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ORGANIZATION

**WT/DS490/AB/R**  
**WT/DS496/AB/R**

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## **INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS**

AB-2017-6

*Report of the Appellate Body*

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**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
BCI	business confidential information
Chinese Taipei's panel request	Request for the Establishment of a Panel by Chinese Taipei, WT/DS490/2
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
General Interpretative Note	General Interpretative Note to Annex 1A of the WTO Agreement
HS	harmonized system
JE	Joint Exhibit
KPPI	Komite Pengamanan Perdagangan Indonesia
MFN	most-favoured nation
Panel Report	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/R, WT/DS496/R, and Add.1
Regulation 137	Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on Imposition of a Safeguard Duty against the Import of Flat-Rolled Products of Iron or Non-Alloy Steel, dated 7 July 2014 and promulgated on 15 July 2014
RTA	regional trade agreement
S&D	special and differential
TBT Agreement	Agreement on Technical Barriers to Trade
Viet Nam's panel request	Request for the Establishment of a Panel by Viet Nam, WT/DS496/3
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

**PANEL EXHIBITS CITED IN THIS REPORT**

<b>Exhibit Number</b>	<b>Short Title (if applicable)</b>	<b>Description</b>
IDN-8 (both original and translated versions) JE-1 (translated version)	Final Disclosure Report	KPPI's Final Disclosure Report, dated March 2014
IDN-20 (translated version) JE-4 (both original and translated version)	Regulation 137	Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on Imposition of a Safeguard Duty against the Import of Flat-Rolled Products of Iron or Non-Alloy Steel, dated 7 July 2014 and promulgated on 15 July 2014

### CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , <a href="#">WT/DS121/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , <a href="#">WT/DS438/AB/R</a> / <a href="#">WT/DS444/AB/R</a> / <a href="#">WT/DS445/AB/R</a> , adopted 26 January 2015, DSR 2015:II, p. 579
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , <a href="#">WT/DS367/AB/R</a> , adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , <a href="#">WT/DS18/AB/R</a> , adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , <a href="#">WT/DS22/AB/R</a> , adopted 20 March 1997, DSR 1997:I, p. 167
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , <a href="#">WT/DS139/AB/R</a> , <a href="#">WT/DS142/AB/R</a> , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Renewable Energy/ Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , <a href="#">WT/DS412/AB/R</a> / <a href="#">WT/DS426/AB/R</a> , adopted 24 May 2013, DSR 2013:I, p. 7
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , <a href="#">WT/DS276/AB/R</a> , adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , <a href="#">WT/DS207/AB/R</a> , adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , <a href="#">WT/DS207/R</a> , adopted 23 October 2002, as modified by Appellate Body Report <a href="#">WT/DS207AB/R</a> , DSR 2002:VIII, p. 3127
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , <a href="#">WT/DS339/AB/R</a> / <a href="#">WT/DS340/AB/R</a> / <a href="#">WT/DS342/AB/R</a> , adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , <a href="#">WT/DS454/AB/R</a> and Add.1 / <a href="#">WT/DS460/AB/R</a> and Add.1, adopted 28 October 2015
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , <a href="#">WT/DS394/AB/R</a> / <a href="#">WT/DS395/AB/R</a> / <a href="#">WT/DS398/AB/R</a> , adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , <a href="#">WT/DS461/AB/R</a> and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , <a href="#">WT/DS415/R</a> , <a href="#">WT/DS416/R</a> , <a href="#">WT/DS417/R</a> , <a href="#">WT/DS418/R</a> , and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , <a href="#">WT/DS135/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , <a href="#">WT/DS27/AB/R</a> , adopted 25 September 1997, DSR 1997:II, p. 591

Short Title	Full Case Title and Citation
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , <a href="#">WT/DS27/AB/RW2/ECU</a> , adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , <a href="#">WT/DS27/AB/RW/USA</a> and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Fasteners (China)	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , <a href="#">WT/DS397/AB/R</a> , adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , <a href="#">WT/DS26/AB/R</a> , <a href="#">WT/DS48/AB/R</a> , adopted 13 February 1998, DSR 1998:I, p. 135
EC – Seal Products	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , <a href="#">WT/DS400/AB/R</a> / <a href="#">WT/DS401/AB/R</a> , adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , <a href="#">WT/DS315/AB/R</a> , adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tariff Preferences	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , <a href="#">WT/DS246/AB/R</a> , adopted 20 April 2004, DSR 2004:III, p. 925
EC and certain member States – Large Civil Aircraft	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , <a href="#">WT/DS316/AB/R</a> , adopted 1 June 2011, DSR 2011:I, p. 7
Guatemala – Cement I	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , <a href="#">WT/DS60/AB/R</a> , adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Patents (US)	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , <a href="#">WT/DS50/AB/R</a> , adopted 16 January 1998, DSR 1998:I, p. 9
Indonesia – Iron or Steel Products	Panel Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , <a href="#">WT/DS490/R</a> , <a href="#">WT/DS496/R</a> , and Add.1, circulated to WTO Members 18 August 2017
Japan – Apples	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , <a href="#">WT/DS245/AB/R</a> , adopted 10 December 2003, DSR 2003:IX, p. 4391
Korea – Dairy	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , <a href="#">WT/DS98/AB/R</a> , adopted 12 January 2000, DSR 2000:I, p. 3
Thailand – Cigarettes (Philippines)	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , <a href="#">WT/DS371/AB/R</a> , adopted 15 July 2011, DSR 2011:IV, p. 2203
Thailand – H-Beams	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , <a href="#">WT/DS122/AB/R</a> , adopted 5 April 2001, DSR 2001:VII, p. 2701
US – Carbon Steel	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , <a href="#">WT/DS213/AB/R</a> and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Certain EC Products	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , <a href="#">WT/DS165/AB/R</a> , adopted 10 January 2001, DSR 2001:I, p. 373
US – Continued Zeroing	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , <a href="#">WT/DS350/AB/R</a> , adopted 19 February 2009, DSR 2009:III, p. 1291

