INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

(DS490 / DS496)

**RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANELS' QUESTIONS TO THE THIRD PARTIES**

October 20, 2016

QUESTIONS FOR THE THIRD PARTIES:

I. THREAT OF SERIOUS INJURY

1. Article 4.2(a) of the Agreement on Safeguards provides that when determining whether increased imports have caused serious injury, an IA *must* "evaluate" *inter alia* "the rate and amount of the increase in imports of the product concerned in absolute and relative terms." The complainants argue that this evaluation must necessarily include an examination of increased imports *relative to domestic production*. However, Indonesia argues that the absence of any explicit reference to domestic production in the text of Article 4.2(a) means that it is not *required* to examine increased imports relative to domestic production, and that an examination of imports relative to domestic consumption would suffice to comply with its obligations. The parties have both drawn support for their differing interpretations of the language in Article 4.2(a) from Article 2.1 of the Agreement on Safeguards. Please explain your views on the extent to which Article 2.1 may or may not inform the proper interpretation of the relevant language in Article 4.2(a)?

1. Article 2.1 informs the proper interpretation of the relevant language in Article 4.2(a). In particular, Article 2.1's express statement that an authority may apply a safeguard only if a product is being imported in increased quantities in absolute terms or *relative to domestic production* necessarily informs the interpretation of Article 4.2(a)'s reference to increased imports in "relative terms."

2. Article 2.1 sets out the conditions that must be met to apply a safeguard measure. It provides that a Member may impose a safeguard measure *only if* the relevant product is "being imported into its territory in such increased quantities, *absolute* ***or*** *relative to domestic production* . . . as to cause or threaten to cause serious injury to the domestic industry." Thus, Article 2.1 is clear that one of the possible preconditions for the imposition of a safeguard is an increase in imports *relative to domestic production*.

3. Within this framework, Article 4.2(a) discusses the factors to be considered by competent authorities in their investigation when evaluating whether "increased imports have caused or are threatening to cause serious injury to a domestic industry{,}" consistent with Article 2.1.[1] Article 4.2(a) requires competent authorities to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." The Article then goes on

[1] Article 2.1 stresses that a "Member may apply a safeguard measures to a product only if that Member has determined, *pursuant to the provisions set out below*, that such a product is being imported into its territory in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry." The reference to other "provisions" reinforces that the Article 2.1 inquiry will depend on an analysis of the Article 4.2(a) factors that must be considered by the competent authorities during their investigation.

to specify the factors to be considered – those factors include the "rate and amount of the increase in imports of the product concerned in *absolute and relative terms*."[2]

4. Note that Article 4.2 connects "absolute" and "relative terms" with "and," as opposed to the "or" used in Article 2.1. This difference reflects the differing roles of the two articles: Article 2.1 specifies the conditions for imposing a safeguard, while Article 4.2 specifies the factors that must be examined by an authority. Thus, Article 4.2 requires an authority to examine **both** absolute and relative increases; while Article 2.1 provides that either one of these two types of increases will meet this increased quantity condition.

5. The context of Article 2 – with its requirement for increases in absolute terms or relative to domestic production – indicates that Article 4.2(a)'s reference to increases in imports "in absolute and relative terms" is a reference to these same numerical comparisons. That is, when Article 4.2(a) mentions increased imports in "relative terms" as a factor that competent authorities must consider in their investigation, this is a reference to the increase relative to domestic production as specified in Article 2.1.

6. Further, the structure and plain text of Article 4.2(a) indicate that its reference to increased imports in "relative terms" as a factor to be considered by competent authorities concerns *domestic production*, as opposed to domestic consumption or market share. In particular, the very next factor listed in Article 4.2(a), following its reference to increases in imports in relative terms, concerns "the share of the domestic market taken by increased imports." Market share is normally evaluated in terms of domestic consumption. If the "relative terms" in the prior clause were to mean relative to domestic consumption, then there would be no purpose to inclusion of a subsequent clause requiring an examination of domestic market share.

