INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

(DS490 / DS496)

THIRD PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

October 6, 2016

I. INTRODUCTION

Ms. Chairperson, Members of the Panel:

1. The United States appreciates the opportunity to provide our views as a third party in this dispute. In our statement today, we will address certain issues of systemic concern regarding the interpretation and application of the *Agreement on Safeguards* ("Safeguards Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

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

2. The United States has concerns with the interpretative approach to Article I:1 of GATT 1994 suggested by Vietnam and Taiwan (the complainants) in this dispute. The complainants present a stand-alone claim under Article I:1 of the GATT 1994, arguing that Indonesia's safeguard measure is inconsistent with Article I:1 because it does not apply to like products from all Members.[1]

3. This argument fails to recognize that the WTO Agreement is a single undertaking and that 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.

4. Turning first to Article XIX, the United States recalls that Article XIX states in relevant part:

> If, as a result of . . . the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that [Member] in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers . . ., the [Member] 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.

[1] *See* Taiwan's and Vietnam's First Written Submission, para. 5.133.

Article XIX thus recognizes that a Member may suspend certain obligations under the GATT 1994 "to the extent necessary" to prevent injury. Whether the extent of suspended obligations "necessary to . . . remedy injury" 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.

5. Turning now to the Safeguards Agreement, the United States recalls that the Preamble makes clear that the Safeguards Agreement is intended to clarify Article XIX, as well as how this provision fits within the framework of the GATT 1994. In particular, the Preamble states that the Safeguards 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.

6. And, this is exactly what the Safeguards Agreement provides – that is, it clarifies that in certain circumstances differential treatment is to be provided. 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*. In particular, Article 9.1 provides that "[s]afeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent," and as long as developing country Members "with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned." 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.

7. In short, the Safeguards Agreement serves to clarify how the MFN principle applies with respect to safeguard measures, and the particular legal issues in this dispute would appear to turn on whether Indonesia has properly applied Article 9 of the Safeguards Agreement.

8. 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

9. The complainants argue that the increase in imports relied upon by Indonesia in support of its imposition of the safeguard measure is "not recent enough" and is therefore inconsistent with Article XIX:1 of GATT 1994 and Articles 2.1 and 4.2 of the Safeguards Agreement. The United States has two comments on this issue.

10. First, whether or not data relied upon in support of a safeguard 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."[2]

11. Second, 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. It appears that Indonesia made its determination to impose the safeguard measure based on a data set that 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.[3]

12. The United States recalls that 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

[2] *Argentina – Footwear (EC) (AB)*, para 131.

[3] *See* Indonesia's First Written Submission, paras. 94-95.

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

13. 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.[4] On this point, the United States notes its view that 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 and show that "as a result of unforeseen developments and of the effect of the obligations incurred . . ., including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." 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.

14. 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.[5]

[4] *See* Taiwan's and Vietnam's First Written Submission, paras. 5.19-5.33; *see also* European Union's Third Party Written Submission, para 10 (arguing that the causation showing requires a "detailed explanation of trade flows, as well as data on global demand and price developments concerning the specific product at issue.").

[5] *See* European Union's Third Party Written Submission, para 10.

V. CONCLUSION

15. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of these views.