

Report of the Panel

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## 1. INTRODUCTION

### 1.1 *Complaint by Japan*

1.1 On 30 October 2013, Japan requested consultations with Ukraine pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("the GATT 1994") and Article 14 of the Agreement on Safeguards regarding the definitive safeguard measure<sup>1</sup> imposed by Ukraine on imports of certain passenger cars and the investigation that led to the imposition of this measure.<sup>2</sup> The European Union and the Russian Federation requested on 13 and 14 November 2013, respectively, to join the consultations pursuant to Article 4.11 of the DSU.<sup>3</sup> On 29 November 2013, Ukraine informed the DSB that it had accepted the requests of the European Union and the Russian Federation to join the consultations.<sup>4</sup>

1.2 Consultations were held on 29 November 2013 and 21 January 2014, but failed to resolve the dispute.

### 1.2 *Panel Establishment and Composition*

1.3 At its meeting on 26 March 2014, the DSB established a panel pursuant to the request of Japan in document WT/DS468/5, in accordance with Article 6 of the DSU.<sup>5</sup>

1.4 The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Japan in document WT/DS468/5 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>6</sup>

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<sup>1</sup> Japan submits that we should refer to "safeguard measures" in the plural. In Japan's view, there are two measures at issue since Ukraine has imposed two different duty rates for passenger cars with different engine volumes. We agree that Ukraine has imposed different rates for different categories of passenger cars, and also note that the documents containing the relevant decisions refer to "safeguard measures" in the plural. However, the different rates of duty were imposed on the same date through a single decision with otherwise identical parameters, including the duration, the date of implementation, etc. and are also based on the same finding of injury or threat thereof caused by increased imports and the same decision regarding the national interest to impose additional duties. We also note that our findings in this dispute are the same for all categories of passenger cars covered by the measure at issue. For simplicity, we therefore prefer to refer to the "safeguard measure" at issue throughout this Report, mindful of the fact that it sets different duty rates for different categories of passenger cars.

<sup>2</sup> See WT/DS468/1.

<sup>3</sup> See WT/DS468/2 and WT/DS468/3.

<sup>4</sup> See WT/DS468/4.

<sup>5</sup> See WT/DSB/M/343.

<sup>6</sup> See WT/DS468/6.

1.5 On 10 June 2014, Japan requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. This paragraph provides:

If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6 On 20 June 2014, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr William Davey

Members: Mr Felipe Hees

Mr Chang-fa Lo

1.7 Australia, the European Union, India, Korea, the Russian Federation, Turkey and the United States have reserved their rights to participate in the Panel proceedings as third parties.

### *1.3 Panel Proceedings*

#### *1.3.1 General*

1.8 After consultations with the parties, the Panel adopted its Working Procedures<sup>7</sup> and timetable on 29 July 2014.

1.9 The Panel held a first substantive meeting with the parties on 29 and 30 September 2014. A session with the third parties took place on 30 September 2014. The Panel held a second substantive meeting with the parties on 17 and 18 November 2014. On 5 December 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 12 February 2015. The Panel issued its Final Report to the parties on 18 March 2015.

#### *1.3.2 Working procedures on BCI*

1.10 At Ukraine's request and after consultations with both parties, the Panel adopted, on 8 August 2014, additional procedures for the protection of BCI.<sup>8</sup>

<sup>7</sup> See the Panel's Working Procedures in Annex A-1.

Report of the Panel

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## 2. FACTUAL ASPECTS

### 2.1 *The Measure at Issue*

2.1 This dispute concerns the definitive safeguard measure imposed by Ukraine on imports of certain passenger cars to Ukraine and the investigation that led to the imposition of this measure.

### 2.2 *Other Factual Aspects*

2.2 Further to a complaint lodged by the Association of Ukrainian Vehicle Manufacturers "Ukravtoprom" on behalf of three Ukrainian automobile manufacturers (VO KrASZ LLC, ZAZ CJSC, Eurocar CJSC), Ukraine's Interdepartmental Commission on Foreign Trade adopted, on 30 June 2011, Decision No. SP-259/2011/4402-27 on the initiation and conduct of the safeguard investigation on imports of motor cars to Ukraine, regardless of country of origin and export.

