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**Council on Trade in Goods
Committee on Safeguards**

**REQUEST UNDER ARTICLE 13.1(E) OF THE AGREEMENT ON SAFEGUARDS
(REQUEST FROM THAILAND)**

**FACTUAL REPORT TO THE COUNCIL FOR TRADE IN GOODS BY
THE CHAIRPERSON OF THE COMMITTEE ON SAFEGUARDS**

The following factual report is being submitted by the Chairperson of the Committee on Safeguards, Mr Hyouk Woo Kwon.

1 INTRODUCTION

1.1 Procedural Background

1.1. On 15 March 2018, Thailand submitted a request pursuant to Article 13.1(e) of the Agreement on Safeguards ("SG Agreement") in relation to certain action taken by Turkey. Thailand's request is contained in document G/L/1213/Rev.1-G/SG/158/Rev.1, attached as Annex 1 to this report ("the Request").

1.2. Article 13.1 of the SG Agreement provides, in relevant part, as follows:

A Committee on Safeguards is hereby established, under the authority of the Council for Trade in Goods, which shall be open to the participation of any Member indicating its wish to serve on it. The Committee will have the following functions:

[...]

(e) to review, at the request of the Member taking a safeguard measure, whether proposals to suspend concessions or other obligations are "substantially equivalent", and report as appropriate to the Council for Trade in Goods;

1.3. The Committee on Safeguards ("the Committee") discussed this Request at its regular meeting held on 23 April 2018,¹ at its informal meetings held on 20 June 2018 and on 14 September 2018. Members also discussed this Request at the regular meeting of the Committee held on 22 October 2018. At the meeting of 22 October, the chair explained in informal mode his revised text and asked whether he could understand, on an *ad referendum* basis, that Members had no more comments on the draft. He asked Members to inform him by close of business of 29 October 2018 if any Members still had comments. Having heard no more comments, the chair decided to submit this factual report to the Council on Trade in Goods under his own responsibility on 30 October 2018.

1.2 Notifications by Thailand and Turkey

1.4. By way of background, the following is a brief chronology of the major notifications submitted by Thailand and Turkey relevant to the investigation referred to in the Request.

¹ See G/SG/M/53 (see Annex 3) for the minutes of this meeting.

- (a) On 31 January 2014, Thailand submitted a notification² informing the Committee that it initiated an investigation on non alloy hot rolled steel flat products in coils and not in coils ("the subject product") on 30 January 2014.
- (b) On 27 May 2014, Thailand submitted a notification³ informing the Committee of the results of its preliminary determination before taking a provisional safeguard measure. It was confirmed in another notification⁴ submitted on 23 September 2014 that the provisional measure took effect on 7 June 2014. Turkey was not included in the list of developing countries excluded from the provisional measure.
- (c) On 13 January 2015, Thailand submitted a notification⁵ informing the Committee that the competent authority "has recommended imposing the safeguard duty for a period of three years starting from 7 June 2014, i.e., the date when the provisional measures took effect, until 6 June 2017." Turkey was not included in the list of developing countries excluded from the measure.
- (d) On 18 October 2016, Thailand submitted a notification⁶ of a review pursuant to Article 7.2 of the Agreement on Safeguards regarding the extension of the safeguard measure, and stated that "the notice of the initiation of the investigation was published ... on 3 October B.E. 2559 (2016)".
- (e) On 18 April 2017, Thailand submitted a notification⁷ of its proposal to extend a safeguard measure.
- (f) On 20 April 2017, Turkey notified⁸ its request for consultations with Thailand.
- (g) On 19 June 2017, Thailand submitted a notification⁹ of its decision to extend a safeguard measure. The measure "would be effective from 7 June 2017 until 6 June 2020". Turkey was not included in the list of developing countries excluded from the measure.
- (h) On 3 August 2017, Turkey submitted a notification under Article 12.5 of the SG Agreement regarding its proposed suspension of concessions. (G/L/1183-G/SG/N/12/TUR/5; Attached as Annex 2 to this report.)

2 THAILAND'S REQUEST

2.1. In its Request, Thailand asks the Committee to "review whether the suspension of concessions or other obligations applied by Turkey is 'substantially equivalent' as provided for in Article 8.2 of the Agreement on Safeguards" and to "report its findings to the Council for Trade in Goods".¹⁰

2.2. The Request explains as follows:

Thailand considers that the suspension of concessions and other obligations applied by Turkey is not substantially equivalent as provided for in Article 8.2 of the Agreement on Safeguards considering that the substantially equivalent concessions should be calculated based on a 3-year average of import value preceding the original measure where the level of concessions is not affected and where relevant factors of injury indicate that the domestic industry suffered from the surge in imports.

² G/SG/N/6/THA/4.

³ G/SG/N/7/THA/3-G/SG/N/11/THA/3.

⁴ G/SG/N/7/THA/3/Suppl.1-G/SG/N/11/THA/3/Suppl.1.

⁵ G/SG/N/8/THA/3-G/SG/N/10/THA/3-G/SG/N/11/THA/4.

⁶ G/SG/N/6/THA/4/Suppl.1-G/SG/N/14/THA/3.

⁷ G/SG/N/8/THA/3/Suppl.1-G/SG/N/10/THA/3/Suppl.1.

⁸ G/SG/143.

⁹ G/SG/N/8/THA/3/Suppl.2-G/SG/N/10/THA/3/Suppl.2.

¹⁰ G/L/1213/Rev.1-G/SG/158/Rev.1, para. 7.

3 VIEWS EXPRESSED

3.1 Turkey

3.1. Turkey's statement made at the regular meeting of the Committee of 23 April 2018 is available in document G/SG/M/53 (Annex 3).

