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## INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

### NOTIFICATION OF AN APPEAL BY INDONESIA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 28 September 2017, from the delegation of Indonesia, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Indonesia hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *Indonesia – Safeguard on Certain Iron or Steel Products* (WT/DS490/R, WT/DS496/R), which was circulated on 18 August 2017 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, Indonesia is simultaneously filing this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submission to the Appellate Body, Indonesia appeals, and requests the Appellate Body to modify or reverse legal interpretations leading to the legal findings and conclusions of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

#### **1 THE PANEL ERRED IN DETERMINING THAT REGULATION NO. 137.1/PMK.011/2014 IS INCONSISTENT WITH ARTICLE I:1 OF THE GATT 1994 BECAUSE IT IS NOT A SAFEGUARD MEASURE**

Indonesia contends that the Panel erred in finding that suspension of MFN obligation couldn't be the basis of safeguard imposition since it is not necessary to remedy or prevent serious injury to the domestic producers or due to the existence of the General Interpretative Note to Annex 1A of the WTO Agreement. This finding is in contradiction with an adopted panel report *Dominican Republic – Safeguard Measures*.<sup>2</sup> In addition, this issue is not under the Panel's term of reference and during the course of panel proceeding no party to the dispute has ever challenged that Regulation No. 137.1/PMK.011/2014 is not a safeguard measure.<sup>3</sup>

Since Regulation No. 137.1/PMK.011/2014 is a safeguard measure, the Panel erred in finding that Regulation No. 137.1/PMK.011/2014 is inconsistent with Article I:1 of the GATT 1994. In addition, the Panel also erred in concluding that the complainants also make the same claim on the basis of the same arguments against the specific duty as a stand-alone measure. Indonesia requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.11, 7.31, 7.38, 7.40, 7.41, 7.43 and 7.44. In addition, Indonesia requests the Appellate Body to reverse the Panel's findings in paragraph 8.1 of its Report.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Indonesia's right to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, para. 7.30.

<sup>3</sup> Panel Report, para. 7.10.

## **2 THE PANEL ERRED TO MAKE A FINDING THAT IS OUTSIDE ITS TERM OF REFERENCE**

Indonesia submits that the panel erred in making findings that is outside its term of reference because of two reasons. First, the Panel has made a finding relating to Article 1 of the Agreement on Safeguards and Article XIX:1(a) last sentence relating to the definition of a safeguard measure which was not included in its term of reference nor has ever been raised by any party to the dispute. Second, the Panel has erred in making a finding of the consistency of Regulation 137.1/PMK.011/2014 as a stand-alone measure (not as a safeguard measure) which is outside the measure at issue in the Panel's request. In the Panel request, complainants have explicitly identified the measure at issue as "the specific duty imposed as a safeguard measure"<sup>4</sup> and a party's submission during panel proceedings cannot cure a defect in a panel request.<sup>5</sup>

Based on the foregoing, Indonesia is of the view that the Panel has acted beyond its term of reference which is inconsistent with Article 6.2 and Article 7 of the DSU because (1) the Panel makes a finding under Article 1 of the Agreement on Safeguards or the last sentence of Article XIX:1(a) of the GATT 1994 when there is no such claim in the panel request; (2) the Panel erred in making a finding of the inconsistency of Article I:1 of the GATT 1994 based on a stand-alone measure (not as a safeguard measure) which is not identified as such by the complainants in the Panel request. Therefore, Indonesia requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.10, 7.40, 7.42-7.44 and 8.1.

## **3 THE PANEL FAILED TO MAKE AN OBJECTIVE ASSESSMENT UNDER ARTICLE 11 OF THE DSU WITH RESPECT TO FINDING REGULATION 137.1/PMK.011/2014 IS NOT A SAFEGUARDS MEASURE**

Indonesia is of the view that the Panel failed to conduct an objective assessment by self-initiating an examination of an undisputed issue beyond its term of reference which departed from a well established case law. The Panel could not invoked Article 11 of the DSU to justify this approach. Several case laws referred to by the Panel as legal basis have different circumstances and facts. All prior WTO cases involving safeguard measures never started an examination of claims of inconsistency under any provision of the Agreement on Safeguards by first examining whether the measure at issue is in fact a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards if not disputed by any party. In fact the Panel has acknowledged that both parties have never challenged and have concurring positions that Regulation 137.1/PMK.011/2014 is a safeguard measure.

In addition, the Panel raised this issue whether the measure at issue is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards at the later stage of Panel proceeding which is on the second substantive meeting.<sup>6</sup>

Therefore, Indonesia requests the Appellate Body to reverse the Panel's conclusions and the Panel's legal interpretations contained in paragraphs 7.10 and 7.40, 7.43 and 8.1.

In addition, Indonesia notes that the above grounds of appeal are without prejudice to the arguments developed in Indonesia Appellant's Submission.

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<sup>4</sup> Request for Establishment of a panel by Viet Nam, WT/DS496/3, 18 September 2015; and Request for Establishment of a panel by TKPM, WT/DS490/2, 21 August 2015.

<sup>5</sup> Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 642.

<sup>6</sup> See Second Set of Panel Questions.