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UKRAINE – DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY JAPAN

The following communication, dated 13 February 2014, from the delegation of Japan to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 30 October 2013, Japan requested consultations with the Government of Ukraine ("Ukraine") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 14 of the *Agreement on Safeguards* regarding the definitive safeguard measures imposed by Ukraine on imports of certain passenger cars and the investigation that led to the imposition of those measures.¹

Japan held consultations with Ukraine on 29 November 2013 and 21 January 2014. Unfortunately those consultations failed to resolve the dispute.

I. BACKGROUND AND MEASURES AT ISSUE

1. Initiation of the safeguard investigation

On 30 June 2011, the Inter-Departmental Commission for International Trade (hereinafter referred to as "the Commission") adopted decision No. SP-259/2011/4402-27 whereby it initiated an investigation with a view to the application of the safeguard measures on imports of certain passenger cars to Ukraine regardless of their country of origin or their country of export. The Commission decision was taken further to a complaint lodged by the Association of Ukrainian Vehicle Manufacturers "UkrAvtoprom" on behalf of three Ukrainian automobile manufacturers. A Notice of the Commission decision of initiation was published in the "Uryadoviy Kuryer" No. 118 of 2 July 2011.

2. Investigation and Final Determination

In the course of the investigation, the Commission adopted on 6 March 2012 decision No. SP-272/2012/4423-08 whereby it extended the duration of the investigation by 60 days. A Notice concerning this decision was published in the "Uryadoviy Kuryer" No. 44 on 7 March 2012.

On 11 April 2012, the Ministry of Economic Development and Trade of Ukraine sent to the Embassy of Japan a document called "Main Conclusions of Report and Materials prepared by the Ministry".

On 28 April 2012, the Commission approved decision No. SP-275/2012/4423-08 (hereinafter referred to as the "Decision") according to which the safeguard measures shall be imposed on imports of the product concerned to Ukraine, in the form of the following two additional duties:

¹ WT/DS468/1, G/L/1055, G/SG/D46/1.

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- for cars of a cylinder capacity exceeding 1000 cm³ but not exceeding 1500 cm³: 6.46%
 - for cars of a cylinder capacity exceeding 1500 cm³ but not exceeding 2200 cm³: 12.95%

The product concerned involved motor cars and other motor vehicles principally designed for the transport of persons (category M1 – vehicles with no less than 4 wheels and no more than 8 sitting places except the driver's sitting place), with spark-ignition internal combustion engine and crank gear of a cylinder capacity exceeding 1000 cm³ but not exceeding 2200 cm³, new, classified under UKTZED codes 8703 22 10 00 and 8703 23 19 10.

The Notice concerning the Decision was published in the "Uryadoviy Kuryer" No. 48 on 14 March 2013. The Decision itself has not been published.

The safeguard measures entered into force 30 days after the publication of the Notice. It provides that the measures will have a duration of three years.

The measures at issue in this dispute cover all decisions and notices of the authorities mentioned above as well as any related measures and amendments or replacement measures taken by the authorities in relation to this investigation and/or the imposition of the safeguard measures.

II. LEGAL BASIS FOR THE CLAIMS

Japan is deeply concerned by the safeguard measures imposed by Ukraine and the underlying investigation that led to the imposition of those measures. Specifically, Japan considers that:

