Ukraine – Definitive Safeguard Measures on Certain Passenger Cars
(WT/DS468)

Third Party Oral Statement of Australia

30 September 2014
I. INTRODUCTION

1. Members of the Panel, thank you for the opportunity to present Australia’s views in this dispute in respect of the Ukraine’s definitive safeguard measures on certain passenger cars.

2. This dispute raises systemic issues concerning the rights and obligations of WTO Members under the Agreement on Safeguards and the General Agreement on Tariffs and Trade 1994 (GATT).

3. In its third party oral statement, Australia will confine its remarks to two issues: (i) the relevance of delay in applying a safeguard measure, and (ii) WTO Members’ notification obligations.

II. DELAY IN APPLYING A SAFEGUARD MEASURE AS EVIDENCE THAT AN INCREASE IN IMPORTS IS NOT RECENT ENOUGH

4. The Agreement on Safeguards and Article XIX of GATT together establish that safeguard measures are temporary emergency actions that can only be used where necessary to prevent or remedy serious injury caused by a surge in imports. By temporarily restricting import competition, safeguard measures allow domestic industry to adapt to changed economic conditions.

5. Australia considers that a delay in applying safeguard measures after finding that safeguard measures are necessary may raise doubt as to whether the safeguard measure is justified. A delay may mean that the increase in imports that originally supported the imposition of the measure is no longer recent enough to warrant an emergency measure to remedy "increased imports".

6. We note the Appellate Body’s findings in Argentina – Footwear (EC) that the phrase "such increased quantities" in Article 2.1 of the Agreement on Safeguards requires that the increase in exports "must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'."1

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1 Appellate Body Report, Argentina – Footwear (EC), para. 131.
7. A lengthy delay between making a positive finding that increased imports have caused serious injury to domestic industry and actually imposing a safeguard measure raises questions about whether the "serious injury" is recent enough to justify the present application of an "emergency" safeguard measure under Article 2.1. In such circumstances, it is unclear there would be recent serious injury that justifies imposing a safeguard measure.

8. Furthermore, Australia notes that Article 5.1 of the Agreement on Safeguards requires WTO Members to apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. A lengthy delay between finding that increased imports have caused serious injury to domestic industry and the actual application of a safeguard measure may affect whether a safeguard measure is still "necessary" to prevent or remedy that serious injury under Article 5.1.

9. In particular, noting that safeguard measures are intended to be emergency actions, a delay before the safeguard measure is applied suggests that there may no longer be an emergency that must be prevented or remedied through a safeguard measure.

III. NOTIFICATION OF SAFEGUARD MEASURES

10. Australia recalls that under Article 12.1 of the Agreement on Safeguards, WTO Members are subject to three discrete obligations to immediately notify certain aspects of safeguard investigations and measures. Specifically, WTO Members must immediately notify the Committee on Safeguards if they initiate a safeguard investigation; make a finding of serious injury or the threat of serious injury caused by increased imports; or decide to apply or extend a safeguard measure.

11. The Appellate Body in United States – Wheat Gluten has specifically clarified that the notification obligations set out in Articles 12.1(b), 12.1(c) and 12.2, although related, are discrete.²

12. In Australia’s view, immediate notification is important to preserving the transparency of emergency safeguard measures and to ensure that WTO Members can monitor the progress of safeguard investigations and measures.

IV. CONCLUSION

13. In this statement, Australia has commented on the legal interpretation of a number of matters relating to the Agreement on Safeguards and Article XIX of GATT.

14. In particular, Australia has argued that a delay between the conclusion of a safeguard investigation and the application of a safeguard measure may raise doubt as to whether the safeguard measure is justified. Australia has also commented on Members’ notification obligations under the Agreement on Safeguards.