世界贸易组织法律与实务教学研究文丛

WTO中国案例精选（一）

Selected China WTO Cases

杨国华/编

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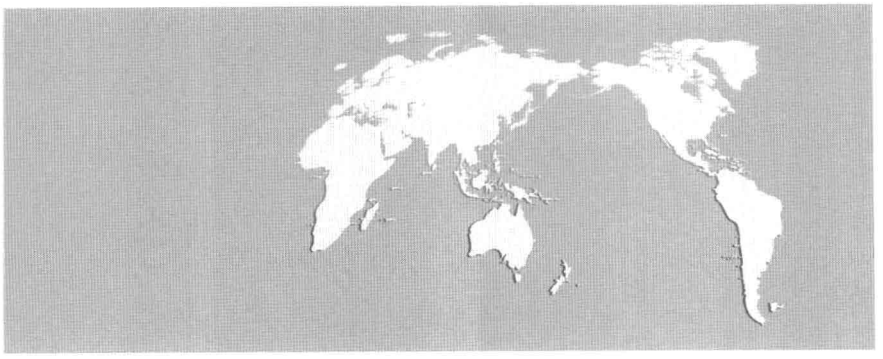

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总序

一座法律教学与研究的宝库

中国加入WTO十周年，给我们提供了16份争端解决裁决报告。这些报告不仅对中国与美国和欧盟等其他WTO成员之间的贸易争端作出了裁判，而且向我们展现了一系列精彩的法律分析。例如，采取“保障措施”，应当如何对“未预见的发展”进行分析？《补贴与反补贴措施协定》中的“公共机构”，是指“政府控制”的机构，还是“履行政府职能”的机构？对中国的产品同时采取反倾销和反补贴措施，为何要考虑“双重救济”问题？为何美国有关行政部门拨款的法案属于“卫生与植物卫生措施”？为何专家组认定欧盟单独税率的规定不符合《反倾销协定》，而上诉机构又是如何“基于不同理由”维持了专家组裁决？在针对中国产品采取“特殊保障措施”时，应当如何分析进口与产业损害之间的因果关系？再如，中国对构成整车特征零部件的税收为何属于“国内费用”，而不是“普通关税”？中国知识产权法律中的刑事门槛为何没有违反《与贸易有关的知识产权协定》第61条的“商业规模”之规定？《中国加入WTO议定书》承诺中的“sound recordings”，为何既包括物理形态（CD、DVD）也包括电子形态（网络音乐），而上诉机构又如何解决了一个“复杂的法律问题”，即议定书承诺能否援用GATT第20条例外的问题？但在另外一个案件中，为何中国关于出口税承诺又无权援引GATT第20条例外？

在这些法律分析中，专家组和上诉机构不仅对案件事实（“措施”）进行了详细的描述和准确的归纳，而且对相关法律，即WTO协定的相关条款进行了明确的解释。更为重要的是，对于“法律为何适用于案件事实”，裁决报告中有充分翔实的论证，常常达到几十页的篇幅！这些是真正意义上的法律分析，体现了法律的严谨和理性。

WTO中涉及中国的争端解决裁决报告，只是WTO裁决的一小部分。自1995年成立以来，WTO争端解决机构已经作出了200余份裁决报告，有更多更为精彩的法律分析。

而且，随着全球化和各国经济贸易交往的增加，WTO争端解决裁决报告的数量还在不断增加……

WTO裁决报告仿佛一座宝库，亟待法律教学和研究的挖掘。

法律教学应当使用WTO案例，因为研读这样的法律分析，学生必定会得到很好的法律训练。此外，对于中国是当事方的案件，裁决涉及中国的贸易法律和政策以及中国的经济利益，因此使用这些案件教学是饶有趣味的。对于中国并非当事方的案件，由于它们涉及国民待遇、最惠国待遇和取消数量限制等重要的国际贸易规则，覆盖了货物贸易、服务贸易和知识产权等主要的国际贸易领域，而中国作为一个贸易大国，有短期或长期的利益，因此使用这些案件教学，不会让学生有“事不关己”的“陌生感”。这也契合了国家实

