts:

- i. the period of investigation: 2008-2010;
- ii. imports into Ukraine increased by 37,9% relative to domestic production and 37,1% relative to consumption. However, in absolute terms imports decreased by 71%;
- iii. even though imports in absolute terms and consumption on the domestic market of Ukraine decreased, increase in imports relative to production by 37,9% was considered as unforeseen developments;
- iv. negative impact of imports on the domestic industry was confirmed by the following factors in 2010 as compared to 2008: production volumes decreased by 78,9%; capacity utilization decreased by 74,86%; sales volumes on the domestic market of Ukraine decreased by 86,33%; profit from operating activity decreased by 89,9%; number of employees decreased by 51,56%; labour efficiency decreased by 46,3%; share on the domestic market of Ukraine decreased by 35%; and
- v. serious injury was caused by increase in imports, but not any other factors. Such factors as global financial and economic crisis, non-competitiveness of national automobile industry were not attributed to serious injury caused.

III. INCREASE IN IMPORTS

Ukraine's competent authorities determined that the increase in imports by 38% relative to the domestic industry output and by 37% compared to the domestic consumption of passenger cars in Ukraine over the period of investigation (2008-2010) constitutes reasonable grounds for

imposition of safeguard measures, even despite the decrease of import volumes to Ukraine in absolute terms by 71%.

The Panel disagreed with Ukraine's determination of increased imports relying on the fact that the increase in imports was not examined in a proper manner as far as:

- i. In determining an increase in imports, the competent authorities provided only a simple mathematical comparison of data on import volumes over the period of investigation instead of carefully considering all relevant factors ("the intervening trends") that could have an impact on imports during the entire period of investigation, not only in its separate terms (points of time) (*end-point-to-end-point comparison*);¹
- ii. A simple mathematical analysis of imports cannot substitute the obligation of competent authorities to thoroughly examine whether an increase in imports over the period of investigation was "sudden enough", "sharp enough" and "significant enough", as these criteria, developed in the WTO case law, constitute the benchmark for determining whether an increase in imports qualifies as an "increase" within the meaning of Article 2.1 of the *Agreement on Safeguards*(the "Agreement");² and
- iii. The safeguard measures in question were imposed on 14 March 2013, two years after the end of the period of investigation (2008-2010). This fact, in the Panel's view, is inconsistent with Article 2.1 of the Agreement obliging the competent authorities to use only the "recent" data in the course of investigation, since safeguard measures are to be applied only in case the product "is being imported" in increased quantities. This means that an increase in imports shall occur in the "recent past", both in relation to the date of initiation of an investigation as well as to the date of application of a safeguard measure.³

IV. SERIOUS INJURY OR THREAT OF SERIOUS INJURY

A. SIGNIFICANT OVERALL IMPAIRMENT

¹ Paras 7.124-7.139

² Paras 7.140-7.148

³ Paras 7.154-7.185

The Panel reaffirmed very high standard of injury for the purposes of serious injury in the context of “threat of serious injury” as it was confirmed in numerous cases (i.e. *US – Wheat Gluten*, *US – Lamb*⁴).

At the same time, the Panel shed some light on the Appellate Body’s (the “AB”) position in the *US – Line Pipe* that “defining “threat of serious injury” separately from “serious injury” serves the purpose of setting a lower threshold for establishing the right to apply a safeguard measure”.⁵ In the present case, the Panel opined that the above AB’s reference demonstrated that even in the absence of any observable serious injury, but in case of threat of the latter, a Member is allowed to apply the safeguard measures to prevent imminent serious injury.⁶

Therefore, in the Panel’s view, a threat of serious injury determination must be grounded in facts, just like a finding of serious injury.⁷ Importantly, a finding of a threat of serious injury is a forward-looking predictive finding based on facts concerning the present state of the domestic industry.⁸

B. CLEARLY IMMINENT

The Panel reaffirmed the AB conclusions in *US – Lamb* that “clearly imminent” requires not only an assessment of historical and existing facts, but also making fact-based projections concerning future developments in the domestic industry’s condition.⁹ Moreover, referring to *US – Lamb*, the Panel stated that data pertaining to the latter part of the period of investigation are of high importance to analyse the likely immediate future developments in the injury factors for an analysis of a threat of serious injury. This notably requires a fact-based assessment of likely developments in the very near future with respect to all the relevant factors.¹⁰

C. SHARE OF THE DOMESTIC MARKET TAKEN BY INCREASED IMPORTS

The Panel found that it was incorrect to replace analysis of the share of the domestic market taken by increased imports by analysis of the domestic industry’s share on the said market. The Panel also

⁴ Para. 7.223

⁵ Para. 7.226

⁶ Para. 7.227

⁷ Paras 7.228, 7.230

⁸ Para. 7.230

⁹ Para. 7.232

¹⁰ Paras 7.234-7.235

highlighted that the Notice of 14 March 2013 (the “Notice”) did not contain analysis or projections as to the likely development of the import market share in the near future.¹¹

