INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

(AB-2017-6 / DS490, DS496)

**THIRD PARTICIPANT ORAL STATEMENT
OF THE UNITED STATES OF AMERICA**

May 8, 2018

I. INTRODUCTION

1. The United States appreciates the opportunity to provide its views in this dispute. In our statement today, we will address certain issues regarding the interpretation of the Safeguards Agreement,[1] the GATT 1994,[2] and the DSU,[3] in the context of the findings made by the Panel and the issues appealed by the parties.

II. THE PANEL PROPERLY RECOGNIZED THAT IT HAD THE RESPONSIBILITY TO EVALUATE WHETHER THE MEASURE IS A SAFEGUARD UNDER ITS TERMS OF REFERENCE.

2. All three disputing parties concur that the Indonesian measure at issue was a safeguard measure. The United States agrees with the disputing parties that the measure at issue meets what – in *most* circumstances – is the most fundamental criterion for establishing the existence of a safeguard measure: namely, that the Member adopting a measure invokes Article XIX of the GATT 1994 as a basis for "suspending [an] obligation" or "withdraw[ing] or modifying[ing] [a] concession."[4] Indeed, Article XIX:2 of the GATT 1994 and Article 12 of the Safeguards Agreement make clear that advance notice by a Member intending to suspend an obligation or to modify or withdraw a concession is a precondition to applying a safeguard measure. In this dispute, Indonesia did notify other Members that it intended to adopt a safeguard measure, and thus did invoke Article XIX. In most situations, the question of whether the Safeguards Agreement applied would be resolved by this fact.

3. However, in the unusual circumstances of this dispute – namely, the fact that Indonesia has no tariff binding on the goods in question – an additional criterion called for examination. That question was whether Indonesia's tariff increase involved suspension of an

[1] *Agreement on Safeguards* ("Safeguards Agreement").
[2] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").
[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[4] GATT 1994 Article XIX(1)(a).

obligation or withdrawal or modification of a concession, and thus whether Article XIX or the Safeguards Agreement applied to the tariff increase.

4. The Panel properly recognized that it had the authority and responsibility to consider this issue. Indeed, had the Panel just accepted the disputing parties' assertions that the measure at issue was a safeguard measure – without considering whether the fundamental criteria for a safeguard measure existed – the Panel in essence would have been issuing an advisory opinion. And, the DSU does not give panels the authority to issue advisory opinions. Rather, Article 3.4 of the DSU provides that: "Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the *rights and obligations under this Understanding and under the covered agreements*."[5] Pursuant to Articles 7.1 and 11 of the DSU, panels (and in case of appeal by extension the Appellate Body) are charged with making those findings as will assist the DSB in making a recommendation to a Member, pursuant to DSU Article 19.1, to bring a measure that has been found to be WTO-inconsistent into conformity with the relevant covered agreement.[6] Accordingly, where a measure is not within the scope of a covered agreement, it would be inconsistent with a panel's role under Articles 7.1, 11, and 19.1 of the DSU to make a finding as to the measure's consistency with that agreement. Such a finding cannot assist the DSB in making a recommendation to bring a measure into conformity with a covered agreement because the measure is *not subject to* that

[5] DSU Art. 3.4 (emphasis added).
[6] See DSU Article 7.1 (panel terms of reference: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."); DSU Article 11 ("The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.").

agreement. Put differently, a panel may not issue a finding on whether a measure *not* covered by an agreement would be otherwise consistent with that agreement.

III. THE PANEL CORRECTLY FOUND THAT THE MEASURE AT ISSUE WAS NOT A SAFEGUARD.

5. The Safeguards Agreement, as explained in its Preamble, seeks to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX." Article 1 of the Safeguards Agreement defines safeguard measures as "those measures provided for in Article XIX of GATT 1994." Article XIX, in turn, authorizes Members facing an injurious increase in imports subject to an obligation or concession "to suspend the obligation in whole or in part or to withdraw or modify the concession" when they have satisfied certain procedural and substantive requirements. Thus, a safeguard measure exists only when a Member has suspended an obligation, or withdrawn or modified a bound concession, and asserts that it is entitled to do so under Article XIX and the Safeguards Agreement.

6. In this case, the Panel found that "Indonesia has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions." The Panel further reasoned that "Indonesia's obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of galvalume, implying that the specific duty did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994."[7] Indonesia did not explain that the effect of any other WTO obligation resulted in the import situation that required emergency action.[8] For these reasons, the Panel found that Indonesia's specific duty on galvalume was not a measure within the scope of Article XIX of the GATT 1994, or the

[7] *Indonesia – Iron or Steel Products (Panel)*, para. 7.18.
[8] GATT 1994 Art. XIX:1.

Safeguards Agreement. The Panel's reasoning is sound, and the disputing parties have not provided a basis for a finding that the Panel made a legal error in reaching this conclusion.