- (1) Ukraine failed to comply with Article 12.1 of the Agreement on Safeguards since it failed to notify immediately the Committee on Safeguards upon (a) initiating an investigation relating to serious injury or threat thereof and the reasons for it; (b) making a finding of serious injury or threat thereof caused by increased imports; and (c) taking a decision to apply or extent a safeguard measure.
- (2) Ukraine failed to comply with Article 12.2 of the Agreement on Safeguards as it failed in making the notifications referred to in paragraphs 1(b) and 1(c) of Article 12 of the Agreement on Safeguards to the Committee on Safeguards to provide all pertinent information including, but not limited to, evidence of serious injury or threat thereof caused by increased imports and timetable for progressive liberalization.
- (3) Ukraine failed to comply with Article 12.3 of the Agreement on Safeguards since it failed to provide adequate opportunities for prior consultations on the proposed measure, with a view to reviewing the information provided under Article 12.2 with WTO Members having a substantial interest as exporters of the product concerned. Ukraine also failed to comply with Article 12.5 of the Agreement on Safeguards since it did not notify immediately to the Council for Trade in Goods the results of any consultations referred to in Article 12 of the Agreement on Safeguards.
- (4) Ukraine failed to comply with Article 8.1 of the Agreement on Safeguards since it did not endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing between Ukraine and Japan under the GATT 1994 in accordance with Article 12.3 of the Agreement on Safeguards.
- (5) Ukraine failed to publish a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law and a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined, thereby acting inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.
- (6) Ukraine applied the safeguard measures more than two years after the end of the investigation period, and therefore failed to have determined the increased import on the basis of the increase in imports that must have been sudden and recent, thereby acting inconsistently with Articles 2.1 and 11.1(a) of the Agreement on Safeguards.

and Articles X:3(a) and XIX(a) of the GATT 1994. When applying the safeguard measures, Ukraine also failed to properly conduct, on the basis of such data, the investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views, and failed to publish a report and a detailed analysis of the case as well as a demonstration of the relevance of the factors examined, thereby acting inconsistently with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

- (7) Ukraine imposes the safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Ukraine did not provide for a timetable for progressive liberalization to facilitate adjustment, *inter alia*, in its determination and its WTO notification, at regular intervals during the period of application. Therefore, Ukraine acts inconsistently with Articles 3.1, 4.2(c), 5.1, 7.1, 7.4, 11.1(a) and 12.2 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (8) Ukraine failed to make reasoned and adequate findings and conclusions in its determination with respect to the alleged unforeseen developments and explanation of how those alleged unforeseen developments resulted in increased imports of the specific products covered by the safeguard measures, causing serious injury. Therefore, Ukraine acts inconsistently with Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (9) Ukraine failed to make reasoned and adequate findings and conclusions in its determination as to the alleged effect of obligations incurred under the GATT 1994 and as to how that effect has resulted in increased imports of the specific products covered by the safeguard measures, causing serious injury. Therefore, Ukraine acts inconsistently with Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (10) Ukraine failed to make reasoned and adequate findings and conclusions in its determination with respect to the alleged increase in imports of the specific products under investigation, in absolute terms or relative to domestic production. Therefore, Ukraine acts inconsistently with Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (11) Ukraine failed to make reasoned and adequate findings and conclusions in its determination as to the existence of an alleged serious injury and/or threat of serious injury. Therefore, Ukraine acts inconsistently with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (12) Ukraine failed to make reasoned and adequate findings and conclusions in its determination as to the causal link between the alleged increase in imports and the alleged serious injury and/or threat of injury of the domestic industry. In particular, there are no reasoned and adequate findings and conclusions substantiating the causal relationship between the alleged increased imports and the alleged serious injury and/or threat of injury to the domestic industry nor explanations as to how the alleged injury and/or threat of injury to the domestic industry caused by factors other than imports was not attributed to the increased imports. Therefore, Ukraine acts inconsistently with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c) and 11.1(a) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.
- (13) Through the safeguard measures, Ukraine imposes duties which are in excess of those set forth in its schedule, thereby violating Article II:1(b) of the GATT 1994.

Ukraine's measures therefore nullify and impair benefits accruing to Japan under the Agreement on Safeguards and the GATT 1994.

Accordingly, Japan respectfully requests that, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994 and Article 14 of the Agreement on Safeguards, the Dispute Settlement Body establish

a Panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

In view of the 3-year validity of the safeguard measures at issue and to ensure that the dispute settlement system provides an effective solution to this dispute, Japan hopes that the panel will issue the final report to the parties as soon as possible, and in any case not later than the period of six months from the date that the composition and terms of reference of the panel were agreed upon, as stipulated in Article 12.8 of the DSU.

Japan asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 26 February 2014.
