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INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

AB-2017-6

Report of the Appellate Body

Addendum

This *Addendum* contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS490/AB/R, WT/DS496/AB/R.

The Notices of Appeal and Other Appeals and the executive summaries of written submissions contained in this *Addendum* are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

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ANNEX A-1**INDONESIA'S NOTICE OF APPEAL***

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:¹

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*.² 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.³

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.

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

* This document, dated 28 September 2017, was circulated to Members as document WT/DS490/5, WT/DS496/6.

¹ 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.

² Panel Report, para. 7.30.

³ Panel Report, para. 7.10.

explicitly identified the measure at issue as "the specific duty imposed as a safeguard measure"⁴ and a party's submission during panel proceedings cannot cure a defect in a panel request.⁵

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 invoke 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.⁶

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.

⁴ Request for Establishment of a panel by Viet Nam, WT/DS496/3, 18 September 2015; and Request for Establishment of a panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS490/2, 21 August 2015.

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

⁶ See Second Set of Panel Questions.

ANNEX A-2**THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN
AND MATSU'S NOTICE OF OTHER APPEAL***

Pursuant to Articles 16.4 and 17 of the DSU, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Indonesia – Safeguard on Certain Iron or Steel Products* (WT/DS490; WT/DS496). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu simultaneously files this Notice of Other Appeal, the Other Appellant Submission and the executive summary thereof with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu appeals, and requests that the Appellate Body *reverse* the findings and conclusions of the Panel, with respect to the following errors contained in the Panel Report:¹

The Panel erred in the interpretation and application of Article 1 of the Agreement on Safeguards, Article XIX:1(a) of GATT 1994 and other relevant provisions when finding that the specific duty imposed by Indonesia is not a safeguard measure. As a result, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body *reverse* the Panel's findings in paragraphs 7.40-41 and 8.1(a) of its report, which are based on its legally erroneous reasoning in paragraphs 7.10, 7.12-17 and 7.32.

Moreover, in the event that the Appellate Body finds that the specific duty imposed by Indonesia is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, and reverses the Panel's relevant findings and conclusions, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body complete the analysis of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of GATT 1994.

Lastly, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submits that the Appellate Body should leave the Panel's finding contained in paragraphs 7.42-7.44 of the Panel Report that Indonesia's specific duty is inconsistent with Indonesia's MFN-treatment obligation under Article I:1 of the GATT 1994 undisturbed.

* This document, dated 3 October 2017, was circulated to Members as document WT/DS490/6.

¹ Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to refer to other paragraphs of the Panel Report in the context of its other appeal.

ANNEX A-3**VIET NAM'S NOTICE OF OTHER APPEAL***

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 23(1) of the Working Procedures for Appellate Review, Viet Nam 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/DS496/R), which was circulated on 18 August 2017 (the "Panel Report").

Pursuant to Rules 23(1) and 23(3) of the Working Procedures for Appellate Review, Viet Nam is simultaneously filing this notice of other appeal and its other appellant's submission with the Appellate Body Secretariat. Viet Nam is providing as well an executive summary of the other appellant's submission, in accordance with the Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

For the reasons further elaborated in its other appellant's submission, Viet Nam appeals and requests the Appellate Body to reverse the findings and conclusions of the Panel with respect to the errors contained in the Panel Report described below.¹

I. THE PANEL ERRED IN FINDING THAT INDONESIA'S MEASURE IS NOT A "SAFEGUARD MEASURE"

1. The Panel erred in its interpretation and application of Article XIX:1(a) of the GATT 1994, various provisions of the Agreement on Safeguards, including Articles 1 and 9.1, as well as the General Interpretative Note to Annex 1A of the WTO Agreement, when it found that Indonesia's measure is not a safeguard measure.²

2. In particular, and without prejudice to the arguments developed in Viet Nam's other appellant's submission, the Panel erred in finding that the suspension of the most-favoured-nation treatment (MFN) obligation under Article I:1 does not constitute a "suspension" of "the obligation" under Article XIX:1(a) of the GATT 1994. This error includes:

- The Panel's erroneous finding that Indonesia's suspension of the MFN obligation under Article 9.1 of the Agreement on Safeguards did not intend to prevent or remedy serious injury;³ and
- The Panel's erroneous finding that the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards does not constitute a "suspension" of the MFN obligation, because the question of "suspension" does not arise due to the application of the General Interpretative Note to Annex 1A of the WTO Agreement.⁴

II. REQUEST FOR FINDINGS, COMPLETION OF THE ANALYSIS, AND SUGGESTION FOR IMPLEMENTATION

3. Viet Nam requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.40-7.41, 8.1(a) and 8.2 of the Panel Report that Indonesia's specific duty applied pursuant to Regulation No. 137.1/PMK.011/2014 is not a safeguard measure, and to find instead that this measure is a safeguard measure within the meaning of Article XIX of the GATT 1994 and

* This document, dated 3 October 2017, was circulated to Members as document WT/DS496/7.

¹ Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures for Appellate Review, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Viet Nam's right to refer to other paragraphs of the Panel Report in the context of its other appeal.

² Panel Report, paras. 7.40-7.41, 8.1(a) and 8.2.

³ Panel Report, paras. 7.25-7.28.

⁴ Panel Report, para. 7.29.

the Agreement on Safeguards. Viet Nam further requests the Appellate Body to declare moot and of no legal effect the Panel's legal interpretations provided in paragraphs 7.12-7.41 of the Panel Report, and paragraphs 2.9-3.7 of Annex A-3 of the Addendum to the Panel Report.

4. Viet Nam requests the Appellate Body to complete the legal analysis and find that the measures at issue in this dispute are inconsistent with the following provisions:

a. With respect to the specific duty imposed as a safeguard measure:

- Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards, because KPPI failed to explain in a reasoned and adequate manner the existence of both "unforeseen developments" and "the effect of the [GATT] obligations", as well as the logical connection of these elements with the increase in imports that allegedly caused serious injury;
- Article XIX:1(a) of the GATT 1994, and Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards, as KPPI failed to explain in a reasoned and adequate manner why the alleged increase in imports was "recent enough";
- Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a) and 4.2(c) of the Agreement on Safeguards, as KPPI failed to provide a reasoned and adequate explanation of how the facts support its threat of serious injury determination, including the evaluation of all relevant serious injury indicators;
- Article XIX:1(a) of the GATT 1994, and Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards as KPPI failed to explain in a reasoned and adequate manner a causal link, and to conduct a proper non-attribution analysis in accordance with those provisions;
- Articles 2.1, 3.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards, because Indonesia applied the safeguard duty to a product that is different from the product that was investigated, and thus failed to observe the requirement of parallelism;

b. With respect to Indonesia's notifications of the finding of threat of serious injury and of the decision to impose a safeguard measure:

- Article 12.2 of the Agreement on Safeguards, because Indonesia failed to provide "all pertinent information" in the relevant notification; and

c. With respect to the obligation to provide an opportunity to hold consultations:

- Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards, because Indonesia failed to provide Members having a substantial interest as exporters with a meaningful opportunity to hold consultations prior to the imposition of a safeguard measure.