施卓越法律人才教育培养计划的要求,有助于培养一批具有国际视野、通晓国际规则、能够参与国际法律事务和维护国家利益的涉外法律人才。而对于研究者,研究这些案件所涉及的国际规则和中国利益,提出对策建议,对中国法律和政策的制定以及"全球治理"的参与,都有非常重要的意义。

更为重要的是,这些裁决得到了154个WTO成员的充分尊重,按照WTO的法律程序得到了执行。法律的权威在这里得到了体现。法律是管用的,能给法律的学习者和研究者带来无穷的动力,也为我国建设法治社会提供了借鉴。

开启这座宝库的大门,只需举手之劳:钥匙就是每个人手中的鼠标,只要对着WTO官方网站轻轻一点,全部案例就会出现在屏幕上!我们这套丛书,不过是在为这座宝库做个广告。

是为序。

商务部条约法律司副司长 **杨国华**

西南政法大学国际法学院院长 **张晓君**

2012年3月31日

代前言

让法律活起来

——WTO 案例在法学教育中的作用

案例在法学教育中的作用是公认的。有了案例，法律规则就“活”了起来——从抽象的概念、冷冰冰的条文，变成了社会中一个个活生生的事例。通过对这些事例的研究，学生们就开始看到了法律的“用处”，进而对条文的含义和理念有了清晰、深刻的认识，同时培养了独特的法律思维。这样，当他们走向社会、遇到一件件具体的事情时，脑海里就会浮现一个个成案及其背后所体现的法律原则，并且迅速将之运用于解决眼前的问题。因此，在法学教育中，应当大量使用案例教学，使得学生的法律知识和法律思维得到反复强化和巩固。

然而，选择好的案例何其难也！国内法院判决大多过于简单，对法律条文为何适用于本案事实所言甚少，仿佛将事实查明后，就有现成的、毋庸置疑的条文等着。英美法传统的法院判决也许有比较充分的说理、论证过程，但这些案件的事实离我们实在太遥远，永远给人一种“隔”的感觉。法律是“本土”的，离开了我们自己生活的法律，我们永远无法真正地理解，更不用说将其准确地运用于我们自己的生活。不仅如此，无论是国内判决还是国外判决，我们又从何处获得呢？是的，有人会出版“案例精选”，但那些是我们所需要的案例吗？那些案例能够完全反映我们所要学习的法律制度吗？

就在这个时候，我们发现了 WTO 案例。WTO 成立 15 年来，已经有了 400 多个案件、200 多份专家组和上诉机构裁决，几乎覆盖了 WTO 的所有协议。这些裁决的重大特色，是对“法律条文为何适用于本案事实”有详尽的论述。为了确定一个协议条款的含义，专家组和上诉机构往往会从词典中查找其“通常含义”，从该条款的前后左右甚至其他协议对照“上下文”，从该条款所在协议的前言和整体明确“宗旨和目的”。在此过程中，常常会参照大量的先例。这些先例为条款的理解提供了多样的思路。在初步确定了条款的含义后，专家组和上诉机构还会参考“补充资料”，例如协议谈判时的文件，以印证其理解的准确性。然后，他们会拿着“条款的含义”这个“放大镜”，仔细查看案件的事实，一点点确定两者是否相符。经过这样的法律论证、法律推理，读者会对“法律”及其“法律”适用于事实的过程，有一个清晰的了解。阅读和研究这样的案例，能够培养法律解释的能力，更能够锻炼法律适用的本领。此外，这些案例的裁决在 WTO 官方网站上可以全部免费下载，而涉及中国的案例更会让学生增加一种“亲切感”——中国在国际组织做为“原告”或“被告”的案件，不仅事关重大，而且饶有趣味。