Short Title	Full Case Title and Citation
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , <a href="#">WT/DS244/AB/R</a> , adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , <a href="#">WT/DS449/AB/R</a> and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , <a href="#">WT/DS437/AB/R</a> , adopted 16 January 2015, DSR 2015:1, p. 7
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , <a href="#">WT/DS212/AB/R</a> , adopted 8 January 2003, DSR 2003:I, p. 5
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS108/AB/RW</a> , adopted 29 January 2002, DSR 2002:I, p. 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/AB/R</a> , adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , <a href="#">WT/DS285/R</a> , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Lamb</i>	Panel Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , <a href="#">WT/DS177/R</a> , <a href="#">WT/DS178/R</a> , adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , <a href="#">WT/DS353/AB/R</a> , adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , <a href="#">WT/DS202/AB/R</a> , adopted 8 March 2002, DSR 2002:IV, p. 1403
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , <a href="#">WT/DS217/AB/R</a> , <a href="#">WT/DS234/AB/R</a> , adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , <a href="#">WT/DS268/AB/R</a> , adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , <a href="#">WT/DS58/AB/R</a> , adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , <a href="#">WT/DS257/AB/R</a> , adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , <a href="#">WT/DS248/AB/R</a> , <a href="#">WT/DS249/AB/R</a> , <a href="#">WT/DS251/AB/R</a> , <a href="#">WT/DS252/AB/R</a> , <a href="#">WT/DS253/AB/R</a> , <a href="#">WT/DS254/AB/R</a> , <a href="#">WT/DS258/AB/R</a> , <a href="#">WT/DS259/AB/R</a> , adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , <a href="#">WT/DS381/R</a> , adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , <a href="#">WT/DS322/AB/RW</a> , adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Indonesia – Safeguard on Certain Iron or Steel Products**

Indonesia, *Appellant/Appellee*  
Chinese Taipei, *Other Appellant/Appellee*  
Viet Nam, *Other Appellant/Appellee*

Australia, *Third Participant*  
Chile, *Third Participant*  
China, *Third Participant*  
European Union, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Russian Federation, *Third Participant*  
Ukraine, *Third Participant*  
United States, *Third Participant*

AB-2017-6

Appellate Body Division:

Zhao, Presiding Member  
Servansing, Member  
Van den Bossche, Member

## 1 INTRODUCTION

1.1. Indonesia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter Chinese Taipei), and Viet Nam each appeal certain issues of law and legal interpretations developed in the Panel Report, *Indonesia – Safeguard on Certain Iron or Steel Products*<sup>1</sup> (Panel Report).<sup>2</sup> On 28 September 2015 and 28 October 2015, two panels were established to consider complaints by, respectively, Chinese Taipei<sup>3</sup> and Viet Nam<sup>4</sup> (the complainants)<sup>5</sup> concerning a specific duty applied by Indonesia on imports of galvalume.<sup>6</sup> The specific duty was imposed following an investigation initiated and conducted under Indonesia's domestic safeguards legislation by Indonesia's competent authority (Komite Pengamanan Perdagangan Indonesia, or KPPI).<sup>7</sup> The specific duty was adopted pursuant to Regulation No. 137.1/PMK.011/2014 (Regulation 137) of the Minister of Finance of the Republic of Indonesia, which entered into force on 22 July 2014.<sup>8</sup> The factual aspects of this dispute are set forth in greater detail in the Panel Report.

<sup>1</sup> WT/DS490/R and WT/DS496/R, 18 August 2017.

<sup>2</sup> The Panel issued its findings in the form of a single document containing common findings as well as conclusions and recommendations with respect to the disputes initiated by Chinese Taipei and Viet Nam.

<sup>3</sup> Request for the Establishment of a Panel by Chinese Taipei, WT/DS490/2, 20 August 2015 (Chinese Taipei's panel request).

<sup>4</sup> Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 15 September 2015 (Viet Nam's panel request).

<sup>5</sup> At its meeting on 28 October 2015, the DSB decided that the panel established at the request of Chinese Taipei in DS490 would also examine the dispute in DS496 initiated by Viet Nam, in accordance with Article 9.1 of the DSU. (Panel Report, para. 1.5)

<sup>6</sup> Galvalume is defined under the specific duty as flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, clad, plated, or coated with aluminium-zinc alloys, containing by weight less than 0.6% of carbon, with a thickness not exceeding 0.7 mm, under harmonized system (HS) code 7210.61.11.00. The complainants also challenged as "measures at issue" notifications made by Indonesia to the Committee on Safeguards, and Indonesia's alleged "failure to provide an opportunity for consultations on relevant information related to the safeguard measure, including on the proposed measure and its date of introduction prior to the actual imposition of the measure". (Chinese Taipei's panel request, pp. 2-3; Viet Nam's panel request, paras. 1.5.b and 1.5.c) In this Report, reference to the "measure at issue" relates to the specific duty applied by Indonesia on imports of galvalume.

<sup>7</sup> Panel Report, para. 2.1; Chinese Taipei's panel request, para. I.B.a; Viet Nam's panel request, para. 1.5.a.

<sup>8</sup> Panel Report, para. 2.2 (referring to Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on Imposition of a Safeguard Duty against the Import of Flat-Rolled Products of Iron or Non-Alloy Steel (22 July 2014) (Panel Exhibits IDN-20 and JE-4)).

1.2. Following consultation with the parties, the Panel adopted its Working Procedures on 1 July 2016, and additional procedures for the protection of business confidential information (BCI) on 22 July 2016.<sup>9</sup>

1.3. Before the Panel, Chinese Taipei and Viet Nam raised several claims in relation to the specific duty applied by Indonesia on imports of galvalume. Specifically, the complainants claimed that Indonesia had acted inconsistently with: (i) Article XIX:1(a) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 3.1 of the Agreement on Safeguards because KPPI failed to demonstrate the existence of "unforeseen developments", "the effect of the [GATT] obligations", and the "logical connection" between these two elements and the increase in imports that allegedly caused serious injury; (ii) Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 3.1 of the Agreement on Safeguards (and, consequently, Articles 4.2(a) and 4.2(c) of the Agreement on Safeguards) because KPPI's determination of increased imports was not based on an increase in imports that is "recent enough"; (iii) 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 because KPPI failed to provide a reasoned and adequate explanation of how the facts support the determination of threat of serious injury, including the evaluation of all relevant serious injury indicators; (iv) Article 4.1(b) of the Agreement on Safeguards (Viet Nam only) because KPPI's finding of threat of serious injury is inconsistent with the definition of "threat of serious injury" under that provision; (v) 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 because KPPI failed to establish a causal link and to conduct a proper non-attribution analysis in accordance with these provisions; and (vi) Articles 2.1, 3.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards because KPPI failed to observe the required "parallelism" by applying the specific duty to a product that is different from the product that was the subject of its investigation, and failed to provide a reasoned and adequate explanation thereof.<sup>10</sup> The complainants further alleged that Indonesia had acted inconsistently with: (i) Article 12.2 of the Agreement on Safeguards because Indonesia failed to provide "all pertinent information" in the notifications of the finding of threat of serious injury and the proposal to impose a safeguard measure to the Committee on Safeguards; and (ii) Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards because Indonesia failed to provide a reasonable opportunity to hold prior consultations.<sup>11</sup>