> **2. The complainants in this dispute suggest that the requirement to "evaluate" "the rate and amount of the increase in imports of the product concerned in absolute and relative terms" *cannot* be satisfied by simply examining imports relative to domestic consumption, because this would be the same as examining the "share of the domestic market taken by increased imports," which is itself a relevant factor that is also identified in Article 4.2(a). In other words, the complainants submit that a finding that the requirement to examine increased imports in "relative terms" could be satisfied when increased imports are considered relative to *domestic consumption* would render the requirement to examine the "share of the domestic market taken by increased imports" *inutile*.**
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> **i. Do you agree with this interpretation?**

7. The United States agrees with this interpretation. For the reasons stated in our response to Question 1, the relevant context indicates that the evaluation of increased imports in "relative terms" must be "relative to domestic production." The United States agrees that if Article

[2] Article 4.2(a) states that competent authorities "shall" evaluate all relevant factors, and "in particular" the factors listed in the paragraph.

4.2(a)'s reference to "relative terms" were interpreted to mean "relative to domestic *consumption*," it would render duplicative the requirement in Article 4.2(a) to examine the "share of the domestic market taken by increased imports."

ii. If so, what would be the implication of such an interpretation for understanding whether IAs are under an *obligation* to examine increased imports relative *to domestic production* in their serious injury determinations?

8. The implication is that, for the reasons explained above, competent authorities are under an obligation to examine increases in imports relative to domestic production in their serious injury determinations.

3. Article 4.2(a) stipulates that when making a determination of serious injury, an IA must evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry…." Would you agree with the view that this language suggests that, apart from the specific factors identified in the remainder of Article 4.2(a) (which it is clear must be examined), the *additional* factors that an IA will need to evaluate when making a serious injury determination will depend upon the particular facts and circumstances that it faces in the investigation at issue – and, in particular, the extent to which any additional factors have "a bearing on the situation of the domestic industry"? To what extent does this requirement inform what would be necessary in order to comply with the obligation to examine increased imports in "relative terms"?

9. Yes, the United States agrees that under Article 4.2(a), the factors permissible for competent authorities to consider, beyond those enumerated in the article, will depend on the particular facts and circumstances in the investigation at issue, including the impact on the domestic industry at issue. The Appellate Body has indicated that competent authorities may consider factors not enumerated in Article 4.2(a) to the extent they are relevant, even if they were not raised by the interested parties. The Appellate Body further stressed that competent authorities must, where necessary, "undertake additional investigative steps . . . in order to fulfill their obligation to evaluate all relevant factors."[3]

II. PARALLELISM

1. To what extent do you consider that the first and last sentences of Article 5.1 of the Agreement on Safeguards provide a legal basis for the application of a safeguard measure on a range of models of the investigated product that is *narrower* than the range of models with respect to which findings of serious injury were made? Please explain your answer in the light of the principle of "parallelism."

10. The first and last sentences of Article 5.1 do not preclude the application of a safeguard measure on a range of models of the investigated product that is narrower than the range of

[3] *US – Wheat Gluten (AB)*, para 55.

models for which investigating authorities made a finding of serious injury. The first sentence of Article 5.1 establishes the maximum permissible extent for the application of a safeguard measure. It allows Members to apply safeguards "*only* to the extent necessary to prevent or remedy serious injury" caused by increased imports and to "facilitate adjustment" of the domestic industry. The first sentence of Article 2.1 does not contain any requirement to apply a safeguard to every model included in the investigation of serious injury.

11. The last sentence of Article 5.1 – "Members should choose measures most suitable for the achievement of these objectives" – accords Members discretion on choosing the appropriate safeguard measure. First, it is expressed in terms of "should," not "shall," which means that the sentence does not impose an obligation enforceable in dispute settlement. Second, by using the phrase "suitable" to achievement of objectives, the sentence leaves to a Member's discretion what particular measures may or may not be "suitable" in the particular circumstances.

