Ukraine – Definitive Safeguard Measures on Certain Passenger Cars

(WT/DS468)

Executive Summary
of the Third Party Written Submission,
Third Party Oral Statement,
and Responses to Questions from the Panel to Third Parties
of Australia

24 October 2014
I. 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

1. The Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT) together establish that safeguard measures are temporary emergency actions that can only be taken where necessary to prevent or remedy serious injury caused by a surge in imports. Safeguard measures give domestic industry the opportunity to adjust to different economic conditions by temporarily restricting import competition.

2. If an investigation finds that a safeguard measure is necessary, a delay in applying the safeguard measure following that investigation may raise doubt as to whether the imposition of the 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 justify an emergency measure to remedy "increased imports".

3. Australia accepts that the Agreement on Safeguards does not establish a specific timeframe for the imposition of a safeguard measure once the requisite determinations have been made. However, the conclusion that a delay may render the safeguard measure inconsistent with the Agreement on Safeguards is implicit in the requirements that the increased imports be recent, that such imports have caused or threatened to cause serious injury and that a safeguard measure is imposed only to the extent necessary to remedy this injury.

4. 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'". The Appellate Body also noted that "the phrase, 'is being imported' implies that the increase in imports must have been sudden and recent." Australia agrees with these findings.

5. In Australia’s view, the language of Article XIX:1(a) of the GATT, Article 4.2(b) of the Agreement on Safeguards and Appellate Body jurisprudence support the view that the injury suffered, or threat thereof, must be recent in order to justify the imposition of safeguard measures. That is, the serious injury must have been caused by a recent increase in imports, and must therefore logically also be recent itself. This is consistent with the Appellate Body’s finding in Argentina – Footwear (EC) that safeguard measures be "emergency actions".

6. Similarly, suspending the application of a safeguard measure following a determination of serious injury would indicate that there was no longer a need to prevent or remedy serious injury or to facilitate adjustment. The subsequent reapplication of the safeguard measure after one year would also raise doubts as to whether the same serious injury (or threat thereof) still existed.

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1 Appellate Body Report, United States – Steel Safeguards, para. 331.
2 Appellate Body Report, Argentina – Footwear (EC), para. 131.
3 Ibid., para. 130.
4 Ibid.
5 Ibid., paras. 93-94.
7. In addition, if the serious injury or the threat thereof is not recent, it may be difficult to show that the measure is still "necessary" to prevent or remedy serious injury or facilitate adjustment within the meaning of Articles 5.1 and 7.1 of the Agreement on Safeguards. 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.

8. If a Member decides to extend a safeguard measure during its four year application period, the authorities must show that it continues to be necessary under Article 7.2 and in conformity with the procedures set out in Articles 2, 3, 4 and 5. That is, the authorities must demonstrate that the emergency measures continue to be justified due to a serious injury or threat thereof caused by increased imports.

9. Finally, Australia notes that the extent to which a delay in application of the safeguard measure renders it inconsistent with the requirements of the Agreement on Safeguards will largely depend on the facts of each case.

II. NOTIFICATION OF SAFEGUARD MEASURES

10. Article 12.1 of the Agreement on Safeguards creates three discrete obligations for Members to immediately notify the initiation of a safeguard investigation and the reasons for initiation; any findings of serious injury or threat of serious injury caused by increased imports; and any decision taken to apply or extend a safeguard measure. Australia understands a "finding" under Article 12.1(b) to mean a determination within the meaning of Article 2 of the Agreement on Safeguards made pursuant to an investigation under Article 3 that a 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.

11. Article 12.2 of the Agreement on Safeguards sets out further requirements for Members when making notifications referred to in Article 12.1, including the provision of a "timetable for progressive liberalization." Australia notes that the Appellate Body in United States – Wheat Gluten specifically clarified that the notification obligations set out in Articles 12.1(b), 12.1(c) and 12.2, although related, are discrete.6

12. Australia emphasises the importance of not conflating the requirements of Articles 12.1(a), 12.1(b) and 12.1(c). The initiation of an investigation, the making of a finding that 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 three discrete matters. Immediate notification of each of these actions to the Committee on Safeguards is important in order to preserve the transparency of emergency safeguard measures and to ensure that WTO Members are able to monitor the progress of safeguard investigations and measures.

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13. In Australia, the Productivity Commission is the competent authority that undertakes safeguard investigations following referral from the Australian Government. The Productivity Commission’s report on its findings and recommendations is submitted to the Australian Government upon completion of its investigation. Under the *Productivity Commission Act 1998* (Cth), the Productivity Commission must table and make public its report within 25 sitting days of Parliament. Australia’s practice has been to publish the report within a timeframe ranging between the same day or up to three days with notification to the WTO on the same day.

14. The Productivity Commission’s findings and recommendations are not legally binding. As such, the Australian Government may choose not to accept the Productivity Commission’s recommendation to impose a measure.

### III. REQUIREMENTS FOR THE PUBLICATION OF A REPORT CONTAINING THE FINDINGS OF THE SAFEGUARD INVESTIGATION

15. Together, Articles 3.1 and 4.2(c) establish that the report of the competent authorities, setting out the findings and reasoned conclusions resulting from the investigation, must be published promptly and should include a detailed analysis of the investigation and the factors examined. Australia emphasises that these two requirements cannot be read in isolation from one another.

16. Given that Article 12 contains discrete obligations to notify both the findings of the competent authority and the government’s decision to apply a safeguard measure, the obligation to publish a report in Article 3.1 is clearly distinct from the timing of any subsequent decision to apply a safeguard measure and related notification requirements. It is important not to conflate the obligations to publish a report of the findings of the safeguard investigation; to notify the Committee on Safeguards; and to notify Members with a substantial interest as exporters of the relevant product if a safeguard measure is actually adopted under Article 12.1 and 12.3. For instance, WTO Members are still required to publish the findings of their investigation where these findings reflect that a safeguard measure is not justified.

### IV. ADDITIONAL OBSERVATIONS AS TO THE SCOPE OF THE SAFEGUARD MEASURE

17. In addition to the conditions of Article 2.1, Australia notes the more detailed requirements of Article 4.2(a) and (b) of the *Agreement on Safeguards* in relation to injury and causation.

18. Following the initial application of the safeguard measure, Ukraine appears to have removed the measure from a subset of the products on which its original determination was based. This raises the question of whether injury caused by the increase in imports of the remaining products would have, by itself, justified the imposition of the measure.

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