1.4. The complainants additionally claimed that Indonesia acted inconsistently with Article I:1 of the GATT 1994 because it excluded the products originating in certain countries from the scope of application of the specific duty without according that exemption immediately and unconditionally to like products originating in the territory of other Members, including the complainants.<sup>12</sup>

1.5. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 18 August 2017, the Panel found that: (i) the specific duty applied by Indonesia on imports of galvalume does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards; and (ii) the application of the specific duty on imports of galvalume originating in all but 120 countries is inconsistent with Indonesia's obligation to accord most-favoured nation (MFN) treatment under Article I:1 of the GATT 1994.<sup>13</sup> Having concluded that the specific duty does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Panel found that there was no legal basis to address the complainants' claims under the Agreement on Safeguards and the GATT 1994 with respect to the specific duty *as a safeguard measure*. Accordingly, the Panel dismissed the entirety of those claims.<sup>14</sup>

1.6. In light of its finding that the application of the specific duty is inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994, the Panel recommended, pursuant to Article 19.1 of the DSU, that Indonesia bring its measure into conformity with its obligations under the GATT 1994.<sup>15</sup>

<sup>9</sup> Panel Report, para. 1.9, and Annexes A-1 and A-2.

<sup>10</sup> Panel Report, para. 3.1.a.i-vi.

<sup>11</sup> Panel Report, para. 3.1.a.viii-ix.

<sup>12</sup> Panel Report, paras. 3.1.a.vii and 3.1.b.

<sup>13</sup> Panel Report, para. 8.1.

<sup>14</sup> Panel Report, para. 8.2.

<sup>15</sup> Panel Report, para. 8.4.



1.7. On 28 September 2017, Indonesia notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>16</sup> and appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>17</sup> (Working Procedures). On 3 October 2017, Chinese Taipei and Viet Nam each notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of their intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, and each filed a Notice of Other Appeal<sup>18</sup> and other appellant's submission pursuant to Rule 23 of the Working Procedures.

1.8. On 16 October 2017, Chinese Taipei, Viet Nam, and Indonesia each filed an appellee's submission.<sup>19</sup> On 19 October 2017, Australia, the European Union, and Japan each filed a third participant's submission.<sup>20</sup> On 4 May 2018, Chile, China, India, Korea, the Russia Federation, Ukraine, and the United States each notified its intention to appear at the oral hearing as a third participant.<sup>21</sup>

1.9. By letter dated 27 November 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report by the end of the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>22</sup> The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body, scheduling issues arising from overlap in the composition of the Divisions hearing different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these appellate proceedings place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat. By letter dated 6 July 2018, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 15 August 2018.<sup>23</sup>

1.10. The oral hearing in this appeal was held on 8 and 9 May 2018. The participants and six of the third participants (Australia, China, the European Union, India, Japan, and the United States) made oral statements and responded to questions posed by the Members of the Division hearing the appeal.

1.11. On 24 November 2017, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Peter Van den Bossche to complete the disposition of this appeal, even though his second term of office was due to expire before the completion of these appellate proceedings.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>24</sup> The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B to the Addendum to this Report, WT/DS490/AB/R/Add.1, WT/DS496/AB/R/Add.1.

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<sup>16</sup> WT/DS490/5 and WT/DS496/6.

<sup>17</sup> WT/AB/WP/6, 16 August 2010.

<sup>18</sup> WT/DS490/6 and WT/DS496/7.

<sup>19</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>20</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>21</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>22</sup> WT/DS490/7 and WT/DS496/8.

<sup>23</sup> WT/DS490/8 and WT/DS496/9.

<sup>24</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

### 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Australia, the European Union, and Japan) are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>25</sup> and are contained in Annex C to the Addendum to this Report, WT/DS490/AB/R/Add.1, WT/DS496/AB/R/Add.1.

### 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether Indonesia's Notice of Appeal and appellant's submission comply with Rules 20(2)(d) and 21(2)(b)(i) of the Working Procedures (raised by Chinese Taipei and Viet Nam);
- b. with respect to the Panel's finding that the measure at issue is not a safeguard measure:
  - i. whether the Panel exceeded the scope of its terms of reference or failed to carry out an objective assessment of the matter (raised by Indonesia); and
  - ii. whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 (raised by all participants);
- c. should the Appellate Body reverse the Panel's finding that the measure at issue is not a safeguard measure:
  - i. whether the Appellate Body is in a position to complete the legal analysis as to the complainants' claims under Article XIX of the GATT 1994 and the relevant provisions of the Agreement on Safeguards; and
  - ii. if so, whether Indonesia acted inconsistently with Article XIX of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards (raised by Chinese Taipei and Viet Nam); and
- d. whether the Panel erred under Article 6.2 of the DSU in finding that the complainants raised a claim under Article I:1 of the GATT 1994 against the specific duty imposed by Indonesia irrespective of whether it is a safeguard within the meaning of Article 1 of the Agreement on Safeguards (raised by Indonesia).

### 5 ANALYSIS OF THE APPELLATE BODY

#### 5.1 Whether Indonesia's Notice of Appeal and appellant's submission comply with the Working Procedures for Appellate Review

5.1. Chinese Taipei and Viet Nam each submit that Indonesia's appeal of the Panel's findings does not sufficiently identify the alleged errors by the Panel. According to the complainants, this lack of clarity prejudiced their ability to make a proper defence against Indonesia's claims on appeal.<sup>26</sup> The complainants advance several arguments to support their position.

5.2. First, the complainants take issue with Indonesia's request that the Appellate Body reverse the Panel's finding of inconsistency with Article I:1 of the GATT 1994 should it reverse the Panel's finding that the measure at issue is not a safeguard measure.<sup>27</sup> In the complainants' view,

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<sup>25</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>26</sup> Chinese Taipei's appellee's submission, paras. 3.2 and 3.6; Viet Nam's appellee's submission, paras. 3.10 and 3.16.

<sup>27</sup> Chinese Taipei's appellee's submission, para. 3.3 (referring to Indonesia's appellant's submission, paras. 42-47); Viet Nam's appellee's submission, para. 3.12 (referring to Indonesia's appellant's submission, para. 43).

