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LAWYERS

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Productivity Commission
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Dear Mr Banks

Thank you for the opportunity to address the Commission in the Public Hearing of 4 December 2007. Subsequent to that meeting, we wish to address the following points.

Evidence

We note with approval the statement by the Commission in its letter of 9 November 2007 to eleven unnamed pork processors that '... a successful case for safeguard action ultimately rests on robust evidence, but published data for the pigmeat processing industry are largely unavailable".

We also note, however, that responses to the questionnaire accompanying that letter cannot provide the robust evidence that the Commission was presumably seeking as they have no probative value. In particular the Commission has not requested:

- materials, such as audited accounts, that might corroborate any responses;
- performance data specific to the business activities of the boning rooms (being the domestic industry for the purposes of this inquiry) in questions 5 and 6; and
- details of how cost and revenue allocations have been made in relation to any disaggregated information that may have been provided by vertically integrated respondents.

We submit that any responses to the questionnaire could in no way be interpreted as providing the clear and objective evidence necessary to justify any reasoned conclusion that criteria for the imposition of safeguards, provisional or final, had been met.

Provisional safeguard measures

APL has suggested to the Commission (Canberra Transcript, p.101) that the accelerated report dealing with provisional measures needs to address only critical circumstances, the consequences of delay and whether imports are causing serious injury.

This is incorrect.

As stated in our Submission of 23 November 2007 to the Commission (pp. 47-49) each and every criterion in Article XIX and the *Agreement on Safeguards* must be tested, analysed and evaluated by the competent authority before any reasoned conclusion can be reached on whether provisional measures are justified. This is because provisional safeguard measures are still 'safeguard' measures within the meaning of the Agreement. In view of the brief time allotted to the Commission to prepare its accelerated report, the mistaken identification of the domestic industry by APL and the absence of any robust disaggregated performance data from the processing sector there is plainly no 'clear evidence' on which the Commission could find that the array of criteria for provisional safeguard measures had been met.

Like or directly competitive goods

The Commissioner, while observing that economists take the view that everything is connected to everything else, conceded that lines have to be drawn somewhere in providing remedies for certain prescribed circumstances that arise in international trade. In the absence of any definition of domestic industry it might be possible to posit in the case of pork imports, for example, that injury has been caused to beef or lamb producers and processors, to grain producers and processors or indeed to seed merchants.

In the case of safeguards the line has been drawn around industries producing like or directly competitive goods. APL has argued that 'directly competitive' is a broader term than 'like goods' and as the former was not at issue in *US - Lamb* its meaning can be construed in the present matter to extend not only to abattoirs but also to pig producers.

That argument is devoid of any merit.

It is true that the two alternative criteria require separate assessments and in certain cases may yield different answers. For example an authority may conclude, applying a characteristics test, that domestically produced butter is not 'like' imported margarine but will almost certainly conclude, applying a market test, that the two products are 'directly competitive' and that the manufacturers of butter constitute the relevant domestic industry. The latter conclusion cannot, however, be expanded to include dairy producers because to do so would involve ignoring the plain meaning of 'directly'. Direct competition occurs at that level in the supply chain where the needs of a purchaser can be met by buying either the imported or domestically produced product. The domestic industry is the industry producing that latter product.

Domestic Industry

Provisional measures can be imposed in accordance with Article 6 of the Safeguards Agreement only after a preliminary determination has been made that there is clear evidence that increased imports have caused or are threatening to cause serious injury. It is not possible to make such a "determination" of "serious injury to the domestic industry" without first properly identifying the domestic industry allegedly injured.

First, the term "serious injury" is defined in Article 4.1 of the *Agreement on Safeguards* as "a significant overall impairment in the position of a domestic industry". This definition makes abundantly clear that a determination of injury cannot be made in a vacuum, but rather that injury is always a qualified injury; it is a reference to the position of the domestic industry, which in turn is defined as the producers of like or directly competitive products. In its report on *US – Hot Rolled Steel*, the WTO Appellate Body pointed to the same logical link between the injury and the domestic industry:

> "We recall first that the *Anti-Dumping Agreement* provides that "injury" means "material injury to a *domestic industry*, threat of material injury to a *domestic industry* or material retardation of the establishment of *such an industry*". (emphasis added) It emerges clearly from this definition that the focus of an injury determination is the state of the "domestic industry".[1] (footnote omitted)

Similarly, the *Agreement on Safeguards'* definition of the term "serious injury" also clearly incorporates a proper identification of the domestic industry as a precondition for any serious injury determination. In other words, it is clear that an improper definition of the domestic industry necessarily invalidates the injury determination.[2] As the Appellate Body in *US – Lamb* stated:

> "it would be a clear departure from the text of Article 2.1 if a safeguard measure could be imposed because of the prejudicial effects that an imported product has on domestic producers of products that are *not* "like or directly competitive products" in relation to the imported product".[3]

Second, the requirement in Article 6 of the *Agreement on Safeguards* to make a "determination" precludes an investigating authority from basing itself on assumptions. The WTO Appellate Body in its report on *US – Oil Country Tubular Goods Sunset Reviews* considered that the requirement to make a "determination" implied that "[A]n investigating authority must have a *sufficient factual basis* to allow it to draw *reasoned and adequate conclusions* concerning" the subject matter of its determination.[4] A preliminary determination is also a "determination" in the sense that it requires a sufficient factual basis that allows the authority to draw reasoned and adequate conclusions about *inter alia* the existence of clear evidence that there is serious injury to the domestic industry caused by the increased imports. No reasoned and adequate conclusions can be drawn if the domestic industry allegedly injured is not properly identified.