2.3 The period of investigation covered three years, namely 2008-2010, with an additional assessment of certain factors during the first half of 2011.

2.4 On 2 July 2011, the safeguard investigation was formally initiated following publication of the Commission's decision of 30 June in the *Uryadovyi Kuryer* No. 118 of 2 July 2011. The investigation was carried out by the Ministry pursuant to Ukraine's Safeguards Law.

2.5 On 13 July 2011, the initiation of the safeguard investigation was notified<sup>9</sup> to the WTO pursuant to Article 12.1(a) of the Agreement on Safeguards.

2.6 On 6 March 2012, the Commission approved Decision No. SP-272/2012/4423-08 to extend the safeguard investigation for an additional 60 days in accordance with Article 8 of the Safeguards Law. The notice concerning this decision was published in the official gazette of Ukraine, the *Uryadovyi Kuryer*, on 7 March 2012.

2.7 On 11 April 2012, the Ministry circulated to Japan and several other exporting countries its Key Findings based on the results of the safeguard investigation. The Ministry proposed to impose safeguard measure in the form of a safeguard duty at a level of 6.46% for passenger cars with an engine volume of 1000cm<sup>3</sup> - 1500cm<sup>3</sup> and 15.1% for passenger cars with an engine volume of 1500cm<sup>3</sup> - 2200cm<sup>3</sup>.

2.8 On 28 April 2012, the Commission took Decision No. SP-275/2012/4423-08 on Imposition of Safeguard Measures on Imports of Motor Cars into Ukraine Regardless of the Country of Origin or Export of 28 April 2012 (hereafter referred to as the "Decision"). A Notice of Imposition of

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<sup>8</sup> See Additional Working Procedures on BCI in Annex A-2.

<sup>9</sup> WTO document G/SG/N/6/UKR/9.

Safeguard Measures on Imports of Motor Cars into Ukraine Regardless of the Country of Origin was published in the *Uryadovyi Kuryer* No. 48 on 14 March 2013. The safeguard measure in the form of a safeguard duty was imposed with the following rates: 6.46% for passenger cars with an engine volume of 1000cm<sup>3</sup> – 1500cm<sup>3</sup> and 12.95% for passenger cars with an engine volume of 1500cm<sup>3</sup> – 2200 cm<sup>3</sup>. The measure entered into force 30 days after its official publication for a duration of three years.

2.9 According to Article 21 of the Safeguards Law, the above-mentioned safeguard measure was not applied to imports into Ukraine of the product concerned originating from the following countries – Members of the WTO: Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Congo, Djibouti, Gambia, Guinea, Guinea-Bissau, Haiti, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda and Zambia.

2.10 On 21 March 2013, Ukraine submitted to the WTO a notification pursuant to Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, and pursuant to Article 12.1(c) and footnote 2 of Article 9 of the Agreement on Safeguards.<sup>10</sup>

2.11 By Decision No. SP-306/2014/4423-06 of 12 February 2014, the Commission decided to progressively liberalize the safeguard measure in accordance with the following schedule:

- a. For cars with a cylinder capacity exceeding 1000 cm<sup>3</sup> but not exceeding 1500 cm<sup>3</sup>, classified under UKTZED<sup>11</sup> code of 8703 22 10 00:
  - i. In 12 months from the day of applying the measure: 4.31%
  - ii. In 24 months from the day of applying the measure: 2.15%.
- b. For cars with a cylinder capacity exceeding 1500 cm<sup>3</sup> but not exceeding 2200 cm<sup>3</sup>, classified under UKTZED code of 8703 23 19 10:
  - i. In 12 months from the day of applying the measure: 8.63%
  - ii. In 24 months from the day of applying the measure: 4.32%.