Indonesia did not adequately explain why a reversal of the Panel's finding that the measure at issue is not a safeguard would automatically require reversal of the Panel's finding under Article I:1 of the GATT 1994.<sup>28</sup>

5.3. Second, with respect to Indonesia's claim that the Panel acted outside its terms of reference in finding an inconsistency with Article I:1 of the GATT 1994, the complainants argue that Indonesia failed to explain which requirements of Article 6.2 of the DSU were breached by the Panel. For the complainants, it is unclear whether this aspect of Indonesia's appeal concerns the identification of the measure at issue or the legal basis of the complaint.<sup>29</sup>

5.4. Finally, with respect to the Panel's finding of inconsistency with Article I:1 of the GATT 1994, Viet Nam argues that Indonesia did not clearly explain the relationship between alleged errors regarding, on the one hand, the characterization of the measure at issue and, on the other hand, the Panel's terms of reference.<sup>30</sup>

5.5. Based on the foregoing, the complainants request that the Appellate Body "reject Indonesia's appeal" with respect to "allegations set out in Section [1] of Indonesia's Notice of Appeal and paragraphs 42 to 48, 51, and 70 to 82 of Indonesia's appellant's submission" on the basis that Indonesia's Notice of Appeal and its appellant's submission fail to comply with the requirements of both Rule 20(2)(d) and Rule 21(2)(b)(i) of the Working Procedures.<sup>31</sup>

5.6. Rule 20(2)(d) of the Working Procedures provides that a Notice of Appeal shall include "a brief statement of the nature of the appeal", including "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel".<sup>32</sup> The Appellate Body has explained that the requirements under Rule 20(2) "serve to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel".<sup>33</sup> The Appellate Body has elaborated on the requirements of a Notice of Appeal as follows:

The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.<sup>34</sup>

5.7. In previous appeals, the Appellate Body has also cautioned that if a particular claim of error is not raised by the appellant in the Notice of Appeal, then that claim is "not properly within the scope of the appeal, and the Appellate Body will not make findings thereon".<sup>35</sup>

5.8. Section 1 of Indonesia's Notice of Appeal is entitled "The Panel erred in determining that [Regulation 137] is inconsistent with Article I:1 of the GATT 1994 because it is not a safeguard

<sup>28</sup> Chinese Taipei's appellee's submission, paras. 3.3-3.4; Viet Nam's appellee's submission, paras. 3.12-3.13.

<sup>29</sup> Chinese Taipei's appellee's submission, para. 3.5; Viet Nam's appellee's submission, para. 3.15.

<sup>30</sup> Viet Nam's appellee's submission, para. 3.14.

<sup>31</sup> Chinese Taipei's appellee's submission, para. 3.6; Viet Nam's appellee's submission, para. 3.16.

<sup>32</sup> Rule 20(2)(d) additionally requires "a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors". We do not understand Chinese Taipei or Viet Nam to raise any objection against Indonesia's Notice of Appeal in this regard. (Chinese Taipei's appellant's submission, para. 3.1; Viet Nam's appellant's submission, para. 3.11)

<sup>33</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

<sup>34</sup> Appellate Body Report, *US – Shrimp*, para. 95. (emphasis original)

<sup>35</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 582 (referring to Appellate Body Reports, *US – Countervailing Measures on Certain EC Products*, para. 72; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 285; *Japan – Apples*, paras. 124-128).

measure". Under that heading, Indonesia makes various claims of error in relation to the Panel's finding that the measure at issue is not a safeguard, including the claim that "this issue is not under the Panel's term of reference".<sup>36</sup> Indonesia also claims that, because the measure at issue "is a safeguard measure, the Panel erred in finding that [the measure at issue] is inconsistent with Article I:1 of the GATT 1994".<sup>37</sup> Finally, Indonesia claims that the Panel erred in concluding that the complainants made "the same claim on the basis of the same arguments against the specific duty as a stand-alone measure."<sup>38</sup>

5.9. Indonesia's Notice of Appeal contains two additional sections, neither of which is the subject of the request for dismissal by the complainants. In section 2 of its Notice of Appeal, Indonesia alleges that the Panel erred in making "a finding that is outside its term of reference" in finding that the measure is not a safeguard measure and that the specific duty as "a stand-alone measure (not as a safeguard measure)" is inconsistent with Article I:1 of the GATT 1994.<sup>39</sup> Moreover, in section 3 of its Notice of Appeal, Indonesia claims that the Panel failed to conduct an objective assessment under Article 11 of the DSU by assessing whether the measure at issue is a safeguard measure.<sup>40</sup>

5.10. Based on our review of Indonesia's Notice of Appeal, we understand Indonesia's appeal to encompass allegations of error concerning: (i) the Panel's finding that the measure at issue is not a safeguard measure; (ii) the scope of the Panel's terms of reference concerning the characterization of the measure at issue; (iii) the scope of the Panel's terms of reference concerning the claim against the specific duty as a "stand-alone measure"; and (iv) the Panel's objective assessment under Article 11 of the DSU of the characterization of the measure at issue. Given that these grounds of appeal are discernible in Indonesia's Notice of Appeal, we do not consider that Indonesia failed to set out "a brief statement of the nature of the appeal" or to provide an "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel", as required under Rule 20(2)(d)(i).<sup>41</sup> Moreover, inasmuch as Indonesia's appeal concerns the scope of the Panel's terms of reference, we recall that "the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal."<sup>42</sup>

5.11. Rule 21(2)(b)(i) provides that an appellant's submission shall "set out a precise statement of the grounds for the appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof". While both the Notice of Appeal and the appellant's submission must set out the allegations of errors, "the appellant's submission must be more specific in this regard", in that it "must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies".<sup>43</sup>

5.12. As we see it, Indonesia's appellant's submission sets out more specific legal argumentation in support of the grounds of appeal identified by Indonesia in its Notice of Appeal. In particular, Indonesia's appellant's submission contains three sections of arguments corresponding to the three sections of the Notice of Appeal described above. In the section of its appellant's submission corresponding to section 1 of its Notice of Appeal<sup>44</sup>, Indonesia alleges errors relating to the Panel's interpretation of Article XIX of the GATT 1994<sup>45</sup>, and it further asserts that the Panel "erred

<sup>36</sup> Indonesia's Notice of Appeal, section 1.

<sup>37</sup> Indonesia's Notice of Appeal, section 1.

<sup>38</sup> Indonesia's Notice of Appeal, section 1.

<sup>39</sup> Indonesia's Notice of Appeal, section 2.

<sup>40</sup> Indonesia's Notice of Appeal, section 3.

<sup>41</sup> That said, we wish to emphasize the importance of drafting a Notice of Appeal with adequate precision in order to reduce the risk of procedural objections and possible dismissal of a claim because it does not comply with the requirements of Rule 20 of the Working Procedures. (Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 686)

<sup>42</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 208. See also Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 791; *US – Carbon Steel*, para. 123.