事实上,将 WTO 案例作为法律教学的资料,还有更为深远的影响。WTO 裁决得到了 153 个成员的普遍尊重——绝大多数得到了执行,即败诉方改正了有关措施,而少数案件的"补偿"和"报复",也是在 WTO 法律程序的框架内进行的。因此,WTO 的法律体制,是"国际法治"的体制——国际法充分表现出了法律的特征。同时,按照 WTO 裁决修改国内的立法或措施,也促进了"国内法治"的进步——中国在认真遵守国际规则。法治,即"良好的法律得到良好的执行"(亚里士多德语),无异于法律的灵魂。对于法律系学生来说,需要培育心中的这片净土,打开眼前的这片蓝天,树立坚定不移的法治理念。只有这样,当他们走向社会,面对与法治相反的现实时,才能尽心尽力地予以纠正,从而推动法治的前进。法治是一种理想,而现实往往与理想相距甚远。但只要我们胸怀理想,就能将现实一步步推向理想。因此,通过 WTO 案例,学生们能够看到这样一个实实在在的"理想国",不会由于理想的虚幻和飘缈而丧失理想的信念。

对于使用 WTO 案例教学的可行性,本人曾经在一所大学的研究生课程中有过成功的尝试。将几个案例分给几组同学阅读,每节课由一组同学介绍案情,其他同学提问。经过一学期的讨论,同学们对专家组和上诉机构分析问题的思路有了比较清晰的把握,并且能够初步运用这一思路进行条文解读和案情分析。不仅如此,同学们还通过案例,对 WTO 的规则和知识有了一定的了解。同学们课堂热烈讨论,课后刻苦阅读,表现出了极大的学习主动性。

值得提及的是,我们倡导 WTO 案例教学,并不局限于"WTO 法"、"国际贸易法"、"国际经济法"、"国际法"等课程。专家组和上诉机构裁决中的思维,是真正的"法律思维":逻辑严谨,论证充分,以理服人。这种法律思维的方式,是所有法律系学生都应当培养的。也正是这样一种思维方式,将法律专业与其他专业区别开来,例如文学的想象、历史的博大、哲学的深刻,以及经济学的数据分析、社会学的问卷调查、心理学的测试实验。

经过这种严谨的法律思维的训练,法律系的毕业生即使在其他行业工作(相当多的毕业生不会从事法官和律师这些纯法律的职业),也能显示出自己的特长。法律思维是一种能力,是在纷繁复杂的社会想象中敏锐地抓住本质的能力。法律思维更体现了一种理念,是借用法律分析的方法展现法律背后的法治(以及公平和正义)的理念。我们社会的各行各业都需要这样的毕业生。

法律来源于丰富多彩的生活,而案例教学能够让法律回到生活,成为有血有肉的"人"。在 WTO 法中,这个"人"是理性的、讲道理的。这个"人"的一言一行,值得我们认真观察研究,认真学习效仿。

2011 年 10 月 29 日

注:中国加入 WTO 十年,截至 2011 年 11 月 30 日,共有 22 个涉及中国的案件(8 个起诉案件,14 个被诉案件,详见本书附录"中国参与 WTO 案件统计"),其中 10 个案件作出了专家组和/或上诉机构报

告。本书所收集的内容，即为这 10 个案件中最为精彩的内容。

但需要说明的是，上文谈到“案例精选”时所提出的疑问，即“但那些是我们所需要的案例吗？那些案例能够完全反映我们所要学习的法律制度吗？”同样适用于本书。出版案例精选，为教学便利之所需。WTO 专家组报告平均 300 页，上诉机构报告平均 150 页，所以阅读全文常常为师生所不便。然而，精选就如满桌大餐中的一道菜，也如交响曲中的一个乐章，虽然能够反映精选者或大多数人的判断，但绝对不能够替代品尝全菜或聆听全曲后自己的判断。何况，所谓“精彩”的感觉，常常是在与其他“不够精彩”的部分相比较后才会产生。因此进行 WTO 案例教学，应当鼓励研读完整的报告，或者至少要研读一份完整的专家组报告和上诉机构报告。（2011 年 11 月 30 日）