5. In addition, Viet Nam requests the Appellate Body to leave the Panel's finding contained in paragraphs 7.42-7.44 and 8.1(b) of the Panel Report that Indonesia's specific duty is inconsistent with Indonesia's MFN-treatment obligation under Article I:1 of the GATT 1994 undisturbed.

6. Finally, Viet Nam requests the Appellate Body to exercise its discretion under Article 19.1 of the DSU and suggest that Indonesia bring its measure, and any extension of it, into conformity with its WTO obligations by immediately withdrawing the specific duty at issue.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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ANNEX B-1**EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION****I. INTRODUCTION**

1. This appeal is very important for Indonesia and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam (Viet Nam) (referred as "the co-complainants") as well as for all WTO Members. The Appellate Body as the highest adjudicatory body in the WTO dispute settlement is required to step in when there are two panel findings that are in contradiction with each other. In addition, this appeal also raised some important issues to clarify Panel's term of reference as well as whether the Panel has made an objective assessment when making its finding.

2. In this dispute, the co-complainants challenged Indonesia safeguard measure on certain flat-rolled products of iron or non-alloy steel ("galvalume") to be inconsistent with Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and various provisions of the WTO Agreement on Safeguards as well as Article I:1 of the GATT 1994.¹ However, it is an undisputed fact that no party, either Indonesia or the co-complainants have ever challenged whether Regulation No. 137.1/PMK.011/2014 is a safeguard measure or not. In other words, both parties to the dispute agreed that Regulation No. 137.1/PMK.011/2014 is a safeguard measure.

3. Nevertheless, the Panel concluded that all co-complainants claims under the Agreement on Safeguards and the GATT 1994 with respect to the specific duty *as a safeguard measure* were dismissed entirely since the Panel found that Regulation No. 137.1/PMK.011/2014 *does not* constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.² Thus, the Panel found that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation No. 137.1/PMK.011/2014 *is inconsistent* with Indonesia's obligation to afford MFN-treatment under Article I:1 of the GATT 1994³ and justification under Article 9.1 of the Agreement on Safeguards cannot be invoked since Regulation No. 137.1/PMK.011/2014 is not a safeguard measure.⁴

4. Indonesia contends that the Panel has made three errors of law. First, the Panel has made an error of law in arriving at its findings and conclusion that Indonesia safeguard measure is inconsistent with Article I:1 of the GATT 1994 because Regulation No. 137.1/PMK.011/2014 is not considered as a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. Second, the Panel erred by making findings that is beyond its term of reference. Third, the Panel has made another error of law by not doing "an objective assessment".⁵

5. Due to the Panel's error of law, Indonesia requests the Appellate Body to reverse the Panel findings on Article 1 of the Agreement on Safeguards as well as Article I:1 of the GATT 1994.⁶ However, Indonesia does not request the Appellate Body to complete the legal analysis since there is no ground for the Appellate Body to exercise such discretion.⁷

¹ Request for Establishment of a panel by Viet Nam, WT/DS496/3 (Viet Nam's panel request), pp. 3-4; and Request for Establishment of a panel by The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS490/2 (The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's panel request), pp. 3-4.

² Panel Report, paras. 8.1 and 8.2.

³ Panel Report, para. 8.1.

⁴ Panel Report, paras. 7.42-7.44.

⁵ Indonesia appellant's submission, para. 7.

⁶ Indonesia appellant's submission, para. 8.

⁷ Indonesia appellant's submission, para. 9.

II. 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

6. In this regard, the Panel made a finding that is not included in its term of reference. Moreover, 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.⁸ The Panel also explicitly made this finding in contradiction with an adopted panel report *Dominican Republic – Safeguard Measures*.⁹ This is a very straight forward appeal to determine which GATT obligations that can be suspended to justify an imposition of a safeguard measure pursuant to the last sentence Article XIX:1(a) of the GATT 1994.

7. In determining that Regulation 137.1/PMK.011/2014 is not a safeguard measure, the Panel rely its finding based on the absence of any Indonesia's WTO obligation that is being suspended by the application of Regulation 137.1/PMK.011/2014 that is necessary to prevent or remedy serious injury or threat thereof.¹⁰ Since Indonesia has no binding tariff obligation with respect to galvalume inscribed into its Schedule of Concession for the purpose of Article II of the GATT 1994,¹¹ the Panel deemed that the suspension of Article I:1 of the GATT cannot be invoked to justify a safeguard measure.¹²

8. Indonesia is of the view that the Panel erred in its finding that Regulation 137.1/PMK.011/2014 is not a safeguard measure because the term "the obligation" in the last part of Article XIX:1(a) of the GATT 1994 shall not only limited to Article II or Article XI of the GATT 1994 but also to include other GATT obligations such as MFN obligation and the imposition of additional specific duty towards certain WTO Members is necessary to prevent or remedy serious injury or threat thereof.¹³ The objective of targeting certain exporting countries (instead of all) is to impose the additional specific safeguard measure only to major exporting countries which contributed the most to the threat of serious injury suffered by Indonesian galvalume producers.

9. Indonesia submits that the Panel has made an error in law by disagreeing with Indonesia and the co-complainants as well as the panel in *Dominican Republic – Safeguard Measures* that the suspension of MFN obligation can the basis of a safeguard imposition because the Panel considered it is not necessary to remedy or prevent serious injury amount to a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards.¹⁴

10. Indonesia also submits that the Panel consideration that the suspension of MFN obligation is not covered by Article XIX:1(a) of the GATT 1994 due to the existence of the General Interpretative Note 1A of the WTO Agreement is incorrect. If the Panel's logic and reasoning were correct, Indonesia submits that it should also be applicable to the suspension of obligation under Article XI of the GATT 1994 whereby it has been well established that the suspension of GATT obligation under Article XI of the GATT would be a classic example of a suspension of GATT obligation under the last sentence of Article XIX:1 (a) of the GATT 1994. The relationship between Article I:1 of the GATT 1994 and all the exceptions provided under the GATT 1994 including Article XIX of the GATT on Economic Emergency Exception should be interpreted harmoniously before invoking the last resort of General Interpretative Note 1A of the WTO Agreement.¹⁵ Indonesia agrees with the panel's consideration in *Dominican Republic – Safeguard Measures* that it does not consider it correct to affirm that if Article XIX:1(a) of the GATT 1994 is interpreted to include the possibility of suspending the general most-favoured-nation treatment obligation in Article I:1 of the GATT 1994, this would necessarily lead to a conflict between GATT Article XIX:1(a) and the Agreement on Safeguards.¹⁶

⁸ Panel Report, para. 7.10.

⁹ Panel Report, para. 7.30.

¹⁰ Panel Report, paras. 7.18 and 7.21-7.32.

¹¹ Panel Report, para. 7.18.