<sup>43</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 59.

<sup>44</sup> This section is entitled the same as the corresponding section of the Notice of Appeal: "The Panel erred in determining that [Regulation 137] is inconsistent with Article I:1 of the GATT 1994 because it is not a safeguard measure". (Indonesia's appellant's submission, heading II, p. 3)

<sup>45</sup> Indonesia's appellant's submission, heading II.D, p. 11, and paras. 29-41.

in finding that the application of the specific duty is inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994<sup>46</sup> because the Panel's finding under Article I:1 was based on "the sole reason" that the Panel had previously found the measure not to constitute a safeguard.<sup>47</sup> Moreover, according to Indonesia, the Panel improperly read the complainants' panel requests as containing a claim of inconsistency with Article I:1 with respect to the specific duty as a "stand-alone measure".<sup>48</sup> Section III of Indonesia's appellant's submission focuses on the Panel's alleged errors in making findings "outside its terms of reference"<sup>49</sup> on whether: (i) the measure at issue is not a safeguard measure<sup>50</sup>; and (ii) the specific duty as a "stand-alone measure" (i.e. not as a safeguard measure) is inconsistent with Article I:1 of the GATT 1994.<sup>51</sup> Finally, section IV of Indonesia's appellant's submission corresponds to Indonesia's claim in section 3 of its Notice of Appeal that the Panel failed to conduct an objective assessment under Article 11 of the DSU in examining whether the measure at issue is a safeguard measure.<sup>52</sup>

5.13. We recognize that there is a certain degree of overlap in some of the arguments advanced by Indonesia in its appellant's submission, particularly as to the scope of the Panel's terms of reference concerning the Panel's finding under Article I:1 of the GATT 1994.<sup>53</sup> However, we do not view this alone as amounting to a failure to comply with Rule 21 of the Working Procedures. In our view, the specific criticisms raised by the complainants relate more to the merit and substance of Indonesia's legal arguments, rather than to the procedural adequacy or admissibility of its appeal. In raising their procedural objection, the complainants appear to take issue with the lack of clarity in Indonesia's appeal regarding: (i) the *reasons* why reversal of the Panel's finding that the measure at issue is not a safeguard measure would automatically require reversal of the Panel's finding under Article I:1 of the GATT 1994; and (ii) the specific legal elements of Article 6.2 of the DSU according to which the Panel is alleged to have exceeded its terms of reference. While criticisms of such a nature may be relevant to the *substantiation* of an appellant's allegations of errors, we do not consider that such criticisms speak to the proper demarcation of the limits of appellate review. We therefore address the merits of the arguments in Indonesia's appellant's submission in the following sections of this Report regarding the issues raised in this appeal.

5.14. In sum, we consider that Indonesia's Notice of Appeal identifies the alleged errors in the issues of law covered in the Panel Report and legal interpretations developed by the Panel, as required under Rule 20(2)(d). Furthermore, as we see it, the complainants' objection under Rule 21(2)(b)(i) is not pertinent to the scope of appellate review but rather relates to the merits and substance of Indonesia's legal arguments. Accordingly, we decline the complainants' request that we "reject Indonesia's appeal" with respect to "allegations set out in Section [1] of Indonesia's Notice of Appeal and paragraphs 42 to 48, 51, and 70 to 82 of Indonesia's appellant's submission".<sup>54</sup>

## **5.2 Whether the Panel erred in finding that Indonesia's specific duty on imports of galvalume is not a safeguard measure**

5.15. Each participant in these proceedings appeals the Panel's finding that Indonesia's specific duty on imports of galvalume is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. They each allege that the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994.<sup>55</sup> For its

<sup>46</sup> Indonesia's appellant's submission, heading II.E, p. 15.

<sup>47</sup> Indonesia's appellant's submission, para. 42. On this basis, Indonesia contends that, should the Appellate Body reverse the Panel's finding that the measure at issue is not a safeguard, it should also automatically reverse its finding of inconsistency with Article I:1 of the GATT 1994. (*Ibid.*, para. 43)

<sup>48</sup> Indonesia's appellant's submission, paras. 44-48.

<sup>49</sup> Indonesia's appellant's submission, heading III, p. 17.

<sup>50</sup> Indonesia's appellant's submission, paras. 63-69.

<sup>51</sup> Indonesia's appellant's submission, paras. 70-80.

<sup>52</sup> Indonesia's appellant's submission, heading IV, p. 25, and paras. 95-108.

<sup>53</sup> For example, in the section of its appellant's submission corresponding to section 1 of its Notice of Appeal, Indonesia contests whether the panel requests in this dispute encompassed a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure. In the section of its appellant's submission corresponding to section 2 of its Notice of Appeal on the Panel's terms of reference, Indonesia advances further arguments relating to its allegation that the Panel's finding under Article I:1 of the GATT 1994 was beyond its terms of reference. (See Indonesia's appellant's submission, paras. 42-48 and 70-82)

<sup>54</sup> Chinese Taipei's appellee's submission, para. 3.6; Viet Nam's appellee's submission, para. 3.16.

<sup>55</sup> Indonesia's appellant's submission, paras. 29-41; Chinese Taipei's other appellant's submission, paras. 7-29; Viet Nam's other appellant's submission, paras. 3.5-3.60.

part, Indonesia further contends that, by making that finding, the Panel: (i) exceeded its terms of reference under Articles 6.2 and 7.1 of the DSU<sup>56</sup>; and (ii) failed to conduct an objective assessment of the matter under Article 11 of the DSU.<sup>57</sup>

5.16. Our analysis proceeds as follows. First, we provide an overview of the Panel's findings. Second, we address Indonesia's assertions that the Panel exceeded its terms of reference and failed to conduct an objective assessment of the matter by ruling on the applicability of the Agreement on Safeguards in the specific circumstances of this dispute. Third, we examine whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994.

