1 ARTICLE 3

1.1 Text of Article 3

Article 3

Investigation

1. A Member may apply a safeguard measure only following an investigation by the

thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

1.2 General

1. The Panel in *Korea – Dairy* observed that the absence of a claim under Article 3 concerning the requirement to publish a report on a safeguard investigation did not preclude the possibility of claims relating to other aspects of an injury determination or safeguard measure:

> "[T]he absence of a claim under Article 3 of the Agreement on Safeguards means at most that the European Communities agrees that the report is WTO compatible for the purpose of Article 3.1 of the Agreement on Safeguards. The European Communities has the right to raise more specific claims under Article 4 of the Agreement on Safeguards and has done so. We consider that if a Member wants to challenge the WTO compatibility of the manner in which an 'injury' determination was performed, or the choice of an appropriate measure to be imposed, this Member does not have to challenge the publication of the final report as such."[1]

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notice, the manner of publication of the notice, and its content. Here as well, a determination of whether public notice is 'reasonable'

after publication of the Notice. Japan asserts that, despite what is provided for in the Safeguards Law, it did not receive all written submissions directly from the other parties. We note, however, that Article 9.5 of the Safeguards Law affords the possibility to interested parties to request access to all information submitted to the competent authorities by another interested party. There is no evidence on record to show that Japan made inquiries with the competent authorities to satisfy itself that it had received all submissions of other parties. Ukraine has stated that it received no such request from Japan. Having opted for the public hearings route to provide opportunities for participation, we do not agree that Ukraine was required under Article 3.1 to do more than it did to ensure access to such written submissions."[10]

1.3.1.4 "interested parties"

9. The Panel in *Ukraine – Passenger Cars* stated that the term "interested parties" in Article 3.1 of the Agreement on Safeguards includes WTO Members:

"We note that Article 3, second sentence, does not define the term 'interested parties'. Nevertheless, it makes clear that the term 'interested parties' at a minimum includes importers and exporters. In addition, it refers to 'other interested parties', without qualification. In our view, therefore, the term 'interested parties' also includes Members such as Japan whose interest in the proceeding is self-evident, as its exporters would be affected by the imposition of a safeguard measure. We find relevant in this regard that the importing Member must, under Article 12.1 of the Agreement on Safeguards, notify the WTO Committee on Safeguards immediately on initiating a safeguard investigation. One of the reasons why Article 12.1 requires immediate

1.3.2.3 "on all pertinent issues of law and fact"

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supplemental report together with the USITC's main reports, in assessing whether the United States had complied with the requirements in Article XIX:1(a):

> "The Agreement on Safeguards does not dictate the precise format of the 'report' that the competent authorities of a Member must publish I.4 (t)-2 (s1c7 (eo(ith)63 (tie)4(o)-28.7 w)10.7 ttie)4( )06n15.6 s (a)e6.3 298.827 0-29347ion(1il10 (do2)vt)15.6

1.3.4 Relationship with other WTO Agreements

1.3.4.1 Article XIX of the GATT 1994

21. In *US – Steel Safeguards*, the Panel and the Appellate Body discussed the relationship between Article XIX of the GATT 1994 on unforeseen developments and Articles 3.1 and 4.2(c) of the Agreement on Safeguards:

> "The United States argued at the oral hearing that 'Article 4.2(c) does not apply to the competent authorities' demonstration of unforeseen developments' under Article XIX:1(a) of the GATT 1994. We disagree. Article 4.2(c) is an elaboration of Article 3; moreover 'unforeseen developments' under Article XIX:1(a) of the GATT 1994 is one of the 'pertinent issues of fact and law' to which the last sentence of Article 3.1 refers. It follows that Article 4.2(c) also applies to the competent authorities' demonstration of 'unforeseen developments' under Article XIX:1(a)."[25]

1.3.4.2 Article 11 of the DSU

22. In *US – Steel Safeguards*, the Appellate Body reviewed the relationship between Article 11 of the DSU and Articles 3.1 and 4.2 of the Agreement on Safeguards:

> "It bears repeating that a panel will not be in a position to assess objectively, as it is neequfef1

> it contain any examples of the type of information that might qualify as 'by nature confidential' or 'information that is submitted on a confidential basis'.
>
> Article 3.2 SA requires that information that is by nature confidential or which is submitted on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. In the absence of a detailed elaboration or definition of the types of information that must be treated as confidential, we consider that the investigating authorities enjoy a certain amount of discretion in determining whether or not information is to be treated as 'confidential'. While Article 3.2 does not specifically address the nature of any policies pertaining to the treatment of such 'confidential' information which a Member's investigating authority may or must adopt, that provision does specify that such 'information shall not be disclosed without permission of the party submitting it'. The provision is specific and mandatory in this regard. This furnishes an assurance that the confidentiality of qualifying information will be preserved in the course of a domestic safeguards investigation, and encourages the fullest possible disclosure of relevant information by interested parties."[27]

24. The Panel in *US – Safeguard Measure on PV Products* stated that "the redaction of confidential information [in the final injury report] does not necessarily establish a failure of the competent authorities to provide findings and reasoned conclusions within the meaning of Article 3.1 of the Agreement on Safeguards."[28]

25. The Panel in *US – Wheat Gluten* addressed the argument that certain aggregate data could not be considered to be "confidential" within the meaning of Article 3.2, and that, even if it was confidential, it could have been presented in percentages and indexes:

"Accordingly, Article 3 establishes certain procedural rules that must be followed before applying a safeguard measure. Specifically, Article 3.1, first sentence, establishes that a Member may only apply a safeguard measure following an investigation conducted by the competent authorities of that Member. That investigation must include, according

> of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU. The Panel's efforts to develop a consensual approach to the conditions under which the Panel might view the requested information were ultimately unsuccessful."[40]

33. Although in *US – Wheat Gluten*, the Panel concluded that the record before it, without the confidential information, provided a sufficient basis for an objective assessment of the facts as required by Article 11 of the DSU, it cautioned that "the WTO dispute settlement system cannot function optimally if relevant information is withheld from a panel."[41] The Appellate Body in *US – Wheat Gluten* endorsed this finding:

> "[We agree] with the panel that a 'serious systemic issue' is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be 'confidential'. We believe that these issues need to be addressed."[42]

34. The Appellate Body in *US – Wheat Gluten* also shared the concerns expressed by the Panel related to the proper functioning of the WTO dispute settlement system:

> "[T]he refusal by a Member to provide information requested of it undermines seriously the ability of a panel to make an objective assessment of the facts and the matter, as required by Article 11 of the DSU. Such a refusal also undermines the ability of other Members of the WTO to seek the 'prompt' and 'satisfactory' resolution of disputes under the procedures 'for which they bargained in concluding the DSU'."[43]

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Current as of: December 2023

[40] Panel Report, *US – Wheat Gluten*, para. 8.11.
[41] Panel Report, *US – Wheat Gluten*, para. 8.12.
[42] Appellate Body Report, *US – Wheat Gluten*, para. 170.
[43] Appellate Body Report, *US – Wheat Gluten*, para. 171.