Indonesia – Safeguard on Certain Iron or Steel Products (DS490/DS496)
AB-2017-6

Third Participant Written Submission of Australia

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I. INTRODUCTION

1. Australia considers that these proceedings raise significant systemic issues and important questions of legal interpretation regarding the scope and application of provisions in the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards.

2. In this submission, Australia will address the proper interpretation of Article XIX of the GATT 1994. In particular, Australia will focus on two fundamental and interrelated questions before the Appellate Body in these proceedings: (i) what makes a measure a safeguard measure; and (ii) which obligations under the GATT 1994 can relevantly be suspended for the purpose of Article XIX:1(a).

3. Australia reserves the right to raise other issues at the oral hearings before the Appellate Body.

II. INTERPRETATION OF ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

4. The principal claim made by all three participants in these proceedings is that the Panel erred in determining that the measure at issue – Indonesia's specific duty on imports of galvalume – did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, as provided for in Article XIX:1(a) of the GATT 1994.\(^1\)

5. Since the Panel's determination was based on (i) its interpretation of what constitutes a safeguard measure under Article XIX:1(a);\(^2\) and (ii) its (consequential) finding that Indonesia's specific duty did not suspend any obligation under the GATT 1994 for the purpose of Article XIX:1(a),\(^3\) Australia will consider each of these aspects in turn.

A. WHAT MAKES A MEASURE A SAFEGUARD MEASURE?

1. The proper interpretation of Article XIX:1(a) of the GATT 1994 with respect to the constituent elements of a safeguard measure

6. Before turning to the Panel's analysis and the participants' appellate arguments, Australia first outlines its views on the proper interpretation of Article XIX:1(a) and the elements of a safeguard measure that the provision lays down.

7. Article XIX:1(a) provides:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall

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\(^1\) Indonesia's appellant submission, Parts II and IV; Vietnam's other appellant submission, Part 3.1; Chinese Taipei's other appellant submission, Part II.

\(^2\) Panel Report, Indonesia – Iron or Steel Products, paras. 7.15 and 7.40-7.41.

\(^3\) Panel Report, Indonesia – Iron or Steel Products, paras. 7.20, 7.26, 7.32, and 7.40-7.41.
be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (emphasis added)

8. The text of the provision makes clear, through the use of the word "including", that the "tariff concessions" referred to are those that form part of "the obligations incurred by a contracting party under this Agreement". The Appellate Body has confirmed this in previous disputes, finding that Article XIX:1(a) covers specific tariff concessions set out in a Member's Schedule of Concessions, which are subject to a Member's obligations under Article II of the GATT 1994. 4

9. The text of the provision also makes clear that a Member may temporarily suspend an obligation incurred under the GATT 1994 where, as a result of that obligation, a product is imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the Member's like domestic industry. The Appellate Body has confirmed this in previous disputes, finding that Article XIX:1(a) provides that a safeguard measure is to be invoked:

... only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to "suspend the obligation in whole or in part["]... 5 (emphasis added)

10. In Australia's view, Article XIX:1(a) therefore establishes that a "safeguard measure" is a measure that:

(i) suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff concession; and

(ii) suspends that GATT obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue.

11. In Australia's view, element (i) comprises the requisite content of a safeguard measure, and element (ii) comprises the requisite objective of a safeguard measure. Importantly, the content and the objective of a safeguard measure are linked – that is, in order to constitute a safeguard measure, the obligation that is suspended (the content) must be suspended with the aim of addressing the injurious surge of imports caused or threatened by complying with that obligation (the objective).

12. In light of these two constituent elements, it follows that a measure that does not suspend a Member's GATT obligation or withdraw or modify a Member's scheduled tariff concession – i.e., a measure that lacks the requisite content of a safeguard – does not constitute a safeguard measure.

13. Likewise, where a measure suspends a GATT obligation or withdraws or modifies a scheduled tariff concession, but that suspension, withdrawal or modification does not have the aim of addressing the injurious surge of imports caused or

4 Appellate Body Reports, Argentina – Footwear (EC), para. 91; and Korea – Dairy, para. 84.
5 Appellate Body Reports, Argentina – Footwear (EC), para. 93; and Korea – Dairy, para. 86.
threatened by complying with the relevant obligation or concession – i.e., where the measure lacks the requisite objective of a safeguard – the measure does not constitute a safeguard measure.