### 5.2.1 The Panel's findings

5.17. Before the Panel, both sides maintained, "albeit for somewhat different reasons", that Indonesia's specific duty on imports of galvalume constitutes a safeguard measure to which the disciplines of the Agreement on Safeguards apply.<sup>58</sup> In particular, Indonesia highlighted that the measure at issue had been adopted as a result of a safeguards investigation conducted by KPPI in accordance with Indonesia's domestic trade remedy regulations.<sup>59</sup> The complainants, for their part, focused on the fact that the specific duty "suspends" Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994.<sup>60</sup>

5.18. The Panel considered that a "fundamental question" arose as to whether the measure at issue is, indeed, a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.<sup>61</sup> Recalling its duty under Article 11 of the DSU to undertake "an objective assessment of the matter", including "an objective assessment of the applicability of the covered agreements invoked in this dispute"<sup>62</sup>, the Panel determined that it would have to "examine this issue for [itself], rather than simply proceeding on the basis of the parties' concurring positions".<sup>63</sup>

5.19. The Panel noted that, under Article 1 of the Agreement on Safeguards, "safeguard measures ... shall be understood to mean those measures provided for in Article XIX of GATT 1994". Turning to Article XIX:1(a) of the GATT 1994, the Panel expressed the view that the "measures provided for" under that provision are "measures that *suspend a GATT obligation and/or withdraw or modify a GATT concession*, in situations where, as a result of a Member's WTO commitments and developments that were 'unforeseen' at the time that it undertook those commitments, a product 'is being imported' into a Member's territory in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'".<sup>64</sup> The Panel further observed that safeguard measures "must result in the suspension, withdrawal, or modification of a GATT obligation or concession for a particular purpose", namely, "they must operate 'to the extent and for such a time as may be necessary to prevent or remedy such injury'".<sup>65</sup> Thus, in the Panel's view, a safeguard measure can be deemed to exist only if the suspension or withdrawal relates to a GATT obligation or concession that a Member "finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury".<sup>66</sup> On this basis, the Panel held:

<sup>56</sup> Indonesia's appellant's submission, paras. 63-69.

<sup>57</sup> Indonesia's appellant's submission, paras. 95-108.

<sup>58</sup> Panel Report, para. 7.10. See also e.g. Chinese Taipei's panel request, WT/DS490/2, p. 2; Viet Nam's panel request, WT/DS496/3, para. 1.5.b; complainants' joint first written submission to the Panel, paras. 1.2-1.4; Indonesia's first written submission to the Panel, paras. 21-30.

<sup>59</sup> See e.g. Indonesia's first written submission to the Panel, paras. 21-22; Panel Report, fn 84 to para. 7.47.

<sup>60</sup> Complainants' joint comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 1.6. Indonesia agreed with this view. (Indonesia's comments on complainants' joint responses to Panel questions following the second Panel meeting, para. 7)

<sup>61</sup> Panel Report, para. 7.10.

<sup>62</sup> Panel Report, para. 7.10 and fn 33 thereto (quoting Appellate Body Reports, *China – Auto Parts*, para. 139; referring to Panel Reports, *Dominican Republic – Safeguard Measures*, para. 7.58; *US – Gambling*, para. 6.250; Appellate Body Reports, *US – Shrimp*, para. 119; *Canada – Autos*, para. 151).

<sup>63</sup> Panel Report, para. 7.10.

<sup>64</sup> Panel Report, para. 7.13 (referring to Appellate Body Reports, *Argentina – Footwear (EC)*, paras. 93-94; *Korea – Dairy*, paras. 86-87). (emphasis original)

<sup>65</sup> Panel Report, para. 7.13. (emphasis original)

<sup>66</sup> Panel Report, para. 7.14.

[O]ne of the defining features of ... 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>67</sup>

5.20. Applying this reasoning to the facts of this dispute, the Panel observed that Indonesia "has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions" and is, therefore, "free to impose any amount of duty it deems appropriate" on that product, including the specific duty at issue in these proceedings.<sup>68</sup> The Panel determined, therefore, that Indonesia's specific duty on imports of galvalume does not "suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994".<sup>69</sup> Having made this finding, the Panel turned to assess whether the measure at issue suspends any other obligation incurred by Indonesia under the GATT 1994.

5.21. First, the Panel addressed Indonesia's argument that the measure at issue suspends "the GATT exception under Article XXIV of the GATT 1994".<sup>70</sup> Indonesia maintained that the imposition of the specific duty on imports of galvalume from its regional trade agreement (RTA) partners suspends the tariff obligations incurred by Indonesia under the RTAs, which would have otherwise prevented it from countering the increased imports.<sup>71</sup> The Panel disagreed with Indonesia, noting that Article XXIV of the GATT 1994 "is a *permissive* provision" that "does not impose any positive obligation ... either to enter into [RTAs] or to provide a certain level of market access to its [RTA] partners through bound tariffs".<sup>72</sup> According to the Panel, Indonesia's tariff commitments vis-à-vis its RTA partners are obligations assumed under the respective RTAs, not the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).<sup>73</sup> Therefore, the Panel concluded that there is "no basis" to assert that the specific duty suspends "the GATT exception under Article XXIV".<sup>74</sup>

5.22. Second, the Panel addressed the contention that the imposition of the specific duty suspends Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994. Indonesia observed that the special and differential (S&D) treatment disciplines set forth in Article 9.1 of the Agreement on Safeguards require it to exempt the 120 countries listed in Regulation 137 from the scope of application of the specific duty. According to Indonesia, this results in a "discriminatory" application of the measure that suspends the MFN treatment obligation under Article I:1 of the GATT 1994.<sup>75</sup>

5.23. The Panel rejected Indonesia's argument. In the Panel's view, the exemption of certain developing country Members from the application of a safeguard measure under Article 9.1 is, by its own terms, "legally premised" on an importing Member's intention to apply a safeguard measure.<sup>76</sup> Recalling its prior findings that the measure at issue does not suspend Indonesia's concessions under Article II or Article XXIV of the GATT 1994, the Panel considered that the legal premise for the application of Article 9.1 was not met and that, therefore, there is "no basis" for Indonesia's invocation of Article 9.1.<sup>77</sup> Moreover, according to the Panel, Indonesia's exemption of the 120 countries listed in Regulation 137 from the scope of application of the specific duty is not "*necessary to remedy or prevent serious injury*"<sup>78</sup>, but rather has "the *sole purpose*" of providing

<sup>67</sup> Panel Report, para. 7.15. (emphasis original) See also para. 7.17.

<sup>68</sup> Panel Report, para. 7.18 (referring to Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 7).

<sup>69</sup> Panel Report, para. 7.18.

<sup>70</sup> Panel Report, para. 7.19 (quoting Indonesia's comments on the complainants' joint responses to Panel questions following the second Panel meeting, para. 10).

<sup>71</sup> Panel Report, para. 7.19 (referring to Indonesia's comments on the complainants' joint responses to Panel questions following the second Panel meeting, para. 8).

<sup>72</sup> Panel Report, para. 7.20. (emphasis original)

<sup>73</sup> Panel Report, para. 7.20.

<sup>74</sup> Panel Report, para. 7.20.

