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

Third Party Written Submission of Australia

22 September 2014
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I. INTRODUCTION

1. This complaint brought by Japan in respect of the Ukraine’s definitive safeguard measures on certain passenger cars 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).

2. Australia’s third party submission focuses on the issues of delay in applying a safeguard measure; WTO Members’ notification obligations in relation to findings in safeguard investigations and decisions to apply a measure; and the application of a safeguard measure to a narrower range of products than that considered in the safeguard investigation.

3. Australia reserves the right to raise other issues in the third party oral hearing before the Panel.

II. REQUIREMENTS FOR THE IMPOSITION OF A SAFE GUARD MEASURE UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND CONTEXT OF THESE RULES

4. The Agreement on Safeguards and Article XIX of GATT set out specific obligations and parameters for the application of a safeguard measure.

5. Article XIX:1 of the GATT sets out rules for "Emergency Action on Imports of Particular Products", and states:

   (a) 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 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.

   (b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

6. The Agreement on Safeguards establishes more detailed obligations. Relevantly, Article 2.1 provides:
A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

7. Article XIX of GATT and Article 2.1 of the Agreement on Safeguards together establish that a safeguard measure can only be imposed where a WTO Member has found that, as a result of unforeseen circumstances, imports of a product have increased to such a level, and in such a manner, that serious injury to the domestic industry producing the like or directly competitive product has been caused or is threatened.  

8. In this context, Australia notes that safeguard measures are only intended for use in specific, exceptional circumstances. They are temporary emergency actions that may only be taken when it is necessary to prevent or remedy serious injury which has arisen due to unforeseen developments. Safeguard measures then provide the opportunity for domestic industry to adjust to different economic conditions by temporarily restricting import competition. Indeed, the title to Article XIX of the GATT describes safeguard measures as "Emergency action on imports of particular products" (emphasis added).

9. The Appellate Body in Argentina – Footwear (EC), when commenting on the meaning of Article XIX of GATT and the title of this provision, further noted that safeguard measures were intended to be "out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'." Safeguard measures are therefore clearly intended to serve as urgent remedies against current serious injury or the threat of serious injury.

10. The Agreement on Safeguards seeks to balance this need to urgently protect a domestic industry from existing or impending serious injury with the complementary entitlements of WTO Members to conduct trade on the basis of rules that Members have agreed upon, and to monitor the trade remedy measures of others. A WTO Member may therefore only apply a safeguard measure "to the extent necessary" to prevent or remedy serious injury and would also be subject to due process and transparency obligations of the Agreement on Safeguards.

III. DELAY IN APPLYING A SAFEGUARD MEASURE SUGGESTS THAT “SUCH INCREASED QUANTITIES” OF IMPORTS DO NOT EXIST RECENTLY ENOUGH AS TO CAUSE OR THREATEN TO CAUSE SERIOUS INJURY

11. Australia submits that a delay in the application of safeguard measures following the conclusion of an investigation finding that a safeguard measure is necessary may raise doubt as to whether the imposition of a safeguard measure is justified. Specifically,

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1 Appellate Body Report, United States – Steel Safeguards, para. 331.
2 Appellate Body Report, Argentina – Footwear (EC), paras. 93-94.
3 Article 5.1, Agreement on Safeguards.
putting aside whether the safeguard measure was justified immediately following the completion of the investigation, an unexplained delay may mean that the increase in imports that originally supported the imposition of the measure is no longer recent enough to justify an emergency measure to remedy "increased imports". In these circumstances, the measure may therefore no longer be justified under the Agreement on Safeguards.

12. The Appellate Body in Argentina – Footwear (EC) found that the language "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'."\(^4\) The Appellate Body in this dispute noted that:

> In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years. In our view, the phrase 'is being imported' implies that the increase in imports must have been sudden and recent.\(^5\)

13. We note in this regard the Panel’s comments on the Appellate Body’s views in United States – Line Pipe:

> The word "recent" – which was used by the Appellate Body in interpreting the phrase "is being imported" – is defined as "not long past; that happened, appeared, began to exist, or existed lately".\(^6\)

14. If an investigating authority finds that there are increased imports and that domestic industry has suffered from serious injury as a result of those increased imports, but a lengthy delay occurs before the safeguard measure is imposed, Australia considers that this would raise serious questions about whether the "serious injury" suffered previously is recent enough to justify the present application of an "emergency" safeguard measure under Article 2.1. That is, in such circumstances, it is unclear there would be recent serious injury that justifies imposing a safeguard measure.

15. Furthermore, Australia notes that Article 5.1 of the Agreement on Safeguards states, in relevant part, that:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment…

16. This provision imposes a clear obligation on WTO Members to only apply a safeguard measure in a manner that is commensurate with the need to prevent or remedy serious injury.\(^7\) Where there has been a lengthy delay between the conclusion of an investigation finding that a safeguard measure is necessary to prevent or remedy serious injury and the application of that measure, Australia is of the view that it may be difficult to show that a measure is still "necessary" to prevent or remedy that

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\(^4\) Appellate Body Report, Argentina – Footwear (EC), para. 131.
\(^5\) Appellate Body Report, Argentina – Footwear (EC), para. 130.
\(^6\) Panel Report, United States – Line Pipe, para. 7.204.
\(^7\) Appellate Body Report, Korea – Dairy, para. 96.
serious injury within the meaning of Article 5.1. In particular, noting that safeguard measures are intended to be emergency actions to prevent or remedy injury, a delay before the safeguard measure is applied suggests that there may no longer be the urgency that previously necessitated such a measure.