2. The Panel's findings with respect to the constituent elements of a safeguard measure

14. The Panel interpreted Article XIX:1(a) of the GATT 1994 to provide that a safeguard measure is a measure that: (i) suspends a GATT obligation and/or withdraws or modifies a GATT concession; (ii) for a particular purpose. In this way, the Panel correctly identified the two constituent elements of a safeguard measure.

15. However, the Panel defined the objective of a safeguard measure as being "to operate 'to the extent and for such a time as may be necessary to prevent or remedy ... injury';" or, in similar terms, "to pursue a course of action necessary to prevent or remedy serious injury".

16. In Australia's view, considerations of necessity do not form part of the constituent elements of a safeguard measure. Rather, the objective of a safeguard measure is established where a measure's suspension of an obligation (or withdrawal or modification of a concession) has the aim of addressing the relevant serious injury, or threat thereof, arising from complying with that obligation or concession.

17. Drawing upon the full text of Article XIX:1(a), the Panel concluded that the defining features of a safeguard measure include the:

... suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied. (original emphasis omitted)

18. The Panel's definition of what constitutes a safeguard measure therefore requires that the measure be imposed "to the extent necessary" and "where all of the conditions for ... [its] imposition ... are satisfied".

19. In Australia's view, these considerations are not relevant to determining whether a measure is a safeguard measure. Rather, they address the separate (and subsequent) question of whether a safeguard measure has been validly imposed.

3. The participants' arguments with respect to the constituent elements of a safeguard measure

20. Vietnam's other appellant submission indicates that the complainants consider, and argued during the panel proceedings, that, to qualify as a "safeguard measure" under Article XIX:1(a) of the GATT 1994:

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8 Panel Report, Indonesia – Iron or Steel Products, para. 7.14. (emphasis added)
9 Panel Report, Indonesia – Iron or Steel Products, paras. 7.15 and 7.40-41.
10 Vietnam's other appellant submission, para. 3.8.
... a measure: (i) must "suspend" GATT obligations, or "withdraw" or "modify" GATT concessions; and (ii) must be taken with a view to preventing or remediying serious injury to the domestic industry or threat thereof, and facilitating the adjustment of the domestic industry.\footnote{Vietnam's other appellant submission, para. 3.8, first bullet point; and paras. 3.11 and 3.24.}

21. In Australia's view, this definition of a safeguard measure omits the critical link between the suspension of the GATT obligation and the objective of that suspension. To constitute a safeguard measure, it is not sufficient that a measure suspends a GATT obligation and that the measure – but not the suspension of the obligation itself – is taken with a view to preventing or remediying serious injury to a Member's domestic industry. Rather, it is the suspension of the GATT obligation that must have the aim of addressing the relevant injury.

22. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (Chinese Taipei) argues in its other appellant submission that Article XIX:1(a) does not provide any definition of a safeguard measure,\footnote{Chinese Taipei's other appellant submission, para. 8.} and, accordingly:

... the term "safeguard measure" should be broadly interpreted so as to encompass all measures taken against serious injury arising from increased imports without any limitation [as] to the particular type of measure.\footnote{Chinese Taipei's other appellant submission, para. 9. (emphasis added)}

23. To the extent that Chinese Taipei suggests that the only constituent element of a "safeguard measure" is its objective, Australia does not consider that this argument is supported by a proper interpretation of the text of Article XIX:1(a).\footnote{For the reasons discussed above at paragraphs 9-13.}

24. With respect to the Panel's definition of a safeguard measure, Vietnam and Chinese Taipei both argue that the Panel erred by conflating the distinct analyses of (i) whether a measure is a "safeguard measure"; and (ii) whether a safeguard measure is validly imposed.\footnote{Vietnam's other appellant submission, paras. 3.19-3.20; Chinese Taipei's other appellant submission, paras. 13-19. Indonesia's appellant submission does not address the constituent elements of a safeguard measure, but focuses on the Panel's findings with respect to the obligations that can relevantly be suspended for the purpose of Article XIX:1(a) of the GATT 1994.}

