

Article 9

2

² A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

² Appellate Body Report, , para. 132.

by providing transparency for the benefit of all Members concerned, we see nothing in Article 9.1 that mandates one."³

2. In _____, concerning the safeguard measure which took the form of a supplemental duty, the Appellate Body clarified that "duties are 'applied [against a product] irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports together". In this case no evidence had been presented before the Panel that the importing Member made an effort "to make certain that _____ imports from developing countries were excluded from the application of the measures":

"On this point, we start by observing that Article 9.1 obliges Members not to _____ a safeguard measure against _____ originating in developing countries whose individual exports are below a _____ level of three percent of the imports of that product, provided that the collective import share of such developing countries does not account for more than nine percent of the total imports of that product. ... However, we note that Article 9.1 is concerned with the application of a safeguard measure on a _____. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be 'applied' to a product. In our view, duties are 'applied against a _____' when a Member imposes conditions under which that product can enter that Member's market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are 'applied' irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.

...

[T]he available documents reveal no efforts whatsoever by the United States – apart from the claimed 'automatic' structure of the measure itself – to make certain that _____ imports from developing countries were excluded from the application of the measure."⁴

3. The Panel in _____ held that "Members which apply safeguard measures are obliged to adopt _____ available to them to exclude all developing countries that meet the requirements in Article 9.1 of the Agreement on Safeguards".⁵ While pointing out that there is certain flexibility how an investigating authority must comply with the Article 9.1 obligation, the Panel in _____ stated that "[i]rrespective of the way in which each Member complies with this provision, however, the Member concerned must show that it has made the efforts it can to exclude all those Members covered by the provision in Article 9.1 of the Agreement on Safeguards."⁶ Turning to the facts of the investigation before it, the Panel found that the investigating authority of the Dominican Republic had not complied with this obligation:

"As already mentioned, there is a certain flexibility in the manner of complying with the obligations under Article 9.1 of the Agreement on Safeguards. In the present case, the Dominican Republic explicitly excluded imports from four origins, some of them in a similar position to Thailand (as regards imports during the period investigated). Unlike these countries, however, Thailand was not specifically mentioned in the list of countries excluded. It should also be noted that Colombia, Indonesia and Panama did not export to the Dominican Republic either in 2009 and yet these three Members were included by the competent authority in the list of countries excluded.

coverage. It is not enough for the Dominican Republic to state without any further substantiation that imports from Thailand were de facto excluded from the measure's application because there are no grounds for the different treatment given to imports from Thailand and no proof that if Thailand had decided to export the product investigated to the Dominican Republic, it would have been exempt from application of the measures."⁷

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⁷ Panel Report,

, paras. 7.400-7.401.