2.12 A Notice concerning this decision was published in the *Uryadovyi Kuryer*, No. 57 of 28 March 2014. The decision on liberalization entered into force on the date of its publication.

2.13 This decision was notified to the Committee on Safeguards on 28 March 2014.<sup>12</sup>

<sup>10</sup> WTO document G/SG/N/8/UKR/3-G/SG/N/10/UKR/3-G/SG/N/11/UKR/1.

<sup>11</sup> Ukrainian Foreign Economic Activity Commodity Classification Code ("Customs Code of Ukraine").

Report of the Panel

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### 3. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### 3.1 Japan requests that the Panel:

- a. *find* that the safeguard measure adopted by Ukraine is inconsistent with its obligations under the Agreement on Safeguards and the GATT 1994 and, in particular, with:
  - i. Articles 3.1 and 4.2(c) of the Agreement on Safeguards, because 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;
  - ii. Article 3.1 of the Agreement on Safeguards, because Ukraine failed to conduct a proper investigation that includes reasonable public notice to all interested parties and the opportunities for them to present evidence and their views;
  - iii. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate the existence of any "unforeseen developments"; failed to demonstrate a logical connection between the increase in imports and an "unforeseen development"; and failed to provide reasoned and adequate findings and conclusions with regard to an "unforeseen development";
  - iv. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate and evaluate the effect of the obligations incurred under the GATT 1994 and how that effect has resulted in the increase in imports; and failed to provide reasoned and adequate findings and conclusions with regard to the alleged effect of obligations incurred under the GATT 1994;
  - v. Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), 4.2(c) and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to demonstrate that the increase in imports was the result of unforeseen developments and of the effect of obligations incurred under the GATT 1994; failed to establish an increase in imports in a manner

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<sup>12</sup> WTO document G/SG/N/8/UKR/3/Suppl.1-G/SG/N/10/UKR/3/Suppl.2-G/SG/N/11/UKR/1/Suppl.1.

- consistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards; and failed to provide reasoned and adequate findings and conclusions with regard to the increase in imports;
- vi. Article XIX:1(a) of the GATT 1994 and 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, because Ukraine failed to examine all relevant injury factors; and failed to provide reasoned and adequate findings and conclusions of how the facts support its determination of serious injury or threat of serious injury;
  - vii. Article XIX:1(a) of the GATT 1994 and 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, because Ukraine failed to demonstrate the existence of a causal link between the alleged increased imports and the alleged serious injury or threat thereof; failed to make a proper non-attribution analysis; and failed to provide reasoned and adequate findings and conclusions regarding the existence of a causal link between the increased imports and the alleged serious injury or threat of injury and non-attribution of other factors;
  - viii. Article XIX:1(a) of the GATT 1994 and Articles 3.1, 4.2(c), 5.1, 7.1, 7.4 and 11.1(a) of the Agreement on Safeguards, because Ukraine failed to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment"; failed to progressively liberalize the safeguard measure by submitting a relevant timetable for progressive liberalization; and failed to provide reasoned and adequate findings and conclusions as to why the measure is necessary to prevent or remedy the alleged serious injury;
  - ix. Article II:1(b) of the GATT 1994, because Ukraine imposes duties which are in excess of those set forth in its schedule through the unlawful safeguard measure at issue;
  - x. Articles 12.1 and 12.2 of the Agreement on Safeguards, because Ukraine did not notify immediately the Committee on Safeguards upon initiating the safeguard investigation, making a finding of serious injury and taking a decision to apply safeguard measures and because the initial notification made by Ukraine did not include "all pertinent information" as required by Article 12.2 of the Agreement on Safeguards;

Report of the Panel

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- x. Article 12.3 of the Agreement on Safeguards, because Ukraine did not provide adequate opportunities for prior consultations on the proposed safeguard measure and because the consultations held in April 2012 did not fulfil the requirements laid down in Article 12.3 of the Agreement on Safeguards;
  - xii. Article 12.5 of the Agreement on Safeguards, because Ukraine 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;
  - xiii. Article 8.1 of the Agreement on Safeguards, because Ukraine 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;
- b. *recommend* that the DSB, pursuant to Article 19.1 of the DSU, requests Ukraine to bring its measure into conformity with the relevant provisions of the Agreement on Safeguards and the GATT 1994; and
  - c. *suggest*, pursuant to the second sentence of Article 19.1 of the DSU, that Ukraine revoke its safeguard measure.