25. In Vietnam's view:

... the question of whether a safeguard measure is actually necessary, appropriate or properly imposed to achieve the protection sought, within the meaning of Articles XIX:1(a) [of the GATT 1994] or 5.1 [of the Agreement on Safeguards], is a question that relates to the application of the measure and not to a "definitional" or threshold question of whether the measure is a safeguard in the first place.\footnote{Vietnam's other appellant submission, para. 3.20. (emphasis original)}

26. Similarly, Chinese Taipei argues that "the question of whether a safeguard measure is necessary should have no effect on whether the measure is a safeguard measure in the first place",\footnote{Vietnam's other appellant submission, para. 3.20. (emphasis original)} and that, by defining a safeguard measure as one that is necessary to remedy or prevent serious injury, the Panel

\footnote{Chinese Taipei's other appellant submission, para. 19. (emphasis original)}
"confuses the issue of the legal characterization of a safeguard measure with the legality of a safeguard measure".\(^\text{18}\)

27. Australia agrees with Vietnam and Chinese Taipei that the Panel's definition improperly conflates the distinct questions of what constitutes a safeguard measure and whether a safeguard measure has been validly imposed.\(^\text{19}\) However, for the reasons discussed below,\(^\text{20}\) Australia does not consider that this erroneous definition tainted the Panel's substantive finding that the measure at issue is not a safeguard measure.

**B. Which obligations under the GATT 1994 can relevantly be suspended for the purpose of Article XIX:1(a)?**

28. As established above,\(^\text{21}\) a measure will only constitute a safeguard measure if it has both the requisite content and requisite objective of such a measure. Furthermore, these elements are linked in the sense that the relevant GATT obligation at issue must be suspended with the aim of addressing an injurious surge of imports caused or threatened by complying with that obligation.

29. In light of these requirements, a question arises as to which GATT obligations can relevantly be suspended in order to constitute a safeguard measure under Article XIX:1(a).

1. **The proper interpretation of Article XIX:1(a) with respect to the obligations that can relevantly be suspended**

30. The text of Article XIX:1(a) of the GATT 1994 does not explicitly limit the GATT obligations that can relevantly be suspended for the purpose of the provision. Ostensibly, this leaves open the possibility that the suspension of any obligation could constitute a safeguard measure.\(^\text{22}\)

31. However, Article XIX:1(a) expressly contemplates that the effect of the obligation at issue is that it results in a product being imported into a Member's territory in such increased quantities and under such conditions as to cause or threaten serious injury to that Member's like domestic producers. An obligation that is suspended under Article XIX:1(a) must therefore be one that is capable of giving rise to this situation.

32. Likewise, the text of Article XIX:1(a) makes clear that the obligation at issue must be one that is capable of being suspended to address an injurious surge of imports that is caused or threatened by complying with that obligation.\(^\text{23}\)

33. Australia considers that these characteristics implicitly limit the GATT obligations that can relevantly be suspended for the purpose of Article XIX:1(a).

34. Consistent with this analysis, the Appellate Body has previously identified Article II and Article XI of the GATT 1994 as obligations that may be suspended by invoking Article XIX:1(a).\(^\text{24}\) In Australia's view, this is because: (i) complying

\(^\text{18}\) Chinese Taipei's other appellant submission, para. 3. See also para. 13.
\(^\text{19}\) See paragraphs 16 and 19 above.
\(^\text{20}\) See paragraphs 52-53 below.
\(^\text{21}\) See paragraphs 9-13 above.
\(^\text{22}\) See, e.g., Panel Report, Dominican Republic – Safeguard Measures, para. 7.64.
\(^\text{23}\) See paragraphs 7 and 9-13 above.
\(^\text{24}\) Appellate Body Report, Argentina – Footwear (EC), para. 95.
with these obligations (by not imposing tariffs above a Member's bound level and not imposing quantitative restrictions) is capable of resulting in the serious injury, or threat thereof, contemplated by Article XIX:1(a);25 and (ii) suspending these obligations, in whole or in part, (by imposing higher tariffs and/or quantitative restrictions on imports) is capable of providing the "remedy"26 or relief that Article XIX:1(a) is intended to provide.