12. In sum, nowhere does Article 5.1 state that a safeguard measure *must* be applied to all imports causing serious injury, or that a Member cannot apply a safeguard to a narrower subset of imports.

13. Turning to "the principle of 'parallelism,'" the United States cautions that the application and enforcement of abstract principles not set out in the WTO Agreement would be fundamentally at odds with the customary rules of interpretation of public international law.[4] To the extent that "parallelism" has any role in evaluating the consistency of a measure with obligations under the Safeguards Agreement, it is only if that term is used as a shorthand for a specific obligation, or set of obligations, expressly stated in the text of the agreement.

14. Here, the United States understands that "parallelism" is shorthand for the proposition that if imports from all geographic sources are considered in determining that increased imports are causing serious injury, while imports from a specific number of those sources are then excluded from the application of the safeguard measure, that could result in a measure that is inconsistent with the obligations in Article 2 of the Safeguards Agreement. The Appellate Body in *US – Wheat Gluten* found that such a gap between the two could only be justified if the investigating authorities establish that imports from countries covered by the safeguard measure satisfied the conditions for the application of the safeguard under Articles 2.1 and 4.2.[5]

15. The present circumstances, by contrast, do not involve the exclusion of certain geographic sources and, therefore, do not implicate the Article 2.2 issue addressed in *Wheat Gluten*. Rather, the present dispute involves a Member's conclusion that applying the safeguard measure to all of the models of the imported product covered by the competent authorities' finding of serious injury was not necessary. This separate evaluation does not call into question the identity of the product or the conclusion that the product caused serious injury within the

[4] *See* DSU, Art. 3.2.

[5] *US – Wheat Gluten (AB)*, paras. 179-181.

meaning of Article 2.1, and it complies with the Article 2.2 obligation to apply any safeguard measure "to a product being imported irrespective of its source."

> **2. The complainants argue that an IA must ensure that all of the conditions in Article 2.1 are satisfied with respect to the product that is the subject of a safeguard measure, even when that product is narrower in scope than the product actually found to satisfy those conditions in the underlying investigation. Does this argument not effectively imply that any narrowing of the scope of the product covered by a safeguard measure compared to the product examined in the underlying investigation could never be characterized as an action taken to comply with the obligations in the first and last sentences of Article 5.1? In other words, by requiring that the conditions in Article 2.1 must be satisfied in relation to any product subject to a safeguard measure, would it not be precluded to rely upon Article 5.1 to justify the application of a safeguard measure that is less-restrictive because of its reduced product scope of application?**

16. As is the case with Article 5.1, Article 2.1 does not require a Member to apply a safeguard measure to *every* model included in the Member's investigation of serious injury. The plain text of Article 2.1 states that a Member "*may* apply a safeguard measure" based on the conditions listed in the Article; it does not state that the Member must apply the safeguard measure to every model within the scope of products explicitly subject to the Member's injury investigation. In other words, Article 2.1 does not prevent a Member from choosing to narrow the scope of application of a safeguard measure.

17. Turning to the last sentence of this question, yes, the implication of the complainants' argument is that a Member would be "precluded to rely upon Article 5.1 to justify the application of a safeguard measure that is less-restrictive because of its reduced product scope of application." This necessary implication further supports that the proposed interpretation of Article 2.1 is incorrect: as explained in response to the prior question, Article 5.1 explicitly provides that Members may choose "suitable" measures, which may in appropriate circumstances result in a measure that is less trade restrictive than a safeguard applied to the full scope of products examined in the serious injury investigation.