¹² Panel Report, paras. 7.21-7.32.

¹³ Indonesia appellant's submission, para. 30.

¹⁴ Panel Report, para. 7.30.

¹⁵ Indonesia appellant's submission, para. 35

¹⁶ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.72.

11. Assuming *arguendo* that Regulation 137.1/PMK.011/2014 does not result in the suspension of any obligation under the GATT 1994, Indonesia is still of the view that it would still be safeguards within the meaning of Article XIX because the use of the words "shall be free" in the last sentence of Article XIX:1(a) of the GATT 1994 implies that a Member has the discretion to or not to suspend a WTO concession or obligation when imposing a safeguard measure to remedy serious injury that does not suspend a concession or obligation. In addition, Regulation 137.1/PMK.011/2014 was initiated, investigated, notified and imposed in accordance with Article XIX of the GATT 1994 and the Agreement on Safeguards. Recitals of Regulation 137.1/PMK.11/2014 clearly stipulates that basis of the imposition of the safeguard measure is to address the threat of serious injury caused by surge of imports.¹⁷ Indonesia believes that it has correctly characterized Regulation 137.1/PMK.011/2014 as a safeguard measure.

12. Consequently, Indonesia submits that the Panel erred in finding that Indonesia has acted inconsistently with Article I:1 of the GATT 1994 based on the sole reason that Regulation 137.1/PMK.011/2014 is not a safeguard measure.

13. The Panel also erred in concluding that the co-complainants also make the same claim on the basis of the same arguments against the specific duty *as a stand-alone measure* and Indonesia has not contested the co-complainants' Article I:1 claim against the specific duty *as a stand-alone measure*.

14. Based on the foregoing reasons Indonesia is of the view that the Panel has erred in finding Regulation 137.1/PMK.011/2014 is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards as well as Article XIX:1(a) of the GATT 1994. Indonesia also submits that the Panel has erred in making finding of co-complainants' MFN claim as a stand-alone measure. Therefore, 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, 7.44 and 8.1 of its Report.

III. THE PANEL ERRED TO MAKE A FINDING THAT IS OUTSIDE ITS TERM OF REFERENCE

15. Indonesia submits that the Panel has erred in making findings that is outside its term of reference because of two reasons. Indonesia submits that the Panel has erred. 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, co-complainants have explicitly identified the measure at issue as "the specific duty imposed as a safeguard measure".¹⁸ Based on the well-established case law, the panel's jurisdiction or term of reference shall refer to the document of the co-complainants' panel request and the co-complainants have identified the measure at issue in the Panel Request as a safeguard measure. This has also been acknowledged by the Panel itself that both parties agreed and never disputed that in fact Regulation 137.1/PMK.011/2014 is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.¹⁹

16. Nevertheless, although outside of its term of reference and never disputed by parties, the Panel felt obliged to assess whether or not Regulation 137.1/PMK.011/2014 is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards or the last sentence of Article XIX:1(a) of the GATT 1994 based on its obligation under Article 11 of the DSU.²⁰

17. This fact differentiate the case at hand with *Dominican Republic – Safeguard Measures*, where the respondent in that case claimed that the measure at issue is not a safeguard measure and therefore, accordingly the panel made an assessment whether the measure at issue is a

¹⁷ Recitals (a)-(e) of Regulation 137.1/PMK.11/2014.

¹⁸ Viet Nam's panel request, pp. 3-4; and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu's panel request, pp. 3-4.

¹⁹ Panel Report, para. 7.10.

²⁰ Panel Report, para. 7.10.

safeguard measure or not.²¹ The other 10 WTO panel reports on safeguard measures, the panel never started their assessment by assessing whether the measure at issue is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards or not.

18. 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 identified in the Panel's request. Indonesia always relates its defense for the co-complainants' MFN claim in connection with its safeguard measure but never as a stand-alone measure.²² This is because in the Panel Request, the co-complainants have explicitly identified the measure at issue as "the specific duty imposed as a *safeguard measure*."²³ If the co-complainants intended to submit a separate claim of inconsistency with the MFN obligation as a stand-alone measure, the co-complainants must make it clear in the Panel Request so Indonesia could also properly defend itself. The Panel in its questions also relates the MFN claim to the safeguard measure and not as stand-alone measure.²⁴ The only time the co-complainants have ever proposed the MFN claim as a stand-alone measure was at the later stage of the Panel proceeding, when the co-complainants answered the Panel's question No. 51 and co-complainants comments on Indonesia's second written submission, as an alternative argument.²⁵ The Appellate Body in *EC and Certain Member States – Large Civil Aircraft* has made it very clear that a party's submissions during panel proceedings cannot cure a defect in a panel request.

19. Based on the foregoing reasons, Indonesia is of the view that the Panel has acted beyond its term of reference because (1) the panel makes a finding under Article 1 of the Agreement on Safeguard when there is no such claim in the panel request and neither party has ever contested this issue. In addition, the Panel's approach is in contradiction with the well-established law; (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 in the Panel request. Accordingly, 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.

IV. 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 SAFEGUARD MEASURE

20. Indonesia is of the view that making a finding that is not disputed by the parties, beyond its term of reference and in contradiction with the prior adopted panel or Appellate Body reports, cannot be justified under Article 11 of the DSU. All case laws referred to by the Panel to justify its approach have distinct facts and circumstances compared to the case at hand, which is one of the party disputed that a certain covered agreements were applicable.

21. 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.²⁶ In the first and second written submission, no party has ever raised the issue that Regulation 137.1/PMK.011/2014 is not a safeguard measure. Ten panel reports concerning safeguard measure (excluding the *Dominican Republic – Safeguard Measures* and the case at hand) has 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.

22. 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.

²¹ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.23-7.32 and 7.89-7.91.

²² Indonesia's first written submission paras. 198-220; and Indonesia's second written submission, paras. 115-127.

²³ Viet Nam's panel request, pp. 3-4; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's panel request, pp. 3-4.

²⁴ See Panel first set of Questions No 42.

²⁵ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and Viet Nam's response to Panel question No.51, paras.1.20-1.25.

²⁶ See Second Set of Panel Questions.

V. CONCLUSION

23. Based on the foregoing reasons, Indonesia requests the Appellate Body to reverse the Panel's specific conclusions and findings as set out above.