2. The Panel's findings with respect to the obligations that can relevantly be suspended for the purpose of Article XIX:1(a)

35. The Panel did not define which obligations could relevantly be suspended for the purpose of Article XIX:1(a). However, the Panel rejected Indonesia's argument that the specific duty on imports of galvalume suspended Indonesia's obligations under Article XXIV of the GATT 1994 (by imposing the duty on partners to whom it owed lower preferential tariffs under its regional trade agreements) on the basis that this Article "is a permissive provision"27 and "does not impose any positive obligation on Indonesia".28

36. As such, the basis of this aspect of the Panel's finding was that Article XXIV did not amount to an obligation at all, let alone an obligation that Indonesia had "suspended" for the purpose of Article XIX:1(a).

37. The Panel also rejected the parties' argument that the specific duty suspended the most-favoured-nation (MFN) obligation under Article I:1 of the GATT 1994 by excluding galvalume imports from 120 countries (excluding Indonesia considered necessary to comply with Article 9.1 of the Agreement on Safeguards).29 (In so doing, the Panel made certain findings regarding the relationship between Article 9.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 which this submission will not address.)

38. Of relevance to the question considered here, in rejecting the parties' argument, the Panel explicitly noted that Indonesia did not exclude these imports from the application of the specific duty in order to "remedy or prevent serious injury".30 The Panel failed to see:

... how a course of action that dilutes the protective impact of a safeguard measure ... could result in the suspension of a Member's MFN obligations under Article I:1 for the purpose of Article XIX:1(a), given that the fundamental objective of Article XIX:1(a) is to allow Members to "escape" their GATT obligations to the extent necessary to prevent or remedy serious injury to a domestic industry.31 (original emphasis modified)

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25 See Panel Report, Dominican Republic – Safeguard Measures, paras. 7.64-7.65.
26 Appellate Body Report, Argentina – Footwear (EC), para. 93.
27 Panel Report, Indonesia – Iron or Steel Products, para. 7.19. (emphasis original)
29 Panel Report, Indonesia – Iron or Steel Products, paras. 7.22-7.23.
30 Panel Report, Indonesia – Iron or Steel Products, para. 7.22. (original emphasis)
31 Panel Report, Indonesia – Iron or Steel Products, para. 7.28.
39. Part of the basis for this aspect of the Panel's findings was, therefore, that any purported suspension of Article I:1 of the GATT 1994, even if established, lacked the requisite objective of a safeguard measure under Article XIX:1(a).

40. The Panel had already determined that, in the absence of a binding tariff obligation with respect to galvalume, Indonesia's measure did not suspend its obligations under Article II of the GATT 1994. The Panel therefore concluded that Indonesia's specific duty did not suspend any relevant GATT obligation for the purpose of Article XIX:1(a).

3. The participants' arguments with respect to the obligations that can relevantly be suspended for the purpose of Article XIX:1(a)

41. Indonesia and Vietnam argue that the obligations that can relevantly be suspended in Article XIX:1(a) of the GATT 1994 are not limited to Article II or Article XI of the GATT 1994. Rather, Article XIX:1(a) enables a Member to suspend any obligation for the purpose of the provision, including the MFN obligation under Article I:1.

42. Australia agrees that the text of Article XIX:1(a) does not limit the obligations that can relevantly be suspended to only Article II or Article XI of the GATT 1994. However, in order to be suspended for the purpose of Article XIX:1(a), the relevant obligation must be capable of being suspended to address an injurious surge of imports caused or threatened by compliance with that obligation.

43. Indonesia and Vietnam contend that the Panel erred in determining that Indonesia's specific duty did not suspend Indonesia's MFN obligation for the purpose of Article XIX:1(a), given that the duty was applied on a discriminatory basis by excluding imports from 120 countries. However, neither participant demonstrates that Indonesia's purported "suspension" of Article I:1 had the requisite objective of a safeguard measure. That is, Indonesia and Vietnam fail to demonstrate that complying with Article I:1 gave rise to a surge of imports; and that Article I:1 was "suspended" (thereby enabling the discriminatory application of the specific duty) to address this surge of imports causing or threatening serious injury to Indonesia's domestic industry.

44. While Indonesia claims that the specific duty was not imposed on countries other than "major exporting countries" because the latter "contributed the most to the threat of serious injury," neither Indonesia nor Vietnam explains how excluding countries from the specific duty aims to address the threat of serious injury.

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33 See, e.g., Panel Report, Indonesia – Iron or Steel Products, para. 7.32.