目录

案件一

美国钢铁保障措施案

(United States-Definitive Safeguard Measures on Imports of Certain Steel Products, DS252)

一、案件背景

2002年3月5日，美国总统宣布，对10种进口钢材（板材，包括板坯、中厚板、热轧钢、冷轧钢和涂镀板；热轧棒材；冷轧棒材；螺纹钢；焊管类产品；普通碳素和合金管接头；不锈钢棒材；不锈钢杆材；镀锡类产品；不锈钢线材）采取保障措施，在为期3年的时间里，加征最高达30%的进口关税。从3月7日至4月4日，欧盟、日本、韩国、中国、瑞士、挪威、新西兰和巴西等8个WTO成员先后将本案提交WTO争端解决机制。2003年7月11日，专家组做出裁决，认定美国的措施不符合WTO规则。11月10日，上诉机构维持了专家组裁决。

起诉方提出了11个法律主张，包括未预见的发展、进口产品定义、国内相似产品定义、进口增加、严重损害、因果关系、对等性、最惠国待遇、措施的限度、关税配额分配、发展中国家待遇等。限于篇幅，此处仅节选专家组裁决中有关"未预见的发展"的部分（上诉机构维持了专家组裁决，相应部分见上诉机构报告第269段至第330段）。

二、专家组裁决的相关部分

专家组报告第10.31段至第10.150段对"未预见的发展"问题做出了如下裁决：

C. CLAIMS RELATING TO UNFORESEEN DEVELOPMENTS

1. Claims and Arguments of the Parties

10.31　The arguments of the parties can be found in Section Ⅶ. C. 1 *supra*.

10.32　The European Communities, China, Switzerland, Norway and New Zealand claim

that the USITC Report was issued without examining the issue of unforeseen developments, and/or that it did not provide an adequate and reasoned explanation of those developments and the manner in which they resulted in increased imports. ①New Zealand adds that the competent authority has failed to demonstrate the existence of unforeseen developments as a matter of fact. ②Moreover, the European Communities, China, Norway and New Zealand claim that no opportunity was provided by the USITC to interested parties to present evidence and their views on the issue of unforeseen developments. ③For all of these reasons, they claim that the United States has failed to comply with the provisions of both Article 3.1 of the Agreement on Safeguards and Article XIX:1(a) of GATT 1994.

10.33 The United States responds that the USITC identified the unforeseen developments that resulted in increased imports of certain steel products in a manner that was consistent with the United States' obligations under Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards. ④

2. Relevant WTO Provisions

10.34 Article XIX:1(a) of GATT 1994 provides as follows:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

10.35 Article 3.1 of the Agreement on Safeguards provides:

> A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether or not the application of a safeguard

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① European Communities' first written submission, paras. 122-123; China's first written submission, para. 86; Switzerland's first written submission, paras. 109-110; Norway's first written submission, paras. 110-111; New Zealand's first written submission, para. 4.11.

② New Zealand's first written submission, para. 4.29.

③ European Communities' first written submission, para. 178; China's first written submission, para. 125; Norway's first written submission, paras. 166; New Zealand's first written submission, para. 4.30; see also their respective written replies to Panel question No. 1 at the first substantive meeting.

④ United States' first written submission, para. 925.

measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

3. Analysis by the Panel

(a) The Cumulative Application of Article XIX of GATT 1994 and the Agreement on Safeguards

10.36 Article XIX of GATT 1994 provides that a Member is entitled to impose a safeguard measure "[i]f, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products". There is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards. ① This interpretation ensures that the provisions of the Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement. ②

10.37 It is now clear that the circumstances of unforeseen developments within the meaning of Article XIX:1(a) of GATT 1994 must be demonstrated as a matter of *fact*, together with the conditions mentioned in Article 2.1 of the Agreement on Safeguards, in the report of the competent authority and before a safeguard measure can be applied. ③

(b) Standard of Review

10.38 As mentioned in paragraphs 10.21, 10.24 above, the role of this Panel in the present dispute is not to conduct a *de novo* review of the USITC's determination. ④Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed

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① See for instance the Appellate Body Report in *Korea-Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a 'Single Undertaking' and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously ..." and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement*".