ANNEX B-2**EXECUTIVE SUMMARY OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU'S OTHER APPELLANT'S SUBMISSION**

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu seeks reversal by the Appellate Body of a number of findings made by the Panel in this dispute.
2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's first ground of appeal is that the Panel erred in finding that the specific duty imposed by Indonesia is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, because the Panel's proposed definition is erroneous in that it (i) confuses the issue of the legal characterization of a safeguard measure with the legality of a safeguard measure, (ii) contradicts the object and purpose of the Agreement on Safeguards, and (iii) diminishes the rights and obligations of WTO members under the Agreement on Safeguards and the GATT 1994.
3. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that Article XIX:1(a) of the GATT 1994, which the Panel considers to be the relevant paragraph for defining safeguard measures, only lays down a substantive rule governing the imposition of "safeguard measure" but does not provide any definition for "safeguard measure". The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu further considers that the term "safeguard measure" should be broadly interpreted so as to encompass all measures taken against serious injury arising from increased imports without any limitation to the particular type of measure.
4. For the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's second ground of appeal, in the case that the Appellate Body finds that the specific duty imposed by Indonesia is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body complete the analysis with respect to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994, and find that the specific duty is inconsistent with the relevant provisions of such agreements in accordance with The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's claims at the panel stage.
5. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that there is a sufficient factual basis for the Appellate Body to complete the analysis in the present dispute as the Panel has set forth the relevant facts in the Panel Report, and there are no overriding concerns which would prevent it from doing so.¹

¹ (total word count: 343)

ANNEX B-3**EXECUTIVE SUMMARY OF VIET NAM'S OTHER APPELLANT'S SUBMISSION****1 INTRODUCTION¹**

1.1. Viet Nam files this other appeal for systemic and commercial reasons.

1.2. From a systemic perspective, Viet Nam disagrees with the Panel's interpretation of Article XIX GATT 1994 and the Agreement on Safeguards and its finding that the measures at issue do not constitute "safeguard measures" for purposes of WTO law for the following reasons.

1.3. The Panel's approach would exclude from the multilateral disciplines of Article XIX and the Agreement on Safeguards a wide array of measures that are clearly intended to prevent or remedy serious injury to the domestic industry; that are imposed as a result of domestic safeguard investigations; that are notified to the WTO Committee on Safeguards and to all other WTO Members as "safeguard measures"; that involve the participation of exporters, importers and other interested parties and exporting Governments in complex and time-consuming investigations; that give rise to consultations required under the auspices of the Agreement on Safeguards; and that have substantial effects on the commercial interests of exporters and the trading community at large.

1.4. The Panel's interpretation of what is a "safeguard measure" conveys an improper message to governments. Under the Panel's approach, governments may – perhaps under pressure from domestic producers – initiate and conduct safeguard investigations, requiring the involvement of exporters and exporting governments in financially and administratively burdensome investigations and then avoid any consequences under WTO law simply by tweaking the measure they impose at the end of the process. There may be many reasons why a Member would choose to proceed under its domestic safeguards laws rather than by, for example, imposing anti-dumping measures or increasing ordinary customs duties.

1.5. From a commercial perspective, Viet Nam's exports of the subject products have been seriously affected by Indonesia's safeguard measure. Viet Nam also notes that by virtue of Regulation No. 130/PMK.010/2017 of its Ministry of Finance, Indonesia has decided to extend the specific duty for a period of two years from the enactment of the regulation on 20 September 2017.

1.6. Viet Nam hopes that the Appellate Body will provide certainty with respect to the types of measures that are subject to Article XIX and the Agreement on Safeguards. In this connection, Viet Nam requests that the Appellate Body determine that Indonesia's specific measure is a safeguard measure that is inconsistent with Article XIX and the Agreement on Safeguards.

2 THE PANEL ERRED IN FINDING THAT INDONESIA'S SPECIFIC SAFEGUARD DUTY IS NOT A "SAFEGUARD MEASURE" UNDER ARTICLE XIX AND THE AGREEMENT ON SAFEGUARDS

2.1. Viet Nam appeals the Panel Report on the ground that the Panel made a reversible legal error in finding that Indonesia's specific duty is not a safeguard measure, as reflected in paragraphs 7.40-7.41, as well as paragraphs 8.1(a) and 8.2 of the Panel Report.

¹ This Executive Summary contains a total of 2616 words (including footnotes). Viet Nam's Other Appellant's Submission contains a total of 26,196 words (including footnotes).

2.2. Viet Nam submits that this finding is based on the Panel's erroneous interpretation and application of Article XIX, multiple provisions of the Agreement on Safeguards, including Articles 1, 9.1, as well as the General Interpretative Note to Annex 1A of the WTO Agreement (General Interpretative Note to Annex 1A). The Panel based its position on two reasons:

- *First*, the Panel stated that the discrimination that is called for by Article 9.1 of the Agreement on Safeguards is not intended to prevent or remedy serious injury, but rather to ensure certain market access for developing country imports.
- *Second*, the Panel stated that there is a conflict between the obligation of excluding imports from certain developing countries under Article 9.1 of the Agreement on Safeguards and Article I:1 of the GATT 1994. By virtue of the General Interpretative Note to Annex 1A of the WTO Agreement, Article 9.1 prevails over Article I:1. Therefore, there is "no legal basis for the assertion that the discriminatory application of a safeguard measure in accordance with Article 9.1 constitutes a suspension of Article I:1, within the meaning of Article XIX:1(a)".

2.3. In the remaining parts of this section, Viet Nam explains the legal standard to determine whether the measure at issue is a safeguard measure and elaborates on the grounds of its appeal.

2.1 Legal standard to determine whether the measure at issue is a safeguard measure

2.4. Viet Nam considers that the following elements determine whether a measure is a "safeguard measure" for the purposes of Article XIX of the GATT 1994 and the Agreement on Safeguards:

- (i) The measure encompasses a "suspension" of GATT "obligations", or a "withdrawal" or "modification" of GATT concessions. The term "obligations" in Article XIX:1(a) includes the most-favoured-nation (MFN) treatment obligation under Article I:1 of the GATT 1994;
- (ii) The measure is taken with a view to preventing or remedying serious injury to the domestic industry or threat thereof, and facilitating the adjustment of the domestic industry; and
- (iii) The fact that a Member takes a measure as a result of an investigation conducted pursuant to Article XIX and the Agreement on Safeguards, notifies that investigation and the resulting measure to the Committee on Safeguards and to the other WTO Members is evidence that the measure has been taken as a "safeguard measure" to prevent or remedy serious injury to the domestic industry.

2.2 Ground 1: the Panel's consideration that an exclusion under Article 9.1 is not a "suspension" intended to prevent or remedy serious injury

2.5. The Panel's first reason for stating that an exclusion of imports under Article 9.1 is not a "suspension" for Article XIX purposes was that it considered that the discrimination called for by Article 9.1 of the Agreement on Safeguards is not intended to prevent or remedy serious injury. Hence, it was not the type of suspension envisaged by Article XIX:1(a).

2.6. Viet Nam considers that the Panel arrived at this conclusion by unduly splitting the safeguard measure at issue into two of its components: (i) on the one hand, the specific duty that applies to the non-excluded countries; and (ii) on the other hand, the exclusion from the application of that duty to the benefit of imports from certain developing countries. After it bifurcated the measure in this manner, the Panel's subsequent reasoning was based entirely on the purpose of the *second part*, while it disregarded the *first part*. The Panel did not address whether the measure as a whole was aimed to prevent or remedy serious injury to the extent necessary.