Moreover, in view of the Panel, decrease of the domestic industry’s share on the domestic market, by itself, does not automatically mean that the increased imports put the domestic industry out of the market, especially in cases where not all domestic producers are included in the domestic industry by the competent authorities. It may well be that the domestic industry lost its share in favour of the domestic producers which are not part of the domestic industry.¹²

D. THE RATE AND THE AMOUNT OF THE INCREASE IN IMPORTS

The Notice contains only the following information in part of imports analysis: imports decreased by 71% in absolute terms in 2010 as compared to 2008, but increased by 38% relative to the production of the domestic industry. Thus, in view of the Panel, the Ukrainian competent authorities failed to properly evaluate and give a reasoned explanation of the likely development of imports and their effect on the situation of the domestic industry in the very near future.¹³

E. CAPACITY OF KEY EXPORTING COUNTRIES TO GENERATE EXPORTS

The Panel noted that even if the export capacity is not directly indicated in Article 4.2(a) of the *Agreement* among all relevant factors, the competent authorities are entitled to analyse it, especially in case of threat of serious injury.¹⁴

The Panel highlighted the following key issues in respect of export potential:

- i. A mere fact that exporting countries had capacity to produce or export is not sufficient by itself to prove that imports to Ukraine are likely to continue at an increased level or to increase further;¹⁵
- ii. Increase of shares of certain exporting countries in the total imports into Ukraine shall not automatically mean that the Ukrainian market is attractive for them;¹⁶
- iii. The Notice lacks analysis of availability or attractiveness of other export markets as compared to the Ukrainian market;¹⁷ and

¹¹ Para. 7.249

¹² Para. 7.249

¹³ Paras 7.253-7.255

¹⁴ Para. 7.256

¹⁵ Para. 7.257

¹⁶ Para. 7.259

¹⁷ Para. 7.260

- iv. The Notice does not contain substantiation of a high degree of likelihood that an increase in exports to Ukraine will materialize in the very near future as required by *US – Lamb*.¹⁸

F. INJURY FACTORS PERTAINING DIRECTLY TO THE SITUATION OF THE DOMESTIC INDUSTRY

The analysis of injury factors in the Notice consists only of a simple end-point-to-end-point comparison of the data for 2008 and 2010. At the same time, the Notice provides no projections as to likely developments in these factors in the very near future nor recognition or discussion of improvements of certain factors in 2009 as compared to 2010 (the end of the period of investigation).¹⁹

The Panel reaffirmed the conclusion of the AB in *US – Lamb* that data from the most recent past has special importance in the context of the future-oriented analysis for establishing the threat of serious injury.²⁰

Moreover, in view of the Panel, in the absence of any analysis of the intervening trends in the Notice, it is not clear whether the position of the domestic industry was improving or deteriorating towards the end of the period of investigation.²¹

In view of the above, the Panel concluded that Ukraine acted inconsistently with Article 4.2(a) of the Agreement.

V. CAUSAL LINK AND NON-ATTRIBUTION ANALYSIS

Under Article 4.2 (b) of the Agreement, the competent authorities must demonstrate the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof.

Japan submitted that Ukraine failed to demonstrate the existence of a relationship of cause and effect such that increased imports contribute to ‘producing’ the serious injury.²² According to Japan, there are two main basis for such claim: (a) the published report does not contain the analysis of the conditions of competition in the domestic market for passenger cars that ‘explains the interaction

¹⁸ Para. 7.261

¹⁹ Paras 7.266-7.267

²⁰ Paras 7.268-7.269

²¹ Para. 7.269

²² Para. 7.289

between the imported and domestically produced products'; (b) there is no coincidence in time between the increase in imports and the deterioration of the domestic industry.²³ Therefore, the causation analysis was incomplete.

A. CAUSE AND EFFECT RELATIONSHIP

Ukraine determined the existence of a causal link based on the analysis of the following indicators in 2010 as compared to 2008²⁴:

- i. Production volume of the domestic industry decreased by 78,9%;
- ii. Capacity utilization decreased by 74,86%;
- iii. Sales volumes within the domestic market decreased by 86,33%;
- iv. Operating profit decreased by 89,9%;
- v. Employment decreased by 51,56%; and
- vi. Productivity numbers fell by 46,3%.

Concurrently the volume of imports decreased by 71% in absolute terms, but increased by 38% relative to domestic production in Ukraine. At the same time, the demand for passenger cars in the Ukrainian domestic market decreased by 78,8%, and the share of the domestic production in the domestic market also fell by 35%.²⁵Based on that the competent authorities of Ukraine concluded that the domestic industry was driven out of the domestic market of Ukraine resulting in, *inter alia*, a threat of serious injury.

The Panel primarily indicated that a coincidence between an increase in imports and deterioration in the position of the national industry does not imply the existence of a causal link *per se*. The Panel accentuated the fact that the injury factors worsened when there was a relative decrease in imports and began to improve when there was a relative increase in imports, which seem to be counter to findings of causation.²⁶ However, the Notice contains no further explanations of causation. Moreover, no elaboration exists as to how the national industry was driven out of the

²³Ibid.

²⁴ Para. 7.300

²⁵Ibid.

