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## **1 ARTICLE 1**

### **1.1 Text of Article 1**

#### **Article 1**

##### *General Provision*

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

### **1.2 What constitutes a safeguard measure?**

1. The safeguard measure at issue in *Indonesia – Iron or Steel Products* was a specific duty applied by Indonesia on imports of galvalume, following an investigation conducted by Indonesia's competent authority under Indonesia's domestic safeguards legislation. This measure was notified to the WTO Committee on Safeguards as a safeguard measure. Indonesia had no binding tariff with respect to galvalume.<sup>1</sup> The main issue discussed by both the Panel and the Appellate Body was whether the specific duty imposed by Indonesia constituted a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards given that Indonesia had no bound tariff on that product. Although both sides agreed, for various reasons, that the duty was a safeguard measure, in discharging its duty to undertake an objective assessment of the matter under Article 11 of the DSU, the Panel conducted its own examination and concluded that the duty at issue did not constitute a safeguard measure.<sup>2</sup> The Appellate Body stated that the Panel had to conduct an independent and objective assessment of the applicability of the Agreement on Safeguards to the dispute, regardless of whether such applicability had been contested by the parties:

"In light of the above, we consider that a panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute. The complainants in this dispute claimed that Indonesia's specific duty on imports of galvalume is inconsistent with Article XIX of the GATT 1994 and certain substantive provisions of the Agreement on Safeguards. Therefore, it was the Panel's duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constitutes a safeguard measure in order to determine the applicability of the substantive provisions relied upon by the complainants as the basis for their claims."<sup>3</sup>

2. The Panel in *Indonesia – Iron or Steel Products* stressed the fact that a safeguard measure is one that suspends, withdraws or modifies a GATT obligation or concession to the extent necessary in order to prevent or remedy serious injury caused by increased imports:

"Thus, not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a). Rather, it is only measures suspending, withdrawing, or modifying a GATT obligation or concession that a Member

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<sup>1</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 2.1-2.3.

<sup>2</sup> Panel Report, *Indonesia – Iron or Steel Products*, para. 7.10.

<sup>3</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.33. See also Panel Report, *India – Iron and Steel Products*, para. 7.30.

finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury that will constitute 'safeguard measures'. For example, where all of the conditions for the imposition of a 'safeguard measure' have been satisfied, a Member may choose to suspend its obligations under Article XI of the GATT 1994 for a period of time and restrict the volume of imports to a level that prevents or remedies serious injury to its domestic industry *in a way that would otherwise be inconsistent* with the prohibition on the application of quantitative restrictions in that Article. The suspension of the imposing Member's obligations under Article XI in this manner would allow it to 're-adjust temporarily the balance in the level of concessions between that Member and other exporting Members' to prevent or remedy serious injury. In the absence of an obligation preventing a Member's remedial action, there would be obviously no need for that Member to be released from a WTO commitment and, therefore, nothing to 're-adjust temporarily'.

It follows, therefore, that one of the defining features of the 'measures provided for' in Article XIX:1(a) (i.e. safeguard measures) is the suspension, withdrawal, or modification of a GATT obligation or concession that *precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied."<sup>4</sup>

3. On appeal, however, the definition of a safeguard measure made by the Panel in *Indonesia – Iron or Steel Products* was challenged by the parties as having conflated the constituent features of a safeguard measure with the conditions for their WTO-consistent application. The Appellate Body disagreed with the Panel's definition, and found that:

"[T]he Panel appears to have considered that, in order to qualify as a safeguard measure, a measure must operate 'to the extent and for such a time as may be necessary to prevent or remedy ... injury'. As discussed in paragraph 5.59 above, the issue of whether a measure is applied to the extent and for such time as may be necessary to prevent or remedy serious injury is not relevant to determining whether that measure is a safeguard measure for purposes of the applicability of the Agreement on Safeguards. Instead, it relates to the separate question of whether a safeguard measure is in conformity with the procedural and substantive requirements of the Agreement on Safeguards. Second, the Panel seems to have suggested that in determining whether a measure is a safeguard measure, it is relevant to consider whether it was adopted in 'a situation where all of the conditions for the imposition of a safeguard measure are satisfied'. However, an assessment of whether the conditions for the imposition of a safeguard measure have been met is pertinent to the question of whether a WTO Member has applied a safeguard measure in a WTO consistent manner. Hence, we consider that the Panel conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards."<sup>5</sup>

4. The Appellate Body also set out the constituent features of a safeguard measure, and outlined the various factors that a panel must consider when determining whether a given measure constitutes a safeguard measure:

"In light of the above, we consider that, in order to constitute one of the 'measures provided for in Article XIX', a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of

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<sup>4</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.14-7.15.