2.7. However, the two aspects of Indonesia's safeguard measure are part and parcel of the same measure. They are intrinsically linked. This is evident from the design, structure and the intended operation of the measure at issue, based on the texts of KPPI's Final Disclosure Report and Regulation No. 137.1/PMK.011/2014. Clearly, Indonesia could not impose the specific duty *unless*

it met the requirements of both Article 9.1 of the Agreement on Safeguards and its domestic legislation implementing that provision.

2.8. Furthermore, in the Panel's view, "the fact that a Member initiated and conducted an investigation under its domestic safeguards legislation does not necessarily mean that the measures imposed on the investigated product at the end of that process are 'safeguard measures' within the meaning of Article XIX and the Agreement on Safeguards".² However, both the fact that Indonesia's specific duty was imposed as a result of a safeguard investigation initiated, conducted and notified under Article XIX, the Agreement on Safeguards and Indonesia's domestic safeguards legislation and the fact that the resulting measure was notified to all exporting Members and the Committee on Safeguards as a safeguard measure reveal a clear intention to impose a measure designed to prevent and remedy the serious injury to the domestic industry.

2.9. For these reasons, Viet Nam submits that the Panel erred in finding that an exclusion of imports under Article 9.1 of the Agreement on Safeguards is not a "suspension" for the purposes of Article XIX as the discrimination called for by Article 9.1 is not intended to prevent or remedy serious injury.

2.3 Ground 2: the Panel's consideration that an exclusion under Article 9.1 is not a "suspension" because the General Interpretative Note to Annex 1A of the WTO Agreement applies

2.10. The Panel's second reason was that the discriminatory application of a safeguard measure in accordance with Article 9.1 does not constitute a "suspension" of Article I:1, because, by virtue of the General Interpretative Note to Annex 1A, Article 9.1 prevails over the MFN obligation. Thus, according to the Panel, the question of "suspension" does not arise when a Member excludes from the scope of a safeguard measure imports from developing countries, pursuant to Article 9.1.³ In Viet Nam's view, this argument is arbitrary and inconsistent with the Panel's own reasoning.

2.11. First, the Panel's resort to the General Interpretative Note to Annex 1A to determine the relationship between Article I:1 and Article 9.1 is in evident contradiction with the Panel's previous position that, as "the specific duty does not constitute a 'safeguard measure' within the meaning of Article 1 of the Agreement on Safeguards ... there is ... no basis for Indonesia's assertion that it was legally required to apply the specific duty in the manner required by Article 9.1".⁴ Thus, as a matter of internal consistency, after having determined that Article 9.1 was not a proper justification for the exclusion of imports, the Panel nonetheless relied on that rejected justification to invoke the General Interpretative Note and establish that there was no proper "suspension" of Article I:1. The Panel's reasoning is arbitrary to say the least.

2.12. More importantly, the Panel's reference to the General Interpretative Note to Annex 1A implies erroneously that there is a "conflict" between the rule in Article 9.1 of the Agreement on Safeguards and the MFN obligation under Article I:1 of the GATT 1994. Although adherence to Article 9.1 will lead to a violation of Article I:1, Viet Nam considers that the relationship between these provisions cannot be properly characterized as a conflict. Rather, Article I:1 of the GATT 1994, on the one hand, and Article XIX:1(a), as clarified by the Agreement on Safeguards, including Article 9.1, on the other hand, follow a "general rule - exception" relationship. Moreover, given that Articles I:1 and XIX:1(a) are parts of *the same covered agreement* – the GATT 1994, there is no conflict between provisions in two different agreements. Thus, for this reason too, the General Interpretative Note to Annex 1A does not apply.

2.13. However, even assuming that there was a "conflict" between Article I:1 and Article 9.1, the Panel did not explain how the prevalence of one provision over another would entail that the provision that does not apply has to be considered as not "suspended". The Panel simply assumed that these two notions have different meanings, without examining them with a view to determining the applicability of the General Interpretative Note to Annex 1A.

² Panel Report, *Indonesia – Iron or Steel Products*, para. 7.34.

³ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.29.

⁴ Panel Report, *Indonesia – Iron or Steel Products*, para. 7.26.

2.14. In light of the foregoing, the Panel erred in finding that the discriminatory application of a safeguard measure in accordance with Article 9.1 does not constitute a "suspension" of Article I:1, because of the application of the General Interpretative Note to Annex 1A.

2.15. Consequently, the Panel's general finding that the suspension of Article I:1 to exclude certain imports from the application of the specific duty, i.e. imports from developing countries pursuant to Article 9.1, does not constitute a "suspension" for purposes of Article XIX:1(a) and the Agreement on Safeguards has no legal basis.

3 VIET NAM'S REQUESTS FOR THE COMPLETION OF THE LEGAL ANALYSIS

3.1. In the event that the Appellate Body reverses the Panel's finding that Indonesia's specific duty is not a safeguard measure, Viet Nam requests the Appellate Body to complete the legal analysis with respect to its claims under Article XIX and the Agreement on Safeguards, and to make findings with respect to these claims. Viet Nam submits that there are sufficient undisputed facts on the record to make these findings. Further, Viet Nam considers that the completion of the legal analysis is essential to achieve a prompt and positive solution to this dispute within the meaning of Articles 3.3 and 3.7 of the DSU, particularly in the light of Indonesia's notification of 20 September 2017 proposing to extend the safeguard duty for a period of two years.

4 VIET NAM REQUESTS THE APPELLATE BODY TO LEAVE THE PANEL'S FINDING UNDER ARTICLE I:1 OF THE GATT 1994 UNDISTURBED

4.1. Viet Nam's does not appeal the Panel's finding of the inconsistency of Indonesia's specific duty with Indonesia's MFN-treatment obligation under Article I:1 of the GATT 1994 in paragraphs 7.42-7.44 and 8.1(b) of the Panel Report. Moreover, Viet Nam recalls that Article XIX:1(a) allows Members to suspend a GATT obligation or to withdraw or modify a tariff concession only if they satisfy substantive and procedural requirements in Article XIX of the GATT 1994 and the Agreement on Safeguards. Given that the measures at issue are inconsistent with numerous requirements of Article XIX and the Agreement on Safeguards, Indonesia cannot avail itself of the escape clause in Article XIX:1(a). On this basis, Viet Nam, requests the Appellate Body to leave this finding undisturbed.