② Appellate Body Reports, *Argentina-Footwear (EC)*, para. 95; *Korea-Dairy*, para. 85; *US-Lamb*, para. 71.

③ Appellate Body Report, *US-Lamb*, para. 72; Appellate Body Report, *Korea-Dairy*, para. 85.

④ Appellate Body Report, *Argentina-Footwear (EC)*, paras. 116-117; Appellate Body Report, *US-Lamb*, para. 97.

below, the Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers. ①

10.39 In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made". ②

(c) What can Constitute an Unforeseen Development?

10.40 An unforeseen development, pursuant to Article XIX:1(a) GATT 1994, is an unexpected circumstance which has led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to relevant domestic producers. ③ In the current dispute, the United States argues that the USITC identified the financial crises that engulfed Southeast Asia (Asian crisis) and the former USSR (Russian crisis), the continued strength of the United States' market and persistent appreciation of the U,S, dollar, and the confluence of all of these events as unforeseen developments. ④The European Communities, China, Switzerland and Norway contend that none of these events constituted unforeseen developments, nor did any combination of them. ⑤ The same four complainants as well as New Zealand argue that the developments mentioned by the United States were not unforeseen because they were not unexpected. ⑥

10.41 The legal standard that is used to determine what constitutes an unforeseen development is, as agreed by the parties, at least in part, subjective. This is supported by the Appellate Body, who stated in *Korea-Dairy* that safeguard measures "are to be invoked only in situations when ... an importing Member finds itself confronted with developments *it had not 'foreseen' or 'expected'* when *it* incurred [its] obligation [under GATT 1994]". (emphasis added) ⑦

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① Appellate Body Report, *US-Lamb*, paras. 103-106.

② Appellate Body Report, *Argentina-Footwear (EC)*, para. 121; Appellate Body Report, *US-Lamb*, para. 102.

③ Appellate Body Report, *Argentina-Footwear (EC)*, para. 91; Appellate Body Report, *Korea-Dairy*, para. 84.

④ United States' first oral statement, para. 72.

⑤ European Communities' first written submission, para. 151; China's first written submission, para. 97; Switzerland's first written submission, para. 137; Norway's first written submission, para. 139.

⑥ Switzerland's first oral statement on behalf of the complainants, para. 15.

⑦ Appellate Body Report, *Korea-Dairy*, para. 86 and Appellate Body Report, *Argentina-Footwear (EC)*, para. 93 (emphasis added).

10.42　What was "unforeseen" when the contracting parties negotiated their first tariff concessions in all likelihood differs from what can be considered to be unforeseen today. The Panel notes that after 50 years of GATT, tariffs have, for many products, disappeared or reached very low levels. Further, what constitutes "unforeseen developments" for an importing Member will vary depending on the context and the circumstances. Nevertheless, the subjectivity of the standard does not take away from the fact that the unexpectedness of a development①for an importing Member is something that must be demonstrated through a reasoned and adequate explanation.

10.43　In addition, the standard for unforeseen developments may also be said to have an objective element. The appropriate focus is on what should or could have been foreseen in light of the circumstances. The standard is not what the specific negotiators had in mind but rather what they could(reasonably)have had in mind. This was recognized early in GATT by the *U.S.-Fur Felt Hats* decision, which characterized unforeseen developments as "developments [...] which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated". ②

10.44　Moreover, since all the WTO prerequisites, including the demonstration of unforeseen developments, must be satisfied by each safeguard measure, the Panel believes that the factual demonstration of unforeseen developments③must also relate to the specific product(s)covered by the specific measure(s)at issue. Therefore the reasoned and adequate explanation relating to unforeseen developments must contain *specific* factual demonstrations of unforeseen developments identified to have resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers for each safeguard measure at issue.

