Before the World Trade Organization

Indonesia – Safeguard on Certain Iron or Steel Products
(DS490 / DS496)

Third Party Oral Statement of Australia

6 October 2016
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I. INTRODUCTION

1. Members of the Panel, thank you for the opportunity to present Australia’s views in this dispute. While not taking a position on the particular facts at issue, Australia considers that significant questions about the proper interpretation of the Safeguards Agreement arise in this dispute.

2. In particular, Australia considers it important to briefly recall the exceptional nature of safeguard measures. Australia will also address the question of whether the doctrine of parallelism should apply to the scope of the product in a safeguard investigation and to which a safeguard measure is applied.

II. THE EXCEPTIONAL NATURE OF SAFEGUARD MEASURES

3. In opening, Australia would like to highlight the extraordinary and exceptional nature of safeguard measures. The Appellate Body has concluded that safeguard measures were intended by the drafters of the General Agreement on Tariffs and Trade (GATT) "to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'." A safeguard measure under GATT Article XIX "is clearly, and in every way, an extraordinary remedy" and "when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."

4. Australia has systemic interests in the way safeguard investigations are initiated and conducted. As emergency measures, safeguard measures can be blunt instruments against imports which are otherwise legal. Unlike anti-dumping duties and countervailing measures, which target trade actions that could be considered "unfair", safeguard measures target "fair" trade actions. For these reasons, the standards to be met under the Safeguards Agreement are more stringent than under the Anti-Dumping Agreement or Agreement on Subsidies and Countervailing Measures, and care must

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1 See Appellate Body Reports, Argentina – Footwear (EC), paras. 93-94; US – Line Pipe, paras. 80-81; Korea – Dairy, para. 86.
2 Appellate Body Reports, Korea – Dairy, para. 86; Argentina – Footwear (EC), para. 93.
3 Appellate Body Report, Argentina – Footwear (EC), para. 93.
4 Appellate Body Report, Argentina – Footwear (EC), para. 94.
5 Appellate Body Report, Argentina – Footwear (EC), para. 94.
be taken to ensure any safeguard measures fully comply with these stringent standards.

III. THE DOCTRINE OF PARALLELISM

5. The complainants have raised the doctrine of parallelism as a challenge to the application of Indonesia's safeguard measure. Indonesia does not dispute that it narrowed the scope of the product when it applied the relevant safeguard measure from the scope of the product that was investigated. The point of contention is whether the doctrine of parallelism applies to the scope of the product at issue.

6. The complainants argue that by narrowing the scope of the product when applying the measure, Indonesia failed to ensure the product examined corresponded to the product for which the measure was applied, and to provide a reasoned and adequate explanation of the matter. Indonesia argues that "political decisions" to change, *inter alia*, the scope of the product do not violate the Agreement on Safeguards provided they do not broaden the scope of the product or discriminate based on origin.

7. Existing WTO case law on the doctrine of parallelism has established that the identical language of a "product… being imported" in the first and second paragraphs of Article 2 means that the "product" referred to in each paragraph is the same, and Members may not exclude imports from certain sources from the application of the measure where such sources were included in the investigation phase. The Appellate Body has also found that the phrase "increased imports" in Articles 4.2(a) and 4.2(b) "must… be read as referring to the same set of imports envisaged in Article 2.1".

8. The relevant jurisprudence to date has thus focused on what might be termed 'geographic parallelism', reflecting the obligation in the second paragraph of Article 2

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6 Taiwan, Penghu, Kinmen and Matsu (TPKM) and Vietnam's First Written Submission, para. 5.115.
7 Indonesia's First Written Submission, para. 185.
9 See, for example, Appellate Body Report, *US – Wheat Gluten*, para. 96.
that safeguard measures "be applied to a product being imported irrespective of its source".

9. In Australia’s view, the key concern of the doctrine of parallelism is to ensure that the imports to which a safeguard measure is applied correspond directly to the findings of the preceding safeguards investigation. Australia considers that this concern arises equally with respect to the scope of the product at issue as with respect to the source of the product. For this reason, Australia submits that the doctrine of parallelism should extend to the scope of the product. As Japan expressed in its Third Party Submission:

   The need for such coherence and consistency which underlies the principle of parallelism should be applicable to all situations in which the scope of a safeguard measure excludes imports which were included in the scope of the investigation.  

10. Similarly, as the Panel recalled in US – Steel Safeguards, in a finding upheld by the Appellate Body, “the requirement of parallelism… is that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application.”

11. The scope of the product has implications for determining: the like or directly competitive products at issue; the relevant domestic industry; whether imports have increased; whether the domestic industry has suffered serious injury or threat thereof; whether the imports at issue have caused the serious injury or threat thereof; and whether the unforeseen developments can be shown to have caused such injury.

12. Given these fundamental legal implications, it is critical that the product scope to which a safeguard measure is applied corresponds to the product scope in respect of which a safeguard measure was determined to be required during the investigation phase. In the absence of this, it would not be possible to establish that the safeguard

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11 Japan’s Third Party Written Submission, para. 52.
measure that was in fact applied satisfied all the stringent conditions for the measure's application.

13. Where there is any discrepancy between the scope of the product as investigated and the scope of the product subject to the safeguard measure, this must be justified by the results of the investigation. The discrepancy should also be adequately explained by the investigating authority in its report, including to demonstrate non-attribution of injury caused by products excluded at the application of measures phase.

14. In Australia's view, this approach is consistent with the Appellate Body's finding in *US – Steel Safeguards* that imports excluded from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b). The Appellate Body further found that even if the volume of imports that would be excluded is small, it still must be adequately explained by the competent authority.

15. To be clear, Australia does not suggest that there can in no case be a narrowing of the product scope from the investigation phase to the application of measures phase – such as through excluding individual product segments from the application of a safeguard measure. Rather, Australia agrees with the submissions of Japan and the European Union that there may be situations in which such narrowing is reasonable or required, and that this must be determined on a case by case basis.

16. As the European Union suggests, such situations could include where the investigation collected and analysed the relevant data in relation to each product segment in a manner that allowed differentiation or disaggregation at the level of the application of the measure.

17. However, any proposed narrowing of the scope of the product between the investigation and the application of a safeguard measure must be based on a proper

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16 Japan's Third Party Written Submission, para. 54; European Union's Third Party Written Submission, para. 48.
17 European Union's Third Party Written Submission, para. 48.
assessment and justification that ensures all requirements are met in respect of the relevant product segments to which the measure is applied. As Japan correctly observes, "[w]hat matters is that the product with respect to which the assessment pursuant to Articles 2.1 and 4.2(a) of the Agreement on Safeguards is made and the product subject to the safeguard measure are the same".\textsuperscript{18}

IV. \textbf{CONCLUSION}

18. For the reasons outlined, Australia submits that the Panel find that the doctrine of parallelism applies to the scope of the product, such that the product scope to which the safeguard measure is applied corresponds to the findings in the investigation phase.

19. Thank you for the opportunity to present Australia's views in this dispute.

\textsuperscript{18} Japan’s Third Party Written Submission, para. 54.