5 REQUEST FOR FINDINGS, RULINGS, AND SUGGESTION FOR IMPLEMENTATION

5.1. In the light of the foregoing, Viet Nam requests the Appellate Body to:

- a. Reverse the Panel's finding in paragraphs 7.40-7.41, 8.1(a) and 8.2 of the Panel Report that Indonesia's measure is not a safeguard measure within the meaning of Article XIX:1(a) of the GATT 1994 and Article 1 of the Agreement on Safeguards and to find instead that this specific duty is a safeguard measure within the meaning of those provisions. Viet Nam further requests the Appellate Body to declare moot and of no legal effect the Panel's legal interpretations provided in paragraphs 7.12-7.41 of the Panel Report, and paragraphs 2.9-3.7 of Annex A-3 of the Addendum to the Panel Report;
- b. Complete the legal analysis with respect to the complainants' claims under Articles XIX:1(a) and XIX:2 of the GATT 1994 and the Agreement on Safeguards;
- c. Leave undisturbed the Panel's finding contained in paragraphs 7.42-7.44 and 8.1(b) of the Panel Report that Indonesia's specific duty is inconsistent with Indonesia's MFN-treatment obligation under Article I:1 of the GATT 1994; and
- d. Exercise its discretion under Article 19.1 of the DSU and suggest that Indonesia bring its measure, and any extension of it, into conformity with its WTO obligations by immediately withdrawing the specific duty at issue.

ANNEX B-4**EXECUTIVE SUMMARY OF VIET NAM'S APPELLEE'S SUBMISSION**

1.1. Viet Nam agrees with Indonesia's first ground of appeal. Viet Nam provided its views on this matter in paragraphs 3.1-3.61 of its other appellant's submission. Thus, Viet Nam requests the Appellate Body to reverse the Panel's finding that the measure at issue is not a safeguard measure. However, contrary to Indonesia's position, Viet Nam requests the Appellate Body to complete the Panel's legal analysis with respect to its safeguard-related claims.

1.2. Viet Nam disagrees with Indonesia's second ground of appeal. Indonesia's appeal does not clearly set out the Panel's errors, as required by Rules 20(2)(d) and 21(2)(b)(i) of the Appellate Body's Working Procedures, and this lack of clarity prevents Viet Nam from articulating a proper defence of the Panel's finding. Indonesia seems to suggest that the only basis for the Panel's finding of inconsistency with Article I:1 was the finding that the measure was not a safeguard measure and, therefore, that a reversal of this characterization should logically lead to a reversal of the inconsistency with Article I:1. However, the mere characterization of the measure was not determinative of whether the measure was inconsistent with Article I:1 of the GATT 1994. Rather, to find the inconsistency of the measure with Article I:1, the Panel analyzed the Article I:1 claim on the basis of its merits, in the light of the requirements of that provision.

1.3. In any event, Indonesia has failed to demonstrate that the Panel's finding that Indonesia's specific duty is inconsistent with Article I:1 of the GATT 1994 is outside of the Panel's terms of reference and thus inconsistent with Article 6.2 of the DSU. The precise basis for Indonesia's procedural objection is unclear. It appears to be that the proper identification of the specific duty in Viet Nam's Panel request somehow depended on whether the duty was ultimately characterized by the Panel as a "safeguard measure". Nevertheless, Indonesia failed to demonstrate how the Panel's characterization of the measure was dispositive of whether Viet Nam properly identified the specific duty in its Panel request and renders the Panel's finding of inconsistency with Article I:1 of the GATT 1994 outside its terms of reference. Viet Nam's claim under Article I:1 was made in compliance with the requirements of Article 6.2, and, therefore, the matter was properly within the Panel's terms of reference.

1.4. Viet Nam's Panel request identifies the measure at issue as a "specific duty" imposed on imports of the subject product, specified in the same paragraph (i.e. "flat-rolled product of iron or non-alloy steel ..."), which was "imposed [*by Indonesian authorities*] as a safeguard measure, as a result of the investigation initiated on 19 December 2012 and concluded by the Final Disclosure Report". Viet Nam also cited Indonesia's own notifications of various aspects of the safeguard investigation leading to the imposition of this duty to the WTO Committee on Safeguards.¹ Indonesia, Viet Nam, and the Panel had identified the same measure. The fact that the Panel request uses the wording "imposed as a safeguard measure" is a reflection of how Indonesia itself imposed the measure.

1.5. Furthermore, the title of Section "Legal Basis" of the Panel request makes it clear that this section addresses the second requirement of Article 6.2 (i.e. legal basis of the complaint). In addition, the text of paragraph 1.7(a), by referring to "the specific duty", connects the legal basis of the complaint to the measure at issue identified in paragraph para. 1.5(a) of the Panel request (i.e. the specific duty). The Panel request also meets the other requirements in Article 6.2. It was "made in writing" and "indicate[s] whether consultations were held".²

1.6. Viet Nam also disagrees with Indonesia's third ground of appeal. The Panel was not precluded by its terms of reference from determining whether the measure at issue was a safeguard measure for purposes of WTO law.

¹ See *Indonesia – Iron or Steel Products*, Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 18 September 2015, footnote 4.

² See *Indonesia – Iron or Steel Products*, Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 18 September 2015, p. 1.

1.7. While Viet Nam has not made a claim under Article 11 of the DSU, it agrees with Indonesia's general proposition that the Panel did not conduct the treatment of the threshold question in a manner that would ensure an objective assessment of the question before it.

1.8. Viet Nam requests the Appellate Body to:

- a. Reverse the Panel's finding that Indonesia's measure is not a safeguard measure and to declare of no legal effect the Panel's legal interpretations provided in paragraphs 7.12-7.41 of the Panel Report, and paragraphs 2.9-3.7 of Annex A-3 of the Addendum to the Panel Report;
- b. Complete the legal analysis with respect to the complainants' claims under Articles XIX:1(a) and XIX:2 of the GATT 1994 and the Agreement on Safeguards;
- c. Dismiss Indonesia's second ground of appeal as Indonesia failed to comply with the requirements of Rules 20(2)(d) and 21(2)(b)(i) of the Appellate Body's Working Procedures. Should the Appellate Body reject Viet Nam's procedural objection, the Appellate Body should find that the Panel did not act inconsistently with Article 6.2 of the DSU;
- d. Reject Indonesia's third ground of appeal, as the Panel was not precluded by its terms of reference from determining whether the measure at issue is a safeguard measure for purposes of WTO law; and
- e. Exercise its discretion under Article 19.1 of the DSU and suggest that Indonesia bring its measure, and any extension of it, into conformity with its WTO obligations by immediately withdrawing the specific duty at issue.³

1.9. As no party appealed the Panel's finding that the specific duty at issue is inconsistent with Article I:1 of the GATT 1994, the Appellate Body should leave this finding, as set out in paragraphs 7.42-7.44 and 8.1(b) of the Panel Report, undisturbed.

³ See Viet Nam's other appellant's submission, paras. 6.4-6.7.