The preliminary nature of the determination cannot be used to justify a failure in the identification of the domestic industry. While the quality and the quantity of the evidence may be less to justify a provisional measure compared to a final measure, this does not imply that a measure can be imposed without the same type of evidence in respect of the essential conditions for imposition of any preliminary or final safeguard measure: increased imports, serious injury *to*

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[1] Appellate Body Report, *US – Hot Rolled Steel*, WT/DS184/AB/R, para. 189.

[2] See, e.g., Appellate Body Report, *US – Lamb*, WT/DS178/R, para. 96:

> As a result, the imposition of the safeguard measure at issue was based on a determination of serious injury caused to an industry other than the relevant "domestic industry". In addition, that measure was imposed without a determination of serious injury to the "domestic industry", which, properly defined, should have been limited only to packers and breakers of lamb meat. Accordingly, we uphold the Panel's finding, in paragraph 7.118 of the Panel Report, that the safeguard measure at issue is inconsistent with Articles 2.1 and 4.1(c) of the *Agreement on Safeguards*.

Also see, Panel Report, *US – Steel Safeguards*, WT/DS248, 249, 250, 251, 252, 253, 254/R, WT/DS258, 259/R, para. 10.416 – 10.417.

[3] Appellate Body Report, *US – Lamb*, para. 86.

[4] Appellate Body report, *US – Oil Country Tubular Goods Sunset Reviews,* WT/DS346/AB/R, para.179.

the domestic industry, and the causal link.[5] In its report on *US – Softwood Lumber III*,[6] the Panel examined a preliminary determination of the United States in respect of softwood lumber imports from Canada. At no point in the report does the Panel suggest that the preliminary nature of the determination could somehow excuse the flaws in the approach taken in the investigation with respect to the essential elements of the determination.

By way of conclusion, we refer to the recent Panel report in *EC – Salmon (Norway)* which considered that a flaw in the definition of the domestic industry undermined both the determination of compliance with the standing requirements for initiation and the injury determination, and thus constituted a potentially fatal flaw.[7] This report underlines the importance that is to be attached to a proper definition of the domestic industry, as of initiation, and *a fortiori* at the time of the preliminary determination involving the imposition of provisional measures. It also shows the inextricable link between the injury analysis and the proper identification of the domestic industry.[8]

Supply reductions following decisions on herd reduction

When the Commissioner asked about the lag time between a producers decision to reduce the herd and the impact on the market, Professor Hayes misunderstood the question. His answer was based on the time it would take for the sow meat to hit the market. The correct answer is that it takes three months, three weeks, and three days for gestation and another five to six months to fatten the resulting animals. This means that decisions made to reduce the sow herd today result in less pork on the market in nine to ten months.

Safeguard measures should not be implemented, even if the conditions for safeguard measures are found to exist

Our various submissions have highlighted that the conditions pursuant to which the Commission could impose safeguard measures are simply not met. If, however, the Commission ultimately disagrees and finds that the conditions for safeguards are present, then it is our submission that the Commission should recommend that safeguards not be applied. The public interest/economy-wide grounds for this submission are set out in paragraphs 138 to 140 of our submission of 23 November 2007, and we reiterate those points in this submission.

In particular, in paragraph 139 of our earlier submission, we observed that any safeguard measures would 'impact negatively on secondary processors, retailers and consumers'.

In our view such impacts would be likely to represent *significant* impacts on businesses, individuals and the economy in terms of the Government's best practice regulation requirements

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[5] Panels in the anti-dumping context have consistently approached the question of sufficiency of evidence in respect of *initiation* in this manner. Panel report, *Guatemala – Cement I*, WT/DS60/R, para. 7.64; Panel Report, *Guatemala – Cement II*, WT/DS156/R, para. 8.35. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, WT/DS241/R, para. 7.62; Panel Report, *US – Softwood Lumber V*, WT/DS264/R, para. 7.84.

[6] Panel Report, *US – Softwood Lumber III*, DS247/R.

[7] Panel Report, *EC – Salmon (Norway)*, WT/DS337/R, para. 7.118:

> "If the EC's approach to defining domestic industry in this case resulted in an investigation concerning a domestic industry that did not comport with the definition set forth in Article 4.1, then it seems clear to us the EC analyzed the wrong industry in determining the adequacy of support for the initiation of the investigation under Article 5.4 of the AD Agreement, and in considering injury and causation under Article 3, committing an error which is potentially fatal to the WTO-consistency of the investigating authority's determinations on those issues"

[8] Panel Report, *EC – Salmon (Norway)*, para. 7.124.

issued in August 2007, with the consequence that they should be subject to the high level of cost-benefit scrutiny contemplated by the *Best Practice Regulation Handbook.* The impacts on business and the economy would arise through restriction of competition and a restriction on international trade. As is highlighted in the report of the Commission's 1998 pigmeat safeguards inquiry, restrictions on imports are not the only way (and indeed are counterproductive) of promoting structural adjustment and increased efficiency within Australia's pigmeat production sector. For that reason, if the Commission believes that some form of industry assistance specific to the pork sector is justified, measures that would not impose restrictions on trade and competition should be preferred.

Yours faithfully
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