34 Panel Report, Indonesia – Iron or Steel Products, para. 7.18.

35 See, e.g., Panel Report, Indonesia – Iron or Steel Products, section 7.3.2.2 and para. 7.40.

36 Indonesia's appellant submission, para. 30. See also Vietnam's other appellant submission, para. 3.8, third bullet point and para. 3.27.

37 Vietnam's other appellant submission, para. 3.8, third bullet point and para. 3.27. See also Indonesia's appellant submission, para. 30.

38 See paragraphs 9-13 and 31-33 above.

39 Indonesia's appellant submission, paras. 32-37; Vietnam's other appellant submission, paras. 3.27-3.59.

40 Indonesia's appellant submission, para. 33.
Rather, the selective application of the specific duty in fact undermines – or, to adopt the Panel's term, "dilutes"\textsuperscript{41} – its ability to address this threat.

45. Moreover, Indonesia and Vietnam fail to explain how a safeguard measure that did in fact suspend Article I:1 for the purpose of Article XIX:1(a) could nevertheless constitute a legally valid safeguard under Article 2.2 of the Agreement on Safeguards, which requires that a safeguard measure be applied to an imported product irrespective of its source.

46. Vietnam further argues that the Panel arrived at its erroneous conclusion by improperly bifurcating the specific duty into its component parts (the imposition of the specific duty and the exclusion of certain imports from that duty) and failing to "address whether the measure as a whole was aimed to prevent or remedy serious injury to the extent necessary".\textsuperscript{42}

47. However, in Australia's view, this argument asks the Appellate Body to ignore the requisite link between the content and the objective of a safeguard measure. Vietnam appears to suggest (erroneously) that as long as a measure suspends a GATT obligation, and as long as an aspect of the measure – but not the suspension of the GATT obligation itself – is taken to prevent serious injury, the measure constitutes a safeguard measure.

48. With respect to the measure at issue, Australia accepts that Indonesia's specific duty was imposed to prevent serious injury to Indonesia's domestic galvalume producers. However, its imposition did not suspend any of Indonesia's obligations under the GATT 1994. Rather, as Indonesia acknowledged during the panel proceedings, in the absence of a binding tariff obligation with respect to galvalume, Indonesia was "free to impose ... any tariff towards the product concerned at any time for any period of time".\textsuperscript{43} Indonesia's specific duty on imports of galvalume thus lacked the requisite content of a safeguard measure.

III. CONCLUSION

49. For the reasons discussed above, Australia considers that the Panel did not err in finding that the specific duty applied by Indonesia to imports of galvalume did not constitute a safeguard measure for the purpose of Article XIX:1(a) of the GATT 1994.\textsuperscript{44}

50. Article XIX:1(a) establishes that a "safeguard measure" is a measure that:

(i) suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff concession; and

(ii) suspends that GATT obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue.

\textsuperscript{41} Panel Report, \textit{Indonesia – Iron or Steel Products}, para. 7.28.
\textsuperscript{42} Vietnam's other appellant submission, para. 3.34. (emphasis original)
\textsuperscript{43} Panel Report, \textit{Indonesia – Iron or Steel Products}, para. 7.18.
\textsuperscript{44} Panel Report, \textit{Indonesia – Iron or Steel Products}, para. 7.40.
51. While Australia agrees with Vietnam and Chinese Taipei that the Panel's *definition* of what constitutes a safeguard measure improperly imported conditions related to the valid imposition of a safeguard measure, in Australia's view, this erroneous definition did not taint the Panel's substantive *finding* that Indonesia's specific duty did not constitute a safeguard measure.

52. This is because the Panel did not determine that Indonesia's specific duty was not a safeguard measure *on the basis* of these improperly imported conditions – i.e., on the basis that the measure went beyond the extent necessary to prevent or remedy serious injury; or did not satisfy all of the conditions for the imposition of a safeguard.

53. Rather, the basis for the Panel's finding that Indonesia's specific duty did not constitute a safeguard measure was that the measure did not suspend the operation of *any* obligation under the GATT 1994 *for the purpose* of Article XIX:1(a) – i.e., in order to address the injurious surge of imports caused or threatened by compliance with that obligation.45

54. In Australia's view, the Panel's finding that Indonesia's specific duty does not constitute a safeguard measure is supported by a proper interpretation of Article XIX:1(a) of the GATT 1994. The participants' claims with respect to this finding should therefore be rejected.