ANNEX B-5**EXECUTIVE SUMMARY OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU'S APPELLEE'S SUBMISSION**

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu files this appellee's submission seeking dismissal of certain grounds of appeal from Indonesia's Appellant Submission filed on 28 September 2017.
2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Indonesia's claim that the Panel erred in determining that the specific duty was not a safeguard measure. Since the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu takes the position that the specific duty is a safeguard measure, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu has decided not to address Indonesia's claim that the Panel failed to make an objective assessment under Article 11 of the DSU with respect to finding that the specific duty is not a safeguard measure.
3. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with Indonesia's claim that the Panel acted beyond its terms of reference when it assessed whether the specific duty is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu also disagrees with Indonesia's claim that the Panel acted beyond its terms of reference and erred when it found that the specific duty is inconsistent with Article I:1 of the GATT 1994.
4. Finally, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with Indonesia's claim that the Appellate Body has no grounds to complete the legal analysis should the Appellate Body find the specific duty at issue to be a safeguard measure.
5. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submits that Indonesia's appeal of the Panel's finding on the inconsistency of the specific duty with Article I:1 must be dismissed on grounds that:
 - Indonesia's appeal does not fulfil the requirements of Rules 20(2)(d) and 21(2)(b)(i) of the Working Rules for Appellate review, as it does not sufficiently identify the alleged errors in the issues of law;
 - The Panel did not exceed its terms of reference in assessing the legal characterisation of the specific duty, as it is the Panel's duty to perform an objective assessment of the matter as required by Article 11 of the DSU;
 - The Panel did not exceed its terms of reference in finding that the specific duty is inconsistent with Article I:1 of the GATT 1994, as the Article I:1 claim against the specific duty is plainly and clearly prescribed in the text of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's panel request; and
 - The Panel properly performed legal analysis under Article I:1 of the GATT 1994 and correctly found that Indonesia breached its MFN-treatment obligation under such provision.
6. Lastly, in the case that the Appellate Body finds that the specific duty is a safeguard measure, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu requests that the Appellate Body complete the legal analysis for the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu's claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:1 of the GATT 1994.¹

¹ (total word count: 421)

ANNEX B-6**EXECUTIVE SUMMARY OF INDONESIA'S APPELLEE'S SUBMISSION****I. INTRODUCTION¹**

1. This dispute concerns Indonesia safeguard measure that is not considered as a safeguard measure by the Panel. All parties to the dispute agreed that the measure at issue, Regulation No 137.1/PMK.011/2014 (Regulation 137) is in fact a safeguard measure. Thus, the Appellate Body is called upon to clarify this issue not only for this dispute but also for systemic reason.

2. Indonesia stands on its position that although Indonesia agree with the Other Appellants that Regulation 137 is in fact a safeguard measure, Indonesia contends that the Appellate Body (1) should not complete the legal analysis on Regulation 137 and/or Regulation 130 (2) should reject the Other Appellant's request to leave the Panel's finding under Article I:1 GATT 1994 undisturbed should the Appellate Body reverse the Panel's finding that Indonesia's specific duty is not a safeguard measure (3) should not exercise its discretion under Article 19.1 DSU to suggest that the only way for Indonesia to bring its measure into conformity with its WTO obligations is to immediately withdraw Regulation 137 and Regulation 130.

II. THE APPELLATE BODY SHALL NOT COMPLETE THE LEGAL ANALYSIS WITH RESPECT TO OTHER APPELLANTS' CLAIM UNDER THE AGREEMENT ON SAFEGUARDS AND ARTICLE XIX:1(A) AND XIX:2 GATT 1994

3. The Appellate Body has been very cautious in exercising this discretion because the actual mandate of the Appellate Body is only to uphold, modify or reverse the panel's findings appealed.² In this case, the Other Appellants request the Appellate Body to complete the legal analysis on their claims concerning measure at issue that has expired and been replaced with a new regulation that has different sets of facts and has not been addressed at all in the panel stage. Indonesia is of the view that the Appellate Body should reject the Other Appellants' request to complete the legal analysis because (1) completing legal analysis for an expired measure would not be necessary to secure positive solution; (2) some claims under Regulation 137 involves a novel character; and (3) there is no sufficient factual findings nor any undisputed facts in the panel report on Regulation 130.

A. The Appellate Body Shall Not Complete The Legal Analysis On Expired Measure

4. Indonesia submits that completing the legal analysis on Regulation 137 is not necessary to secure a positive solution to this dispute since Regulation 137 has been replaced by Regulation 130.³ Regulation 130 is essentially different with Regulation 137 because it were based on different investigation, legal basis, period of investigation, set of facts on increased imports, injury and causal link, KPPI's final reports, notifications, and different consultations.

B. The Appellate Body Shall Not Complete The Legal Analysis On Novel Issues

5. Some claims raised by the Other Appellants involves a novel issue that has never been addressed by the Appellate Body nor the panels, i.e., the claim relating to parallelism between the product scope of the investigation and the safeguard measure at issue; and the maximum time gap between the end of the POI and the issuance of investigating authority final disclosure report or the imposition of the safeguard measure, which have never been addressed by the Appellate Body.

¹ This Executive Summary contains 1,037 words including footnotes. Indonesia's Appellee's Submission contains 10,151 words, including footnotes.

² Article 17.12 and 17.13 DSU.

³ Panel Report, *Dominican – PP Bags*, para. 7.22.

6. Indonesia submits that should the Appellate Body were to decide to complete the legal analysis on claims relating to Regulation 137, Indonesia respectfully requests the Appellate Body not to complete the legal analysis on claims containing novel issues.

C. The Appellate Body Shall Not Complete The Legal Analysis On Regulation 130

7. Indonesia is of the view that the Appellate Body should not complete the legal analysis on Regulation 130. Although Regulation 130 is the amendment of Regulation 137, there is no sufficient factual findings nor any undisputed facts in the panel report. Moreover, the Other Appellants also have never raised, argued, nor put any evidence concerning Regulation 130.

8. All claims relating to Regulation 137 cannot be automatically assessed under Regulation 130. Regulation 130 is totally different than Regulation 137. Therefore, Indonesia's due process right will be detrimentally undermined should the Appellate Body decides to complete the legal analysis on Regulation 130 in order to secure positive solution to this dispute.

III. VIET NAM REQUEST TO LEAVE THE PANEL'S FINDING UNDER ARTICLE I:1 GATT 1994 SHOULD BE REJECTED

9. Indonesia submits that if the Appellate Body were to reverse the Panel finding that Regulation 137 is not a safeguard measure, the Panel erred in finding that Regulation 137 is inconsistent with Article I:1 GATT 1994 since the sole reason is because the Panel found that Regulation 137 is not a safeguard measure.

10. Indonesia submits that Regulation 137 is a safeguard measure. Under Article 9.1 of the Agreement on Safeguards Indonesia is obliged to exclude certain developing country Members from the imposition of the safeguard measure. This obligation is not conditional upon whether Indonesia has satisfied all substantive and procedural requirements in Article XIX and the Agreement on Safeguards.

IV. VIET NAM REQUEST FOR SUGGESTION FOR IMPLEMENTATION SHOULD BE REJECTED

11. Indonesia submits that the Appellate Body should reject Viet Nam's request for the Appellate Body to suggest that the *only* manner in which Indonesia could remove the various allegations of inconsistencies at issue is by immediately withdrawing both Regulation 137 and Regulation 130 because (1) Regulation 137 is no longer in force; (2) the Appellate Body should confer Indonesia the discretion to choose on how Indonesia could implement the Appellate Body's recommendation; and (3) the Appellate Body cannot complete the legal analysis and make any finding or recommendation or suggestion on Regulation.