²⁶ Para. 7.302

Ukrainian domestic market and whether there were other reasons of the lost sales unrelated to increase in imports.²⁷

Finally, the Panel concluded that the Notice provides for no forward-looking analysis of the existence of causal link.²⁸ In particular, it requires not only an analysis of *de facto* indicators, but also a fact-based projection that a causal link will exist already in the very near future, when a threat will materialize in an actual serious injury.²⁹

B. NON-ATTRIBUTION ANALYSIS

In addition, the Panel acknowledged once again that to comply with requirement of Article 4.2(b) the competent authorities should identify other factors that might have contributed to injurious effects on domestic industry, which shall be reflected in their published report. Japan claimed that Ukrainian competent authorities simply stated that serious injury to the domestic industry had not been caused by other factors without any analysis of even hypothetical injurious effect of such factors.³⁰

According to the Key Findings in the course of investigation, the competent authorities determined three other injury factors that concurrently with increased imports were causing injury to domestic industry of Ukraine. Such factors are the following³¹:

- i. Global financial and economic crisis;
- ii. Non-competitiveness of the domestic automobile production as a possible result of the abolition of the government support, granted to the automotive industry (between 1997 – 2008) or, on the other hand, the commitment to reduce import duties from 25% to 10% upon Ukraine's accession to the WTO; and
- iii. Removal of the 13% import surcharge (that was in force over a period of six months in 2009).

Within panel proceedings, Ukraine submitted explanations why the listed factors could not influence the extent of injury, however in Japan's view such '*ex post* justifications' are irrelevant for the Panel's analysis.³²

²⁷ Para. 7.304

²⁸ Para. 7.305

²⁹ Ibid.

³⁰ Para. 7.309

³¹ Para. 7.327

³² Para. 7.315

The Panel recalled that the competent authorities must identify the nature and extent of the injurious effect of the known factors as well as explain the nature and extent of the injurious effects of those other factors as distinguished from the injurious effect of increased imports.³³ Moreover, the competent authorities must explain the particular method and process they use to make a non-attribution analysis as well as how they ensure that injurious effect of other factors are not included in the assessment of the injury prescribed solely to the increased imports.³⁴

Given the lack of clarity of the Notice, the Panel resorted to the materials of the investigation (the Key Findings) to see whether the competent authorities conducted non-attribution analysis in a proper way. Notably, with regard to the abovementioned other factors the Key Findings simply state that the injury caused by these factors cannot be attributed to the injury caused by the increased imports.³⁵ However, the competent authorities failed to examine how these factors influenced the position of the domestic automobile manufacturers and why they did not attribute to a threat of serious injury.

Therefore, the Panel concluded that the competent authorities of Ukraine did not undertake a proper analysis of causality acting inconsistently with Article 4.2(b) of the *Agreement*.

VI. UNFORESEEN DEVELOPMENTS

In its report, the Panel acknowledged once again that according to Article XIX:1(a) of the GATT the unforeseen developments are the circumstances, the existence of which must be demonstrated in order to apply a safeguard measure.³⁶

In the course of the investigation, the increase in imports relative to domestic production despite the decreased import volumes in absolute terms was determined as the unforeseen development. Hence, the Panel underlined that under Article XIX:1(a) of the GATT the increased imports shall be a *result* of unforeseen developments.³⁷ In other words, the increase in imports by itself cannot be regarded as an unforeseen development. In addition, all explanations regarding the unforeseen

³³ AB Report, *US – Line Pipe*, para.215; Para. 7.316 of the Panel Report (DS486)

³⁴ AB Report, *US – Lamb*, paras. 181, 184-185; Para. 7.318 of the Panel Report (DS486)

³⁵ Para. 7.327

³⁶ Para. 7.59

³⁷ Para. 7.83

developments, provided by Ukraine *ex post facto* were not taken into account by the Panel, since they should be published before the safeguard measures are applied.³⁸

VII. CONCLUSIONS

On 20 July 2015, the WTO DSB adopted the report of the Panel in the dispute at hand. Following the Panel's report, Ukraine took a decision to implement the DSB's recommendations and not to appeal the Panel's findings. Finally, on 6 October 2015, Ukraine informed the DSB that the competent authorities adopted the decision to revoke the safeguard measures on imports of passenger cars from 30 September 2015.

In a nutshell, among key findings of the Panel there are the following:

- i. Increased imports: Ukraine acted inconsistently with Article 2.1 of the Agreement, because it failed to demonstrate that the increase in imports was recent, sudden, sharp and significant enough;
- ii. Threat of serious injury: Ukraine failed to evaluate all relevant factors affecting the domestic industry, notably because it did not properly evaluate the likely development of the injury factors in the very near future and their likely impact on the situation of the domestic industry. Therefore, Ukraine violated Article 4.2(a) of the Agreement;
- iii. Causal link: Ukraine acted inconsistently with Article 4.2(b) of the Agreement by failing to demonstrate the existence of a causal link and to conduct a proper non-attribution analysis; and
- iv. Unforeseen developments: Ukraine violated Article XIX:1(a) of the GATT, because the published report did not contain a demonstration of the unforeseen developments and the effect of GATT obligations; no *ex post facto* explanations were accepted.

³⁸ Para. 7.55