3.2 Ukraine requests that the Panel reject all of Japan's claims in this dispute in their entirety.

#### 4. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

#### 5. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of Korea are reflected in its oral statement, while the arguments of Australia, the European Union, Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, ... ). India and the Russian Federation did not submit written or oral arguments to the Panel.

#### 6. INTERIM REVIEW

6.1 On 12 February 2015, the Panel submitted its Interim Report to the parties. On 24 February 2015, Japan and Ukraine each submitted written requests for the review of precise aspects of the Interim Report and comments.

Neither party requested an interim review meeting. On 3 March 2015, Japan submitted comments on Ukraine's requests for review and comments. Ukraine submitted no comments on Japan's requests for review and comments.

6.2 In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. References in this section to other sections, paragraph numbers and footnotes relate to the Interim Report.

6.3 In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties.

6.4 In order to facilitate understanding of the interim review comments and changes made, the following section is structured to follow the organization of the findings section of this Report (Section 7), with the review requests of the parties, and their comments, addressed sequentially, according to the paragraph numbers that attracted comments.

#### *6.1 Preliminary Matters*

6.5 Regarding paragraph 3.1, Japan notes that the Panel decided to use the term "safeguard measure" in singular form throughout the Interim Report. However, Japan argues that, for the purpose of describing Japan's claim at paragraph 3.1, the term "safeguard measure" should appear in the plural.

6.6 The Panel recalls that its preference to use the term "safeguard measure" in the singular form is discussed and explained in detail at footnote 18. For simplicity and consistency, we also prefer to use one single form throughout our Report. Nevertheless, in response to Japan's comment we moved footnote 18 to paragraph 1.1, where the term "safeguard measure" appears for the first time in the Report.

6.7 Regarding paragraph 7.6, Japan requests the Panel to make one change concerning the date of the publication of Decision No. SP-259/2011/4402-27 and another concerning the use of one word in the description of the product concerned.

6.8 The Panel made appropriate changes to the first sentence and bullet points (a) and (b) of paragraph 7.6.

6.9 Regarding paragraph 7.15, numeral viii, Japan suggests using the same terms that are used in paragraph 3.1, numeral viii, including the phrase "by submitting a relevant timetable for progressive liberalization", which is missing from paragraph 7.15.

6.10 The Panel made the requested changes.

6.11 Regarding Section 7.1.5, and in particular paragraphs 7.29 to 7.37, Ukraine comments that it "maintains" its position regarding whether the Key Findings are a part of the published report of the Ministry. Ukraine submits that



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Report of the Panel

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there is no reason to think that publication in the official newspaper *Uryadovyi Kuryer* is the only legally accepted method of publication provided by Ukraine's Safeguards Law. Ukraine adds that the *Uryadovyi Kuryer* is reserved only for notices about the Commission decisions. Moreover, Ukraine contends that the Key Findings were provided to all interested WTO Members and were therefore a part of the public record of the investigation and could have been made available by the Ministry upon a written request. Ukraine makes no specific request for a change.

6.12 Japan responds that the Panel has already dismissed Ukraine's arguments with regard to the Key Findings at paragraph 7.36. According to Japan, Ukraine's comments do not call for any modification of the Panel's findings in Section 7.1.5.