<sup>75</sup> Panel Report, para. 7.21 (referring to Indonesia's first written submission to the Panel, para. 212; comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 8; comments on the complainants' joint responses to Panel questions following the second Panel meeting, para. 7).

<sup>76</sup> Panel Report, para. 7.25.

<sup>77</sup> Panel Report, para. 7.26.

<sup>78</sup> Panel Report, para. 7.22 (referring to Indonesia's responses to Panel questions Nos. 51 and 52; comments on the complainants' joint responses to Panel questions following the second Panel meeting,

the exempted countries with "continued access to the Indonesian galvalume market".<sup>79</sup> The Panel "fail[ed] 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>80</sup> The Panel found further support in the General Interpretative Note to Annex 1A of the WTO Agreement (General Interpretative Note), which stipulates that "[i]n the event of conflict between a provision of the [GATT] 1994 and a provision of another agreement in Annex 1A to the [WTO Agreement], the provision of the other agreement shall prevail to the extent of the conflict". In the Panel's view, the effect of this rule is that the discriminatory application of a safeguard measure called for in Article 9.1 "is permissible *without having to suspend the operation of Article I:1*", because the former obligation "prevails as a *matter of law*" over the latter.<sup>81</sup>

5.24. Based on the foregoing, the Panel found that the measure at issue does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.<sup>82</sup>

## 5.2.2 Whether the Panel erred under Article 6.2, 7.1, or 11 of the DSU

### 5.2.2.1 Claims and arguments on appeal

5.25. On appeal, Indonesia takes issue with the Panel's decision to assess, on its own motion, whether the measure at issue constitutes a safeguard measure despite the parties' "concurring positions" on that issue.<sup>83</sup> First, Indonesia maintains that the scope of the Panel's terms of reference was determined by the complainants' panel requests.<sup>84</sup> Noting that the complainants' panel requests did not contain "claims" under Article 1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994<sup>85</sup>, Indonesia contends that the Panel exceeded its terms of reference under Articles 6.2 and 7.1 of the DSU by ruling on the question of whether the measure at issue is in fact a safeguard measure within the meaning of those provisions.<sup>86</sup> Second, according to Indonesia, the Panel's assessment amounts to a failure to conduct an objective assessment of the matter under Article 11 of the DSU.<sup>87</sup> Indonesia observes that past panels examining claims brought under the Agreement on Safeguards have never conducted a threshold analysis regarding the applicability of that Agreement, except where this issue had been raised by the parties to the dispute.<sup>88</sup>

5.26. Chinese Taipei disagrees with Indonesia's contention that the Panel exceeded its terms of reference by examining whether the measure at issue constitutes a safeguard measure to which the disciplines of the Agreement on Safeguards would apply. Chinese Taipei submits that Article 11 of the DSU requires a panel "to perform an objective assessment of the legal characterization of the specific duty" at issue, "irrespective of whether the issue was raised in the panel requests or ... was ever disputed by the parties".<sup>89</sup> Since Chinese Taipei considers that the measure at issue is indeed a safeguard measure, it does not find it necessary to address the issue of whether the Panel fulfilled its duties under Article 11 of the DSU.<sup>90</sup>

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para. 10; comments on the complainants' joint responses to Panel questions Nos. 50 and 51). (emphasis original)

<sup>79</sup> Panel Report, para. 7.32. (emphasis original)

<sup>80</sup> Panel Report, para. 7.28. (emphasis original) The Panel specified that it was not expressing an 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 ... *were such discrimination considered by an importing Member to be necessary to prevent or remedy serious injury*". (Ibid., fn 60 to para. 7.28 (emphasis original))

<sup>81</sup> Panel Report, para. 7.29. (emphasis original)

<sup>82</sup> Panel Report, paras. 7.10 and 8.1.a.

<sup>83</sup> Indonesia's appellant's submission, para. 83.

<sup>84</sup> Indonesia's appellant's submission, para. 67.

<sup>85</sup> Indonesia's appellant's submission, paras. 64-66.

<sup>86</sup> Indonesia's appellant's submission, para. 69.

<sup>87</sup> Indonesia's appellant's submission, para. 84.

<sup>88</sup> Indonesia's appellant's submission, paras. 68, 87, 106, and 107.

<sup>89</sup> Chinese Taipei's appellee's submission, para. 4.1.

<sup>90</sup> Chinese Taipei's appellee's submission, para. 1.2.



5.27. Viet Nam also disagrees with Indonesia's claim relating to the Panel's terms of reference, which it sees as conflating "the question of jurisdiction addressed in Article 6.2 of the DSU" and "the correct legal characterisation of a measure".<sup>91</sup> In particular, Viet Nam argues that the identification of the specific measure at issue for purposes of the Panel's terms of reference was not "dependent" on the legal characterization of that measure by the Panel.<sup>92</sup> However, Viet Nam sees "certain merits" in Indonesia's contention that the Panel fell short of its duties under Article 11 of the DSU by assessing on its own motion whether the measure at issue constitutes a safeguard measure.<sup>93</sup> According to Viet Nam, the issue of what constitutes a safeguard measure for the purposes of Article XIX:1(a) and the Agreement on Safeguards "is a question of critical importance" for the WTO Membership at large.<sup>94</sup> Viet Nam complains that the Panel had ample time and opportunity to raise that question early in the proceedings<sup>95</sup>, but addressed it "only at a very late stage", thereby effectively excluding the third parties from this debate.<sup>96</sup>

5.28. As third participants, China, the European Union, and the United States submit that the Panel was entitled to examine on its own motion whether the measure at issue constitutes a safeguard measure.<sup>97</sup> China submits that a panel may, when necessary, assess the characterization of a measure at issue before proceeding to the assessment of its conformity with the relevant covered agreements.<sup>98</sup> The European Union adds that the obligation under Article 11 of the DSU to make an "objective assessment of the matter" requires a panel to examine whether the obligations in a given covered agreement "are relevant and applicable to the case at hand"<sup>99</sup>, irrespective of the parties' positions<sup>100</sup> and the qualification of that measure under municipal law.<sup>101</sup> However, the European Union considers that where a panel intends to deviate fundamentally from the parties' positions, it must give the parties ample opportunity to present their views<sup>102</sup> and avoid "bring[ing] up new issues at a late stage in the proceedings".<sup>103</sup> For its part, the United States submits that, were a panel to defer to the parties' incorrect views as to the applicability of a covered agreement, it would fail to make findings as would assist the DSB in issuing its rulings and recommendations.<sup>104</sup>

### 5.2.2.2 Whether the Panel exceeded its terms of reference or failed to carry out an objective assessment of the matter

5.29. The issues raised by Indonesia on appeal hinge on the extent to which the Panel had a duty to carry out an independent assessment of the applicability of the Agreement on Safeguards in order to subsequently rule on the claims raised by the complainants under that Agreement and Article XIX of the GATT 1994. As we understand them, the allegations of error under Articles 6.2, 7.1, and 11 of the DSU that Indonesia has raised in this dispute are closely related, and we find it useful to address them together.