10.45　In assessing whether the USITC provided a reasoned and adequate explanation of unforeseen developments that resulted in increased imports causing serious injury, it is logical to consider whether the USITC addressed unforeseen developments at all in its published reports, as required by Article 3.1 of the Agreement on Safeguards and Article XIX of GATT 1994, which has been challenged by the complainants.

(d) Demonstration of "Unforeseen Developments" as a Matter of Fact: When, Where and How to Demonstrate Unforeseen Developments

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① Appellate Body Report, *Argentina-Footwear(EC)*, para. 91; Appellate Body Report, *Korea-Dairy*, para. 84.

② *US-Fur Felt Hats*, para. 9, cited with approval in Appellate Body Report, *Argentina-Footwear(EC)*, para. 96; Appellate Body Report, *Korea-Dairy*, para. 89.

③ Appellate Body Report, *US-Lamb*, para. 72; Appellate Body Report, *Argentina-Footwear(EC)*, para. 92; Appellate Body Report, *Korea-Dairy*, para. 85.

(*i*) *Claims and Arguments of the Parties*

10.46 The arguments of the parties can be found in Sections VII. C. 1; C. 2(f) *supra*.

(*ii*) *Analysis by the Panel*

10.47 The Panel recalls that the complainants first raised issues relating to the format and timing of the demonstration of unforeseen developments. The complainants argue that the USITC Report was issued without examining the issue of unforeseen development. They submit that the initial USITC Report, with the exception of a discussion on the Asian and Russian crises, never addressed the requirement of unforeseen developments. They add that the Second Supplementary Report does not form part of the USITC Report and is an *ex post* attempt to demonstrate the existence of unforeseen developments, which did not feature in the same report as the USITC's determination. They argue, therefore, that the Second Supplementary Report should be disregarded. The United States responds that it is perfectly acceptable to issue separate reports, as there is no express guidance on "when, where and how" a demonstration of unforeseen developments must be made. According to the United States, the choice of whether the components of the report are issued at the same time or over a period of time is left to the discretion of the individual Member. ①The Panel will deal with the issues of the form and timing of the competent authorities' report in turn.

The "form" of the demonstration of unforeseen developments in relation to the decision to apply safeguard measures

10.48 In *U. S. -Lamb*, the Appellate Body made it clear that the demonstration of unforeseen developments must be found in the report of the competent authority. ②As the parties have pointed out, the requirement to publish a report is a necessary step in conducting an investigation consistent with Article 3.1. However, Switzerland argues that the demonstration of unforeseen developments must be found in the same report as the one containing the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards and seems to imply that these elements should be contained in a single document.

10.49 The Panel agrees with the United States that nothing in the requirement to publish a report dictates the form that the report must take, provided that the report complies with all of the other obligations contained in the Agreement on Safeguards and Article XIX of GATT 1994. In the end, it is left to the discretion of the Members to determine the format of the report, including whether it is published in parts, so long as it contains all of the necessary elements, including findings and reasoned conclusions on all pertinent issues of fact and law. Together, these parts can form the report of the competent authority.

10.50 The Panel believes that a competent authority's report can be issued in different parts but such multi-part or multi-stage report must always provide for a coherent and integrated

① United States' first written submission, para. 952.

② Appellate Body Report, *US-Lamb*, para. 72; Appellate Body Report, *Korea-Dairy*, para. 85.

explanation proving satisfaction with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, including the demonstration that unforeseen developments resulted in increased imports causing serious injury to the relevant domestic producers. Whether a report drafted in different parts or a multi-stage report constitutes "the report of the competent authority" is to be determined on a case-by-case basis and will depend on the overall structure, logic and coherence between the various stages or the various parts of the report. If separate parts of the report are issued at different times, the discussion relating to unforeseen developments must, in all cases, be integrated logically in the overall explanation as to how the importing Member's safeguard measures satisfies the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards. The publication of a report in many stages may produce added difficulties for the competent authorities to set forth coherent findings in a reasoned and adequate manner.