3.2. Turkey also made the following points:

- Article 13.1 (e) refers to "proposals". Since Turkey's measure is now already in effect, it is no longer a proposal, and so this item should not have been brought to the Committee to begin with.
- The SG Agreement does not provide for any rules on how to calculate the suspension level, and in fact Members have used different methodologies in the past.
- One of the conditions for imposing a SG measure is that the increase of imports should be recent. If a SG measure were not imposed, one would expect that such recent level of import into that country would have continued. Thus, calculating the suspension based on such level is reasonable.
- If one studies past notifications by Members on this issue, in almost all the notifications submitted to the Committee in 2018, Members calculated their level of suspension based on their exports in the year preceding the year in which the original measure was imposed.

3.2 Thailand

3.3. Thailand's statement made at the regular meeting of the Committee of 23 April 2018 is available in document G/SG/M/53 (Annex 3).

3.4. Thailand also made the following points:

- It reiterated its views made in the Request that the suspension of concessions and other obligations applied by Turkey is not substantially equivalent as provided for in Article 8.2 of the Agreement considering that the substantially equivalent concessions should be calculated based on a 3-year average of import value preceding the original measure where the level of concessions is not affected, and not on a selected import value in 2013 where there was a maximum surge in imports before the initiation as alleged by Turkey.
- The end time of this suspension, 4 September 2020, extended to after the planned duration of the measure, which was 6 June 2020.
- Thailand's participation in this discussion is without prejudice to any of Thailand's WTO rights, and in particular, its consideration of whether Turkey had the right to suspend concessions. In Thailand's view, Turkey had no right to suspend concessions.
- Thailand disagrees with Turkey's assertion that Thailand's Request is inappropriate as that provision pertains to "proposals". The title of Article 13 is "Surveillance". This indicates that the Committee is authorized to oversee all aspects related to the implementation of the SG Agreement, including requests for suspension of concessions.
- Article 5 of the Agreement, which deals with the application of safeguard measures, establishes the general principle that the reference value for the measures taken in the course of safeguard proceedings is the average of imports in the last three representative years. Article 5.1 addresses the situation of safeguard measures in the form of quantitative restrictions. A consistent interpretation of the SG Agreement requires that this principle also

apply in the context of Article 8.2 of that Agreement.¹¹ The WTO Appellate Body has made clear that the WTO treaty has to be read as a whole.

- GATT Article XXVIII, which deals with modification of tariff schedules, provides relevant context. The general structure of GATT Article XXVIII appears to have been the model for Article 8.2 of the Agreement on Safeguards. Further, the GATT panel in *Canada – Withdrawal of Tariff Concessions* stated that "As a general principle, Article XXVIII negotiations had in the past been based on the most recent three-year period for which trade statistics were available". More recently the WTO panel in *EU – Poultry (China)* observed that "the determination of which Members hold a principal or substantial supplying interest in the concessions subject to renegotiations is to be made on the basis of the data preceding the initiation of the negotiations, and more specifically, the data for the last three years accompanying the notification which the importing Member circulates to initiate the process".
- Analysis of past similar notifications indicates that how Members made the calculation had not been uniform. In any event, the context provided by the SG Agreement and other provisions of the WTO Agreements make clear that a party seeking to suspend concessions under Article 8.2 must base its proposed suspension on a three-year average of import value preceding the original measure.

3.3 Other Members' Views

3.5. The views of other Members are summarized below:

- A Member asked the Secretariat to compile information on how this issue of methodology of calculating the level of suspension was treated in past notifications made under Article 12.5 of the SG Agreement. (See Annex 4.)
- Regarding this compilation, one Member wished to make it clear that this was merely for background purposes. Another Member did not wish to include it in the report. Among other issues, this Member pointed out that certain recent proposals of suspension of concessions were currently subject to DSU consultations, and so including the compilation here could have an unwanted effect on the eventual analysis of the panel or the Appellate Body. The chair confirmed as follows: the table in Annex 4 contains a list of notifications compiled by the Secretariat for information purposes only, and the list does not represent an endorsement by the Secretariat or the Committee of the approach taken in any of the listed notifications, nor does it represent any position of the Secretariat or the Committee with regard to the listed notifications *per se* or their contents.
- A Member wished to know whether Thailand offered consultations regarding the extension of the relevant measure, when and how Turkey requested consultations, when those consultations were held, the outcome of those consultations, and whether that outcome was notified under Article 12.5 of the SG Agreement. This Member further stated that the issue raised was fact-specific, and that requests made under Article 13.1 need to be handled on a case-by-case basis so that no precedent is set by this report.
- In response, Thailand explained that it had notified¹² on 18 April 2017 its offer of consultations. Turkey notified¹³ on 20 April 2017 its request to join the consultations. The consultations were held on 21 April 2017. At the consultations, Turkey had requested compensation under Article 8.1 of the SG Agreement. However, Thailand considered that Turkey did not have a "substantial interest" in the sense of Article 12.3 of the SG Agreement because Thailand's imports of the subject goods from Turkey amounted to less than 10% of Thailand's total imports of the subject goods. Thailand did not notify the Committee of the outcome of the consultations because Thailand did not propose "any form of compensation referred to in paragraph 1 of Article 8".

¹¹ Thailand refers to the Appellate Body's clarification in *Korea – Dairy* that a "[t]reaty should be interpreted as a whole, and in particular, its sections and parts should be read as a whole".

¹² G/SG/N/8/THA/3/Suppl.1-G/SG/N/10/THA/3/Suppl.1.

¹³ G/SG/143.

4 CLOSING

4.1. In spite of its efforts, the Committee was unable to reach a consensus on the findings called for by Article 13.1(e). Accordingly, I have chosen to submit this factual report to the Council on Trade in Goods, under my own responsibility.
