INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

(DS490 / DS496)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 27, 2016

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. INTRODUCTION

1. The United States will address certain issues of systemic concern regarding the interpretation and application of Articles 2.1, 4.2, 5.1, 9.1, 12.1, and 12.2 of the *Agreement on Safeguards* ("Safeguards Agreement"), as well as Articles I:1 and XIX:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. THE SAFEGUARDS AGREEMENT AND ARTICLE I:1 OF GATT 1994

2. Considering that the WTO Agreement is a single undertaking, a breach of Article I cannot be established without taking into account other relevant articles. Here, a possible Article I claim cannot be examined without considering Article XIX of the GATT 1994, as well as relevant provisions of the Safeguards Agreement.

3. Article XIX recognizes that a Member may suspend certain obligations under the GATT 1994 "to the extent necessary" to prevent injury. Whether this will result in the same treatment for like products from all Members may depend on the facts of the particular case. In any event, Article XIX does not state that Article I MFN obligations may not be suspended.

4. Turning now to the Safeguards Agreement, its Preamble states that the Agreement is intended "to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)." Accordingly, if the Safeguards Agreement states that different treatment is to be provided for like products of different Members, this serves as a clarification – to the extent any ambiguity existed before – that Article I does not preclude such differential treatment.

5. The Safeguards Agreement first states a general MFN principle: Article 2.2 provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." Article 9.1 then provides a more specific rule for a particular situation. Under Article 9.1, differential treatment is not only allowed, but it is *required***.** Accordingly, when the conditions in Article 9.1 apply, the Safeguards Agreement clarifies that a Member following the obligation set out in Article 9 is acting in accordance with the GATT 1994, including Article I. On the other hand, if a Member provides differential treatment for products of different Members in a manner not provided for in Article 9, the Member may be acting inconsistently with its MFN obligations under Article 2.2 of the Safeguards Agreement, as well as under Article I of the GATT 1994.

6. As a final matter, the United States notes that it does not perceive any conflict between Article I of the GATT 1994 and the Safeguards Agreement. However, in the event of conflict, the Safeguards Agreement would prevail. The General Interpretive Note to Annex 1A to the WTO Agreement makes clear that if there is a conflict between a provision of GATT 1994 and "a provision of another agreement in Annex 1A to the Agreement Establishing the Word Trade Organization" — which includes the Safeguards Agreement — then the latter "shall prevail to the extent of the conflict."

III. EXAMINATION OF CONTEMPORANEITY REQUIREMENTS FOR ESTABLISHING INCREASED IMPORTS UNDER ARTICLES 2.1 AND 4.2 OF THE SAFEGUARDS AGREEMENT AND ARTICLE XIX:1 OF GATT 1994

7. Whether or not increased imports data relied upon in support of a safeguard measure is sufficiently contemporaneous must be decided on a case by case basis, taking account of the facts of the particular situation and of the reasoning used by the authority. Articles XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2 of the Safeguards Agreement require competent authorities to establish that an increase in imports has caused or threatened to cause serious injury to a domestic industry. The Safeguards Agreement does not, however, set out absolute standards for how recent, sudden, or significant an increase in imports must be in order to show that the increase caused or threatened to cause serious injury. This analysis is not a "mathematical or technical determination."

8. Based on a review of the record of this dispute, it does not appear that the evidence Indonesia relied upon was sufficiently close in time to the imposition of the safeguard, considering it ended 17 months prior to when the period of investigation closed. The record does not appear to include any explanation as to why more recent information was not sought or obtained. Nor does the record appear to explain how or whether this 17-month gap in data affected Indonesia's analysis in concluding that the product in question "is being imported" under such conditions as to threaten to cause serious injury.

9. Article 4.1(b) defines "threat of serious injury" to mean "serious injury that is *clearly imminent*." Without such explanation, Indonesia provides no basis for evaluating whether the safeguard measure reasonably addressed the condition of the domestic industry at the time it was imposed, or whether the measure was even necessary to prevent serious injury.

IV. OBSERVATIONS REGARDING FINANCIAL CRISES AND THEIR IMPACT ON THE ANALYSIS OF INCREASED IMPORTS UNDER ARTICLE XIX:1 OF GATT 1994

10. The parties, as well as certain third parties, have presented arguments as to whether Indonesia sufficiently explained how the financial crisis was an "unforeseen development," and how it led to increased imports in Indonesia. An examination of issues involving a financial crisis does not require the development of any special types of rules under the Safeguards Agreement. Rather, in justifying the imposition of a safeguard measure based in whole or in part on a financial crisis, a competent authority needs to satisfy the requirements of Article XIX:1 of GATT 1994. This inquiry will, necessarily, depend on the unique facts and circumstances accompanying each particular financial crisis, whether big or small, and a Member's decision to impose a safeguard measure on that basis, whether in whole or in part.

11. Accordingly, the United States would not agree with the contention that some sort of heightened standard would apply in examining issues involving the significance of a financial crisis.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOR THE THIRD PARTIES

QUESTION I: THREAT OF SERIOUS INJURY

1. 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." 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*.

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

3. 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.

4. 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.

5. 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.

6. Moreover, the factors permissible for competent authorities to consider under Article 4.2(a), 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 stressed in *US – Wheat Gluten* that competent authorities must,

where necessary, "undertake additional investigative steps . . . in order to fulfill their obligation to evaluate all relevant factors."

QUESTION II: PARALLELISM

7. Regarding Article 5.1, the first and last sentences of that Article 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 models for which investigating authorities made a finding of serious injury. The first sentence of Article 5.1 establishes the maximum permissible extent, or ceiling, 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 5.1 does not contain any requirement to apply a safeguard to every model included in the investigation of serious injury.

8. 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.

9. 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. 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.

10. 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.

11. 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 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."

12. 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.

QUESTION III: NOTIFICATIONS

13. Regarding notifications, Article 12 does not necessarily require that information be disclosed 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 notifications being made before or after entry into force.

14. Article 12.1 addresses timing, requiring 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."

15. 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." According to the Appellate Body in *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."

16. As to the content requirements of Article 12.2, the kind of information that must be provided in Article 12.1(b) and 12.1(c) notices 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. 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.