<sup>5</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.62.

those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards."<sup>6</sup>

5. Similarly, the Panel in *India – Iron and Steel Products* examined the different elements of the design and structure of a safeguard measure, highlighted by the Appellate Body above, to determine whether the Agreement on Safeguards was applicable to duties imposed by India on imports of iron and steel products. The Panel conducted this examination in the absence of any contestation by the parties in this regard:

"For the reasons explained above, the Panel concludes that the measure at issue resulted in a suspension of obligations incurred by India under the GATT 1994, namely Article II:1(b), second sentence. The measure that resulted in this suspension of GATT obligations was adopted by India as a temporary emergency action, designed to remedy an alleged situation of serious injury to the domestic industry brought about by an increase in imports of the subject products. In light of those aspects, we find that the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Accordingly, the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards are applicable to the examination that the Panel has to make of the claims raised in the present dispute.

We have already noted that the manner in which a Member's domestic law characterizes its own measures is not dispositive of the characterization of such measures under WTO law. Likewise, the manner in which a Member conducts an investigation or notifies measures to the WTO is not dispositive of the legal characterization of the measure. However, all these factors may be relevant elements when considering a measure's design and structure. In this regard, we find that the following elements confirm our conclusion. First, the fact that the Indian competent authority imposed the measure at issue and conducted the respective investigation under domestic legislation that authorizes the Government to impose duties on imports after determining that relevant products are being imported into India in increased quantities and under conditions so as to cause or threaten to cause serious injury to the domestic industry. Second, the fact that the measure at issue had the typical characteristics of a safeguard measure, including (i) that it resulted in duties imposed on imports of the like or directly competitive product to that produced by the affected domestic industry; (ii) that the duties were only temporary; (iii) that the measure was subject to a progressive liberalization at periodic intervals; and (iv) that imports from certain developing countries that did not exceed a threshold were exempted from the duties. Third, the fact that India notified this investigation and measures to the WTO Committee on Safeguards pursuant to the provisions in Article XIX of the GATT 1994 and in the Agreement on Safeguards."<sup>7</sup>

6. Both the Panel and the Appellate Body in *Indonesia – Iron or Steel Products* declined to make a finding on the issue of whether the GATT obligation that is suspended has to be the same one that led to the increase in imports.<sup>8</sup>

7. In *Indonesia – Iron or Steel Products*, Indonesia argued that even though it had no WTO bound rate on the imports of the subject product, it did have preferential tariff rates under certain FTAs and that therefore the GATT obligation being suspended in the investigation at issue was the exception under Article XXIV of the GATT 1994. The Panel, in a finding that was not appealed, rejected this argument:

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<sup>6</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60.

<sup>7</sup> Panel Report, *India – Iron and Steel Products*, paras. 7.74-7.75.

<sup>8</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.16-7.17; Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.60, fn 194.

"Following the second substantive meeting, Indonesia asserted that tariff obligations it incurred under the ASEAN-Korea (10%) and the ASEAN Trade in Goods (0%) RTAs prevented it from 'increase[ing] its tariff' on imports of galvalume. According to Indonesia, 'the application of the preferential tariffs under Indonesia FTAs pursuant to Article XXIV of the GATT 1994 results in Indonesia's inability to counter [the] increased imports'. Thus, Indonesia argues that the imposition of the specific duty on imports of galvalume originating in countries *including its RTA partners* means that the 'GATT obligation being suspended ... is the GATT exception under Article XXIV of the GATT 1994'. We are of the view that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners. Article XXIV of the GATT 1994 is a *permissive* provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures. Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its ASEAN trading partners is established in the ASEAN Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the ASEAN-Korea Free Trade Agreement, not in Article XXIV. In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, 'suspended' 'the GATT exception under Article XXIV' for the purpose of Article XIX:1(a)."<sup>9</sup>