10.51 The complainants have also argued that the timing of the USITC's demonstration is not in accordance with the requirements of Article XIX of GATT 1994 and Article 3.1 of the Agreement on Safeguards, as articulated by the Appellate Body. We deal with this issue below

The timing of the demonstration of unforeseen developments: before the application of the measure

10.52 Given that the demonstration of unforeseen developments is a prerequisite for the application of a safeguard measure①, it cannot take place after the date as of which the safeguard measure is applied. This has been confirmed by the Appellate Body, which noted, in *U. S. -Lamb*, that although Article XIX provides no express guidance on where and when the demonstration of unforeseen developments is to be made, it is nonetheless a prerequisite, and "it follows that this demonstration must be made *before* the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed". ②Any demonstration made after the start of the application of a safeguard measure would have to be disregarded automatically as it cannot afford legal justification for that measure.

10.53 Article 3.1 of the Agreement on Safeguards requires *inter alia* that Members apply a safeguard measure only after competent authorities set forth "their findings and reasoned conclusions reached on all pertinent issues of fact and law". Accordingly, the Appellate Body Report in *U. S. -Lamb* stated that since the demonstration of unforeseen developments is a pertinent issue of fact and law for the application of a safeguard measure, "it follows that the published report of the competent authorities ... must contain a 'finding' or 'reasoned

① Appellate Body Report in *Korea-Dairy*, paragraph 85; see also, Appellate Body Report, *Argentina-Footwear(EC)*, para. 92.

② Appellate Body Report, *US-Lamb*, para. 72(emphasis in original); see also Panel Report, *US-Line Pipe*, para. 7.296.

conclusion' on 'unforeseen developments'". ①Such a reasoned and adequate explanation of how unforeseen developments resulted in increased imports causing serious injury must form part of the overall reported explanation by the competent authority that it has satisfied all the WTO prerequisites for the imposition of a safeguard measure. Since the demonstration of unforeseen developments must be included in the published report of the competent authorities, it is necessary to look for the demonstration of unforeseen developments in the "report of the competent authority", completed and published prior to the application of the safeguard measures.

10.54 The Panel notes that, according to the United States, 22 October, 2001 was the date of the determination made pursuant to Articles 2 and 4 of the Agreement on Safeguards. ② This determination was included in the USITC's Report published in December 2001. On 22 October, 2001, the USITC had not completed its demonstration relating to unforeseen developments. In the Second Supplementary Report of 4 February, 2002, findings were made principally with respect to the issues of "unforeseen developments" and potential exclusions of certain countries from the application of the safeguard measures. The safeguard measures came into effect on 20 March, 2002, pursuant to a proclamation by the President on 5 March, 2002. ③We recall that the demonstration of unforeseen developments must be made in the report of the competent authority and before the measure is applied. To the extent that the February Second Supplementary Report formed part of the competent authority' report—an issue which we will ultimately not need to decide for reasons explained below—the demonstration of unforeseen developments was not necessarily made in an untimely fashion, since this later report was published before the measure was applied.

Conclusion

10.55 Before a decision to apply a safeguard measure can be made in accordance with Article 2 of the Agreement on Safeguards and Article XIX of GATT, a number of conditions must be fulfilled, and certain circumstances must be demonstrated. It is only once all of these prerequisites or requirements are fulfilled, including the completion of the investigation and the issuance of a report containing findings and reasoned conclusions, that a Member is entitled to impose a WTO compatible safeguard measure.

10.56 The United States refers to 22 October, 2001 as the date of the determination pursuant to Articles 2 and 4 of the Agreement on Safeguards. In the Panel's opinion that date cannot constitute the time at which full compliance was achieved with the requirements of Article XIX of GATT and the Agreement on Safeguards, since the USITC could only have completed its demonstration of unforeseen developments on 4 February, 2002.

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① Appellate Body Report, *US-Lamb*, para. 76.

② United States' written reply to Panel question No. 15 at the first substantive meeting.

③ Proclamation 7529 of 5 March, 2002, Federal Register, Vol. 67, No. 45, 7 March, 2002.