6.13 The Panel notes that paragraph 7.36 addresses this issue in detail. Even if it were correct, as Ukraine now suggests, that under the domestic law of Ukraine the Key Findings could not be published in the *Uryadovyi Kuryer*, this does not demonstrate that Ukraine met its obligation under the Agreement on Safeguards to publish them. While we therefore do not change our finding in this regard, in view of Ukraine's argument about the *Uryadovyi Kuryer* we deleted the reference to Ukraine's legal requirements in the fourth sentence of paragraph 7.36.

6.2 *Claims Relating to Unforeseen Developments and the Effect of the Obligations Incurred under the GATT 1994*

6.14 Regarding Section 7.2, Ukraine comments that it maintains its position that the unforeseen developments in the present case consisted of the global financial and economic crisis, and not the different multiple factors cited by the Panel in this section. Ukraine makes no specific request for a change.

6.15 Japan responds by stating that Ukraine's comments should be dismissed since they are essentially a repetition of the arguments already presented by Ukraine throughout the panel proceedings and were dismissed by the Panel.

6.16 The Panel made no change, since the "different multiple factors" referred to by Ukraine have been identified by Ukraine itself during the course of the proceedings.

6.3 *Claims Relating to Increased Imports*

6.17 Regarding paragraph 7.194, Japan suggests that the Panel insert in the second sentence of the paragraph one of its arguments so as to fully reflect Japan's position.

6.18 The Panel made the requested change.

6.19 Regarding Section 7.3.1.1, and in particular paragraphs 7.145 and 7.147 concerning the issue of the "significance" of the relative increase in imports, Ukraine comments that fully addressing the requirement to establish the "significance" of the increase in imports could result in a breach of the confidentiality obligations under Article 3.2 of the Agreement on Safeguards

referred to in Ukraine's submissions to the Panel. In particular, Ukraine considers that providing the precise figures of the original ratio between domestic production and imports could make the confidential information concerning domestic production easily accessible. Ukraine makes no specific request for a change.

6.20 Japan submits that Ukraine's comments should be dismissed. According to Japan, Ukraine does not challenge the numbers provided by the Panel in Section 7.3.1.1, but instead repeats its arguments concerning confidentiality of the data on imports and domestic production. Japan argues that the Panel has already taken into account these arguments, as reflected in footnote 142.

6.21 The Panel recalls that at paragraphs 7.147-7.148 it determined that the competent authorities have not demonstrated, through reasoned explanations, that the relative increase was significant enough. Indeed, in the Notice of 14 March 2013, the competent authorities did not even characterize the relative increase at issue as "significant". At paragraph 7.147 we further observed that "[w]ithout additional information *or* relevant explanations" (emphasis added) the reference to the 37.9% increase is not sufficient by itself to demonstrate the required "significance" and we explained our view. Thus, we did not say, and do not wish to imply that Ukraine could only establish the significance of the relative increase by revealing confidential information in the determination. Nevertheless, in view of Ukraine's comment we added some clarification at the end of paragraph 7.147.

#### 6.4 *Claims Relating to Threat of Serious Injury*

6.22 Regarding Section 7.4.1.1, Ukraine raises a concern that "fully adhering to the Panel's recommendations on the analysis of the increased imports may require violating the regulations of Article 3.2 of the Agreement [on Safeguards]". According to Ukraine, publication of information regarding the level of the market share of increased imports or the rate and amount of the increased imports risks revealing information claimed to be confidential by the domestic industry. However, Ukraine makes no specific request for any change to this section.

6.23 Japan notes that Section 7.4.1.1 deals with a different issue. Furthermore, Japan notes that the Panel has already taken Ukraine's arguments concerning confidentiality into consideration, in particular at paragraph 7.251.

6.24 The Panel notes that Ukraine's concern relates to Section 7.4.1.3. In Section 7.4.1.3, we are not suggesting that confidential information must be disclosed in order to make a finding of threat of serious injury consistent with the Agreement on Safeguards. As provided for in Article 3.2 itself, it is usually possible to provide a meaningful summary of confidential information that does not conflict with the confidentiality requirement under Article 3.2. An analysis and determination based on such a non-confidential summary may well be