8. The parties in *Indonesia – Iron or Steel Products* also argued before the Panel and the Appellate Body that the imposition of the specific duty at issue suspended Indonesia's obligations under Article I:1 of the GATT 1994 because it was applied on a discriminatory basis to comply with the S&D requirements of Article 9.1 of the Agreement on Safeguards.<sup>10</sup> The Panel raised doubts, noting that the S&D afforded to developing countries was not intended to remedy serious injury but was rather a legal prerequisite to the imposition of the specific duty itself.<sup>11</sup> The Appellate Body agreed with this view, finding that:

"Having reviewed the design, structure, and expected operation of the measure at issue, coupled with all the relevant facts and arguments on record, we conclude that the measure does not present the constituent features of a safeguard measure for purposes of the applicability of the WTO safeguard disciplines. The imposition of the specific duty on galvalume may seek to prevent or remedy serious injury to Indonesia's industry, but it does not suspend any GATT obligation or withdraw or modify any GATT concession. While the exemption of 120 countries from the scope of application of the specific duty may arguably be seen as suspending Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994, it has not been shown to be designed to prevent or remedy serious injury to Indonesia's domestic industry. Rather, that exemption appears to constitute an ancillary aspect of the measure, which is aimed at according S&D treatment to developing countries with *de minimis* shares in imports of galvalume as contemplated under Article 9.1 of the Agreement on Safeguards. The disciplines of Article 9.1 set out conditions for the WTO-consistent application of safeguard measures and do not speak to the question of whether a measure constitutes a safeguard measure for purposes of the *applicability* of the WTO safeguard disciplines. Hence, we find that the measure at issue, considered in light of those of its aspects most central to the question of legal characterization, does not constitute a measure 'provided for in Article XIX of GATT 1994'. "<sup>12</sup>

9. In the view of the Panel and Appellate Body in *Indonesia – Iron or Steel Products* the fact that a Member applies a safeguard measure and exempts certain developing countries from the

<sup>9</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.19-7.20.

<sup>10</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.21 and 7.23; Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.41 and 5.46.

<sup>11</sup> Panel Report, *Indonesia – Iron or Steel Products*, para. 7.22.

<sup>12</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.70.

scope of the measure pursuant to Article 9.1 does not necessarily mean that "the very same safeguard measure, *because of that discrimination*, suspends the obligation in Article I:1 to provide MFN-treatment for the purpose of Article XIX:1(a)."<sup>13</sup> The Panel articulated this by highlighting two main considerations:

"First, the discrimination that is called for by Article 9.1 (which would otherwise be inconsistent with Article I:1 of the GATT 1994) is not intended to prevent or remedy serious injury. Rather, that discrimination is intended to leave producers from qualifying developing country Members with essentially the same access to the importing country market as existed prior to the imposition of a safeguard measure. We fail to see how a course of action that *dilutes* the protective impact of a safeguard measure *in order to provide S&D* could result in the suspension of a Member's MFN obligations under Article I:1 for the purpose of Article XIX:1(a), given that the fundamental objective of Article XIX:1(a) is to allow Members to 'escape' their GATT obligations to the extent necessary to *prevent or remedy serious injury to a domestic industry*.<sup>14</sup>

Secondly, we recall that the General Interpretative Note to Annex 1A of the WTO Agreement states that in the event of a conflict between a provision of the GATT 1994 and a provision of another covered agreement, the provision of the covered agreement shall prevail to the extent of the conflict. In our view, the effect of this rule is that the discriminatory application of a safeguard measure that is required by Article 9.1, to the extent it is inconsistent with the principle of MFN-treatment, is permissible *without having to suspend the operation of Article I:1 of the GATT 1994*.<sup>15</sup>

10. The Panel in *Indonesia – Iron or Steel Products* also found that the fact that a measure was imposed as a result of a WTO-consistent safeguard investigation does not necessarily mean that that measure suspends, modifies, or withdraws a GATT obligation or concession and therefore constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.<sup>16</sup>

11. Moreover, having concluded that the specific duty at issue did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Panel, in a finding that was not considered by the Appellate Body, clarified that this does not mean that WTO Members are precluded from imposing safeguard measures on the imports of products for which their tariffs are unbound:

