Before the World Trade Organization

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

Executive Summary of Australia's Third Party Oral Statement and Responses to Questions from the Panel to Third Parties

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I. THE EXCEPTIONAL NATURE OF SAFEGUARD MEASURES

1. Safeguard measures are both extraordinary and exceptional in nature. Care must be taken to ensure any safeguard measure fully complies with the stringent standards of Article XIX of the GATT and the Agreement on Safeguards.

II. THE DOCTRINE OF PARALLELISM

2. Existing WTO case law on the doctrine of parallelism has focused on the source of the product in question. In this case the complainants argue the doctrine should apply to its scope. In Australia's view, the key concern is the same, regardless of whether the doctrine is applied to product scope or source: that is, to ensure any safeguard measures applied are justified by the findings of the preceding investigation.

3. The product scope has fundamental legal implications for the results of an investigation. Any discrepancy in the scope of the product as investigated and the scope of the product subject to the safeguard measure must be adequately explained by the investigating authority, including to demonstrate non-attribution of injury caused by products excluded at the application of measures phase.

4. Australia does not consider Article 5.1 of the Agreement on Safeguards to be a relevant legal basis for a decision not to apply safeguard measures to a sub-set of products, which themselves meet the requirements to apply safeguards. In Australia's view, Article 5.1 does not deal with whether to apply safeguard measures, but rather how Members must calibrate safeguard measures to ensure they are not applied.

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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.
3 Taiwan, Penghu, Kinmen and Matsu (TPKM) and Vietnam's First Written Submission, para. 5.115.
4 Or as the Panel recalled in US – Steel Safeguards at para. 10.595, “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”.
5 For example, 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.
beyond the extent necessary to prevent or remedy the serious injury found and to facilitate adjustment.\(^7\)

5. Nonetheless, Australia considers that it would be possible for an investigating authority to choose not to apply safeguard measures to a subset of products, even where all relevant requirements have been met. There is nothing in the Agreement on Safeguards that requires an investigating authority to impose a safeguard measure. However, this does not nullify the investigating authority's obligation to ensure that any safeguard measures it does apply are justified by the results of the preceding investigation.

III. THREAT OF SERIOUS INJURY

6. While Article 2.1 of the Safeguards Agreement only requires a Member to make a finding of increased imports absolute or relative to domestic production in order to apply a safeguards measure, Article 4.2(a) requires that the Member first evaluate, inter alia, "the rate and amount of the increase in imports of the product concerned in absolute and relative terms".

7. Australia agrees with the complainants that it would render inutile the requirement in Article 4.2(a) to examine the "share of the domestic market taken by increased imports" if the Article 4.2(a) requirement to examine increased imports in "relative terms" could be satisfied by simply examining imports relative to domestic consumption. Article 4.2(a) is "unambiguous that at a minimum each of the factors listed, in addition to all other factors that are 'relevant', must be considered."\(^8\)

8. Article 4.2(a) mandates what an investigating authority must evaluate in its safeguards investigation, while Article 2.1 deals with the necessary threshold to apply safeguard measures once a determination has been made.

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\(^7\) Article 5.1 thus disciplines, for example, the quantum of safeguard duties or the level of quantitative restrictions applied to ensure they do not exceed what is necessary.

IV. NOTIFICATIONS

9. In Australia's view, any deficiencies in the timing of notifications should properly be dealt with under Article 12.1 of the Agreement on Safeguards, not Article 12.2.

10. The Appellate Body in *US – Wheat Gluten* established that, whereas Article 12.1 deals with when notifications must be made, Article 12.2 clarifies what information must be included in notifications under Article 12.1(b) and 12.1(c). While the two articles are explicitly related, a Member may breach one provision and not the other.

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10 Article 12.2 refers to Articles 12.1(b) and 12.1(c).