V. CONCLUSION

12. For the reasons above, Indonesia respectfully requests the Appellate Body to reject (1) the Other Appellants' request to complete the legal analysis under the Agreement on Safeguards and Article XIX:1(a) and XIX:2 GATT 1994; (2) Viet Nam request to leave the panel's finding under Article I:1 GATT 1994; and (3) Viet Nam request for suggestion for implementation.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

I. EXECUTIVE SUMMARY¹

1. Australia considers that the Panel did not err in finding that Indonesia's specific duty did not constitute a safeguard measure for the purpose of Article XIX:1(a) of the GATT 1994.²
2. Article XIX:1(a) establishes that a "safeguard measure" is a measure that:
 - (i) suspends a Member's GATT obligation or withdraws or modifies a Member's scheduled tariff concession (this comprises the *substantive content* of a safeguard measure); and
 - (ii) suspends that obligation, or withdraws or modifies that concession, with the aim of addressing serious injury to the Member's like domestic industry caused or threatened by a surge of imports resulting from the obligation or concession at issue (this comprises the *substantive objective* of a safeguard measure).
3. Importantly, the content and objective of a safeguard measure are *linked* – i.e., in order to constitute a safeguard measure, the *obligation that is suspended* must be suspended *with the aim of addressing* an injurious surge of imports caused or threatened by complying with that obligation.³
4. While Australia agrees with Vietnam and Chinese Taipei that the Panel's *definition* of a safeguard measure improperly imported conditions related to a measure's *valid imposition*, this erroneous definition did not taint the Panel's substantive *finding*. Rather, the Panel found that Indonesia's specific duty did not suspend *any* relevant GATT obligation for the purpose of Article XIX:1(a).⁴
5. While the text of Article XIX:1(a) does not explicitly limit the obligations that can relevantly be suspended for the purpose of the provision, it establishes that the obligation at issue must be capable of being suspended *to address* an injurious surge of imports caused or threatened by complying with that obligation.
6. In Australia's view, the participants' argument that the specific duty suspended Article I:1 for the purpose of Article XIX:1(a) fails to demonstrate that the *discriminatory* application of the duty had the requisite *objective* of a safeguard measure; and ignores the *requisite link* between a safeguard measure's two constituent elements.
7. Since the Panel's finding that Indonesia's specific duty is not a safeguard measure is supported by a proper interpretation of Article XIX:1(a), Australia submits that the participants' claims should be rejected.

¹ This executive summary totals 432 words (including footnotes). Australia's third participant submission totals 4326 words (including footnotes).

² Panel Report, *Indonesia – Iron or Steel Products*, para. 7.40.

³ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 93; and *Korea – Dairy*, para. 86.

⁴ Panel Report, *Indonesia – Iron or Steel Products*, paras. 7.40-7.41.

ANNEX C-2**EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹****A. CHARACTERISATION OF THE MEASURE AT ISSUE**

1. The European Union considers that the Panel was right to consider on its own motion whether the measure at issue constituted a safeguard measure. A panel's obligation to "make an objective assessment of the matter" pursuant to Article 11 comprises the assessment of the applicability of the covered Agreement. The applicability of the provisions which the complainant alleges to be breached is an important part of its *prima facie* case. Thus, where a panel has doubts about this element, it should examine it on its own motion, regardless of whether or not the parties have raised arguments about it. The fact that an issue is not disputed between the parties does not preclude the panel from examining it and coming to an interpretation which differs from the concurring view of the parties, in line with the general principle *jura novit curia*. The issue is to be distinguished from the question whether a panel can address claims which have not been made by the complainant, which it cannot.
2. However, where a panel intends to deviate fundamentally from qualifications shared by both parties, it is obliged to give parties ample opportunity to present their views on that question before the issue is actually adjudicated. This flows from the fundamental principle of due process, which includes the right to be heard, i.e. for parties to have an adequate opportunity to pursue their claims, make out their defences, and establish the facts.

B. THE CHARACTERISATION OF THE MEASURE ON SUBSTANCE

3. To understand what a safeguard measure is, it is required a harmonious reading of the Agreement on Safeguards and Article XIX of GATT 1994.
4. The European Union notes that there are two defining features of a safeguard measure: "suspend the obligation" and "withdraw or modify the concession". The other conditions in Article XIX, whilst not *sine qua non*, may nevertheless serve as confirming hallmarks: increased quantities; like/competitive product; injury; causation.

C. THE STAND-ALONE MFN VIOLATION

5. A panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing; subsequent submissions cannot cure a defect in a panel request. In the present case, the European Union considers that in the circumstances of the case, the co-complainants' panel requests (although being very broad and general on their face) can only be understood as setting out the case as a case against a safeguard measure.
6. Under this premise, the violation of Article I:1 of GATT 1994 can logically only have been consequential to an alleged wrongful application of Article 9.1 of Safeguards Agreement (due to the application of the exclusion to six EU Member States). This alleged breach is fundamentally different in nature from the breach ultimately found by the Panel, namely a breach of Article I:1 due to the exclusion of 118 developing countries, given the non-applicability of Article 9.1 of Safeguards Agreement. The fact that the panel requests did not, as they should have, spell out clearly how or why the measure was supposed to have violated the provisions it allegedly breaches, cannot be relied on to subsequently broaden the scope of the case in order to include claims which were not included in the beginning.

¹ Total number of words (including footnotes but excluding executive summary) = 8069; total number of words of the executive summary = 547.

ANNEX C-3

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION¹

1. In Japan's view, the Panel improperly examined as a preliminary issue whether the duty at issue was a "safeguard measure" defined as a measure suspending, withdrawing or modifying a GATT obligation or concession in order to prevent or remedy serious injury.
2. Japan notes that Article XIX:1(a) of the GATT 1994 does not contain a definition of what is a "safeguard measure". At best, it can be deduced from the text of Article XIX:1(a) of the GATT 1994 that this provision can be invoked by a Member when it is necessary to justify a measure that is inconsistent with *any other GATT provision* (e.g., GATT Articles I, II or XI) provided that the measure meets the requirements laid down in Article XIX of the GATT 1994 and the Agreement on Safeguards.
3. Thus, Japan understands that the only requirement in order for a panel to examine whether a measure is consistent/inconsistent with Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards is whether a GATT obligation is suspended and/or a concession is withdrawn/modified and that the Member applying the measure invokes Article XIX of the GATT 1994 and the Agreement on Safeguards. The question of whether the measure is necessary to prevent or remedy serious injury is not relevant to determine whether a panel may proceed with the examination of whether the measure is consistent/inconsistent with Article XIX:1(a) of the GATT 1994 and the Agreement on Safeguards but rather must be part of the examination of whether the requirements set out in Article XIX:1(a) and the Agreement on Safeguards are satisfied.

¹ 264 words.