"Any WTO Member faced with such a situation would be entitled to exercise its rights under the Agreement on Safeguards to prevent or remedy serious injury to its domestic industry, provided that the chosen remedial course of action suspends, withdraws, or modifies a relevant GATT obligation or concession for that purpose. A Member whose tariff is 'unbound' with respect to a product that is facing competition from imports that are allegedly causing serious injury, may, for example, impose a safeguard measure in the form of an appropriate import quota, thereby suspending its obligations under Article XI of the GATT 1994. Of course, such a measure would have to be based on a WTO-consistent investigation and conclusions. However, the mere fact of having conducted such an investigation does not mean that an otherwise permitted action, such as an increase in an unbound tariff, becomes a safeguard measure subject to review under the Agreement on Safeguards. Indonesia in this case did not undertake any course of action that suspended, withdrew, or modified any GATT obligation or concession. Accordingly, for all of the above reasons, we find that the specific duty applied by Indonesia on imports of galvalume pursuant to Regulation

<sup>13</sup> Panel Report, *Indonesia – Iron or Steel Products*, para. 7.27.

<sup>14</sup> (*footnote original*) In articulating this view, we express no opinion on the extent to which Article XIX:1(a) may or may not authorize an importing Member to apply a measure on a discriminatory basis (that would otherwise be inconsistent with Article I:1 of the GATT 1994), *were such discrimination considered by an importing Member to be necessary to prevent or remedy serious injury*. Our views are strictly limited to the discriminatory application of a safeguard measure that may result from compliance with Article 9.1, which is explicitly intended to afford S&D to qualifying developing country Members.

<sup>15</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.28-7.29.

<sup>16</sup> Panel Report, *Indonesia – Iron or Steel Products*, para. 7.39.

No. 137.1/PMK.011/2014 *does not* constitute a 'safeguard measure', within the meaning of Article 1 of the Agreement on Safeguards."<sup>17</sup>

12. The Panel also held, in a finding that was upheld by the Appellate Body, that the duty at issue in that dispute, which did not represent a safeguard measure because Indonesia had no WTO bound rate on the tariff rate for the subject product, was inconsistent with the MFN principle laid down in Article I:1 of the GATT 1994 because Indonesia had exempted 120 countries from the scope of the duty.<sup>18</sup>

### 1.3 Relationship with Article XIX of the GATT 1994

#### 1.3.1 General

13. In *Korea – Dairy*, the Appellate Body examined the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards in light of, on the one hand, Article II of the WTO Agreement<sup>19</sup>, and, on the other, Articles 1 and 11.1(a) of the Agreement on Safeguards.<sup>20</sup> The Appellate Body concluded that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX and the Agreement on Safeguards:

"The specific relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards* within the WTO Agreement is set forth in Articles 1 and 11.1(a) of the *Agreement on Safeguards* ...

Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.' ... The ordinary meaning of the language in Article 11.1(a) – 'unless such action conforms with the provisions of that Article applied in accordance with this Agreement' – is that any safeguard action must conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the *Agreement on Safeguards*. Thus, any safeguard measure<sup>21</sup> imposed after the entry into force of the WTO Agreement must comply with the provisions of both the *Agreement on Safeguards* and Article XIX of the GATT 1994."<sup>22</sup>

14. In *Argentina – Footwear (EC)*, the Appellate Body reversed a conclusion by the Panel in that dispute that "safeguard investigations and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Agreement on Safeguards satisfy the requirements of Article XIX of GATT."<sup>23</sup> The Appellate Body noted that Articles 1 and 11.1(a) of the Agreement on Safeguards described the precise nature of the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards within the WTO Agreement<sup>24</sup>, and then observed:

"We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures*

<sup>17</sup> Panel Report, *Indonesia – Iron or Steel Products*, para. 7.41.

<sup>18</sup> Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.42-7.44.

<sup>19</sup> See also the Appellate Body's analysis under Article II of the WTO Agreement (in the discussion of Article II of the WTO Agreement).

<sup>20</sup> The issue of the relationship between GATT Article XIX and the Agreement on Safeguards arose in these disputes because the investigating authority in each case had not examined whether the import trends investigated were the result of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994.

<sup>21</sup> (*footnote original*) With the exception of special safeguard measures taken pursuant to Article 5 of the *Agreement on Agriculture* or Article 6 of the *Agreement on Textiles and Clothing*.