IV. NOTIFICATION OF SAFEGUARD MEASURES

17. Articles 12.1 and 12.2 of the Agreement on Safeguards impose obligations on WTO Members to notify certain aspects of safeguard investigations and measures. These provisions state:

1. A Member shall immediately notify the Committee on Safeguards upon:
   
   (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
   
   (b) making a finding of serious injury or threat thereof caused by increased imports; and
   
   (c) taking a decision to apply or extend a safeguard measure.

2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.

18. Article 12.1 creates three discrete obligations for Members, namely:

   (a) to immediately notify the initiation of a safeguard investigation and the reasons for initiation;
   
   (b) to immediately notify any findings of serious injury or threat of serious injury caused by increased imports; and
   
   (c) to immediately notify any decision taken to apply or extend a safeguard measure.

19. Article 12.2 sets out further requirements for Members to adhere to in making notifications referred to in Article 12.1. Australia notes that 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.8

20. Australia emphasises the importance of not conflating the requirements of Articles 12.1(a), 12.1(b) and 12.1(c). Specifically, the action of initiating an investigation, the

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action of an investigatory authority coming to a finding that a domestic industry has 
suffered a serious injury or is suffering from the threat of a serious injury caused by 
increased imports, and the decision of a government to apply a safeguard measure 
based on those findings, are two separate matters. Each of these actions must be 
immediately notified to the WTO Committee on Safeguards under Articles 12.1(a), 
(b) and (c).

21. Australia notes that, in relation to the current dispute, Ukraine does not appear to have 
made an immediate notification of the initiation of a safeguard investigation under 
Article 12.1(a). Furthermore, Australia notes that Ukraine notified its safeguard 
investigation findings and measure under Article 12.1(b) at the same time as its 
notification under Article 12.1(c) of the Agreement on Safeguards. Australia further 
notes Ukraine’s suggestion that the obligation for a Member to publish a report of its 
safeguard investigations and findings is only triggered at the application of the 
safeguard measure.9

22. Australia considers that discrete immediate notifications are required of each of the 
events of initiating a safeguard investigation, making findings of serious injury or the 
threat of serious injury caused by increased imports, and separately applying a 
safeguard measure to remedy this serious injury or threat thereof. Immediate 
notification of these events is important to preserving the transparency of emergency 
safeguard measures and to ensure that WTO Members are able to monitor the 
progress of safeguard investigations and measures.

V. ADDITIONAL OBSERVATIONS AS TO THE SCOPE OF THE 
SAFEGUARD MEASURE

23. In addition to Article 2.1, set out above, Australia notes the more detailed 
requirements of Article 4.2 of the Agreement on Safeguards in relation to injury and 
causation. Article 4.2 states, in relevant part, that:

(a) In the investigation to determine whether increased imports have caused or 
are threatening to cause serious injury to a domestic industry under the terms 
of this Agreement, the competent authorities shall evaluate all relevant factors 
of an objective and quantifiable nature having a bearing on the situation of that 
industry, in particular, the rate and amount of the increase in imports of the 
product concerned in absolute and relative terms, the share of the domestic 
market taken by increased imports, changes in the level of sales, production, 
productivity, capacity utilization, profits and losses, and employment.

(b) The determination referred to in subparagraph (a) shall not be made unless 
this investigation demonstrates, on the basis of objective evidence, the 
existence of the causal link between increased imports of the product 
concerned and serious injury or threat thereof. When factors other than 
increased imports are causing injury to the domestic industry at the same time, 
such injury shall not be attributed to increased imports. …

9 Ukraine’s First Written Submission to the Panel, para. 63.
24. Australia draws the Panel’s attention to the fact that Ukraine appears to have removed the safeguard measure from a subset of the products on which its original determination was based.\textsuperscript{10} This raises the question as to whether injury caused by the increase in imports of products remaining subject to the measure would have, by themselves, justified the imposition of the measure.\textsuperscript{11}

VI. CONCLUSION

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

26. In particular, Australia has argued that an unnecessary delay between the conclusion of a safeguard investigation and the application of a safeguard measure may suggest that the increase in imports that initially justified a measure may no longer be recent enough. Australia has also commented on Members’ notification obligations under the Agreement in Safeguards.

\textsuperscript{10} Ukraine’s Notification to the WTO, G/SG/N/10/UKR/3/Supp.1, 22 May 2013.

\textsuperscript{11} While this issue does not appear to be the subject of a direct claim, Australia considers that it is relevant to the Panel’s consideration of the issues in this dispute.