18. As discussed above, Article 5.1 establishes the *ceiling* for the full scope of the products with respect to which competent authorities may apply safeguard measures: namely, "only to the extent necessary to prevent or remedy serious injury" caused by increased imports and to "facilitate adjustment" of the domestic industry. The Appellate Body expressly recognized that Article 5.1 only sets out the "*maximum permissible extent* for the application of a safeguard measure" under the Agreement.[6]

19. Additionally, the Appellate Body has recognized that Article 5.1's obligation to "ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment . . . applies regardless of the particular form that a safeguard measure might take"; and that "{w}hether it takes the form of a quantitative restriction, a tariff,

[6] *United States – Line Pipe (AB)*, para. 245.

or a tariff rate quota {TRQ}, the measure in question must be applied 'only to the extent necessary' to achieve the goals set forth in the first sentence of Article 5.1."[7] The Appellate Body's explicit reference to a TRQ is significant in considering the viability of the complainants' proposal that a safeguard must always apply to the full scope of products subject to the serious injury investigation. In particular, the implication of complainants' proposed requirement would appear to be that a TRQ is not allowed, because a TRQ could be viewed as having a limited scope in that the increased TRQ duties are not applied to the volume of imports below the TRQ level. This underscores that the complainants' interpretation of Article 2.1 is incorrect.

III. NOTIFICATIONS

> **1. The Panel would be interested in hearing from the third parties in relation to the complainants' claims under Article 12.2 of the Agreement on Safeguards. This provision imposes an obligation on a "Member proposing to apply a safeguard measure" to disclose certain kinds of information in its notifications under Article 12.1(b) and 12.1(c). To what extent do you consider that Article 12.2 *requires* that the relevant information must be disclosed in notifications made *prior to the entry into force* of the relevant safeguard measure? Please explain your answer in the light of the paragraphs 117-126 of the Appellate Body Report in *US – Wheat Gluten*.**

20. As explained below, Article 12 does not necessarily require that information be disclosed in notifications prior to entry into force of a safeguard measure. Rather, Article 12 provides that certain notifications must be made "immediately" upon three different events. Depending on the circumstances, this could result in certain notifications being made before or after entry into force.

21. Article 12.1 addresses the timing of notifications: it imposes requirements on Members to "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."

22. Article 12.2 enumerates certain information to be provided in the notices under Article 12.1(b) and (c): "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." It further provides for notice of any information that the Council for Trade in Goods or the Committee on Safeguards may request of Members. The Appellate Body in *US – Wheat Gluten* made clear that Article 12.2 is concerned *exclusively* with whether the notices under Articles 12.1(b) and 12.1(c) "*satisfy the content requirements* of Article 12.2{,}" which requires examining "whether, in its notifications under *either* Article 12.1(b) *or* Article 12.1(c), the Member proposing to apply a safeguard measure has notified 'all pertinent information', including the 'mandatory components'

[7] *Id.* at para. 230 (quoting *Korea – Dairy*, para. 99, footnote 52) (internal quotation marks omitted).

specifically enumerated in Article 12.2."[8] Thus, according to *US – Wheat Gluten*, Article 12.2 is concerned with the *content* of Article 12.1 notices, and not whether those notices are *timely*. By contrast, Article 12.1 concerns the timeliness of notices based on an "immediate" standard – which the Appellate Body in *US – Wheat Gluten* stated is focused on ensuring "the Committee on Safeguards and Members of the WTO have *sufficient* time to review the notification."[9]

23. As to the content requirements of Article 12.2, the kind of information that must be provided in an Article 12.1(b) notice regarding the "making of a finding of serious injury or threat thereof caused by increased imports," and in an Article 12.1(c) notice of "taking a decision to apply or extent a safeguard measure{,}" will differ depending on the factual circumstances. Significantly, the Appellate Body in *US – Wheat Gluten* recognized that the adequacy of notices under Article 12 must be evaluated in the context of the information available to competent authorities at the time, the complexity of the notifications, the need for translations, and other factors.[10] We further note that Article 3.2 imposes a blanket prohibition on disclosure of confidential information, which would apply even to information that might be considered "relevant" for purposes of Article 12.2.

[8] *See US – Wheat Gluten (AB)*, para. 123 (emphasis in original) (citing *Korea – Dairy Safeguard (AB)*, para. 107, footnote 29).

[9] *US – Wheat Gluten (AB)*, para. 106.

[10] *US – Wheat Gluten (AB)*, para. 105; *see also Korea – Dairy*, para. 7.128.