<sup>22</sup> Appellate Body Report, *Korea – Dairy*, paras. 76-77. See also Appellate Body Report, *Argentina – Footwear (EC)*, para. 84.

<sup>23</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.69.

<sup>24</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 82.

*provided for in Article XIX of GATT 1994.*' ... This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language 'unless such action *conforms with the provisions of that Article applied in accordance with this Agreement*' ... clearly is that any safeguard action must *conform with the provisions of Article XIX of the GATT 1994 as well as with the provisions of the Agreement on Safeguards*. Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards*.<sup>25</sup><sup>26</sup>

15. The Appellate Body in *Argentina – Footwear (EC)* further rejected the Panel's conclusion that because the clause "[i]f, as a result of unforeseen developments ... concessions" in Article XIX:1(a) had been expressly omitted from Article 2.1 of the Agreement on Safeguards, safeguard measures that meet the requirements of the Agreement on Safeguards will automatically also satisfy the requirements of Article XIX. The Appellate Body considered this conclusion as inconsistent with the principles of effective treaty interpretation and with the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards:

"[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions ... We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."<sup>27</sup>

16. The Panel in *US – Lamb*, referring to the statements by the Appellate Body on the relationship between the Agreement on Safeguards and Article XIX of the GATT 1994, observed:

"Thus the Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX which are not reflected in the *Safeguards Agreement* could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the *Safeguards Agreement* and GATT Article XIX must be given meaning and effect."<sup>28</sup>

17. The Appellate Body in *US – Lamb* reiterated the conclusions drawn by the Appellate Body in *Argentina – Footwear (EC)* and in *Korea – Dairy* on the relationship between the Agreement on Safeguards and GATT Article XIX and observed that "Articles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards".<sup>29</sup>

18. The Panel in *Argentina – Preserved Peaches* also concluded that in disputes relating to safeguards measures, a panel must apply the Agreement on Safeguards and GATT Article XIX cumulatively.<sup>30</sup>

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<sup>25</sup> (footnote original) We note that the provisions of Article 11.1(a) of the *Agreement on Safeguards* are significantly different from the provisions of Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*, which state:

"Sanitary or phytosanitary measures *which conform to* the relevant provisions of this Agreement *shall be presumed to be in accordance with* the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)." (emphasis added)

<sup>26</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 83.

<sup>27</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 89.

<sup>28</sup> Panel Report, *US – Lamb*, para. 7.11.

<sup>29</sup> Appellate Body Report, *US – Lamb*, para. 70.

<sup>30</sup> Panel Report, *Argentina – Preserved Peaches*, para. 7.12.

19. The Panel in *US – Steel Safeguards* reiterated that GATT Article XIX and the Agreement on Safeguards apply "cumulatively" when assessing the WTO compatibility of safeguards measures taken by WTO Members:

"[T]here is no reference to unforeseen developments in the Agreement on Safeguards. However, as repeatedly affirmed by the Appellate Body, Articles 1 and 11.1(a) of the Agreement on Safeguards express the continuing applicability of Article XIX of GATT which has been clarified and reinforced by the Agreement on Safeguards.<sup>31</sup> This interpretation ensures that the provisions of the Agreement on Safeguards and those of Article XIX are given their full meaning and their full legal effect within the context of the WTO Agreement.<sup>32</sup><sup>33</sup>

20. Regarding judicial economy when it has been found that the requirements of Articles 2 and 4 of the Agreement on Safeguards have not been met, see the discussion of Article XIX of the GATT 1994.

### **1.3.1.1 "unforeseen developments"**

21. Regarding the phrase "If, as a result of unforeseen developments ... concessions" in GATT Article XIX:1(a), see the Section on Article XIX of the GATT 1994.

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<sup>31</sup> (*footnote original*) See for instance the Appellate Body Report in *Korea – Dairy* at para. 74: "We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously ..." and para. 78: "Having found that the provisions of *both* Article XIX:1 of the GATT 1994 and Article 2.1 of the *Agreement on Safeguards* apply to any safeguard measure taken under the *WTO Agreement* ".

<sup>32</sup> (*footnote original*) Appellate Body Reports, *Argentina – Footwear (EC)*, para. 95; *Korea – Dairy*, para. 85; *US – Lamb*, para. 71.

<sup>33</sup> Panel Reports, *US – Steel Safeguards*, para. 10.36