<sup>91</sup> Viet Nam's appellee's submission, para. 4.2.

<sup>92</sup> Viet Nam's appellee's submission, para. 3.28.

<sup>93</sup> Viet Nam's appellee's submission, para. 5.2.

<sup>94</sup> Viet Nam's appellee's submission, para. 5.8.

<sup>95</sup> Viet Nam's appellee's submission, paras. 5.10-5.12.

<sup>96</sup> Viet Nam's appellee's submission, para. 5.9.

<sup>97</sup> China's opening statement at the oral hearing, para. 3; European Union's third participant's submission, para. 13; United States' opening statement at the oral hearing, para. 4.

<sup>98</sup> China's opening statement at the oral hearing, para. 4.

<sup>99</sup> European Union's third participant's submission, paras. 13-14 (referring to Appellate Body Reports, *Colombia – Textiles*, para. 5.17; *China – Auto Parts*, para. 139; *Canada – Autos*, para. 151); United States' opening statement at the oral hearing, para. 4.

<sup>100</sup> European Union's third participant's submission, paras. 16-19 (referring to Appellate Body Reports, *EC – Hormones*, para. 156; *Chile – Price Band System*, paras. 166-168; *US – Certain EC Products*, para. 123; *EC and certain member States – Large Civil Aircraft*, para. 1128).

<sup>101</sup> European Union's third participant's submission, paras. 20-22 (referring to Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 593; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127; *EC – Tariff Preferences*, para. 105; *US – Oil Country Tubular Goods Sunset Reviews*, para. 188).

<sup>102</sup> European Union's third participant's submission, paras. 24-27 (referring to Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 147; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1136; *Australia – Salmon*, para. 278).

<sup>103</sup> European Union's third participant's submission, para. 27.

<sup>104</sup> United States' opening statement at the oral hearing, para. 4.

5.30. We begin by recalling that a panel's terms of reference under Article 7.1 of the DSU are governed by the panel request(s) unless the parties agree otherwise.<sup>105</sup> Under Article 6.2 of the DSU, a panel request must: (i) "identify the specific measures at issue"; and (ii) "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>106</sup> As the Appellate Body has noted, "a claim, for the purposes of Article 6.2, refers to an allegation 'that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'".<sup>107</sup> The identification of "the treaty provisions claimed to have been violated by the respondent" is necessary if the legal basis of the complaint is to be "presented at all".<sup>108</sup> By contrast, Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the *applicability* of a given covered agreement. These provisions are not directly part of the "legal basis of the complaint", for they are not "claimed to have been *violated* by the respondent".<sup>109</sup> Instead, the fact that a panel request contains claims of violation under the substantive provisions of a covered agreement logically *presupposes* that the complainant considers that such provisions are applicable and relevant to the case at hand.<sup>110</sup>

5.31. We further recall that Article 11 of the DSU requires panels to undertake an "objective assessment of the matter before it, including an objective assessment of the facts of the case and the *applicability of and conformity with the relevant covered agreements*".<sup>111</sup> A panel is thus under a duty to examine, as part of its "objective assessment", whether the provisions of the covered agreements invoked by a complainant as the basis for its claims are "applicable" and "relevant" to the case at hand.<sup>112</sup> Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement.<sup>113</sup> The examination regarding the "applicability" of certain provisions logically precedes the assessment of a measure's "conformity" with such provisions. Indeed, as noted by the Appellate Body, a panel may be required to "determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure" with that provision or covered agreement.<sup>114</sup>

5.32. The Agreement on Safeguards applies to the "measures provided for in Article XIX of GATT 1994".<sup>115</sup> A panel's assessment of claims brought under the Agreement on Safeguards may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. To the extent that the applicability of the Agreement on Safeguards is uncontested, it may well be unnecessary for a panel to include detailed reasoning in this regard in its report. However, contrary to what Indonesia appears to suggest, it does not follow from this that a panel would be precluded from determining the

<sup>105</sup> See e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.11; *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *EC – Selected Customs Matters*, para. 131.

<sup>106</sup> See e.g. Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Carbon Steel*, paras. 125-126.

<sup>107</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.8 (quoting Appellate Body Report, *Korea – Dairy*, para. 139).

<sup>108</sup> Appellate Body Reports, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; *India – Patents (US)*, paras. 89, 92, and 93); *US – Countervailing Measures (China)*, para. 4.8.

<sup>109</sup> Appellate Body Report, *Korea – Dairy*, para. 124. (emphasis added)

<sup>110</sup> For instance, the Request for the Establishment of a Panel by Mexico in *US – Tuna II (Mexico)* contained claims of inconsistency with certain provisions of the Agreement on Technical Barriers to Trade (TBT Agreement). (See WT/DS381/4) Although that panel request did not refer expressly to Annex 1.1 to the TBT Agreement, which sets forth the definition of a technical regulation, this did not preclude an analysis of whether the measure at issue constituted a technical regulation for purposes of the applicability of the Agreement. (Panel Report, *US – Tuna II (Mexico)*)

<sup>111</sup> Emphasis added.

<sup>112</sup> See e.g. Appellate Body Report, *Colombia – Textiles*, para. 5.17. In so doing, a panel enjoys "a degree of discretion to structure the order of [its] analysis" as it sees fit, provided that it proceeds "on the basis of a properly structured analysis". (Ibid., para. 5.20 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 127))

<sup>113</sup> Indeed, such a finding would not assist the DSB in making recommendations or rulings "aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and under the covered agreements". (Article 3.4 of the DSU)

<sup>114</sup> Appellate Body Reports, *China – Auto Parts*, para. 139. (emphasis original) See also e.g. Appellate Body Reports, *US – Shrimp*, para. 119; *Canada – Autos*, para. 151.

<sup>115</sup> Article 1 of the Agreement on Safeguards.

applicability of a particular covered agreement in cases where the issue has not been raised by the parties. As the Appellate Body has consistently stated, "nothing in the DSU limits the faculty of a panel freely to ... *develop its own legal reasoning* – to support its own findings and conclusions on the matter under its consideration".<sup>116</sup> Indeed, the duty to conduct an "objective assessment of the matter" may, at times, *require* a panel to depart from positions taken by the parties. A panel "might well be *unable* to carry out an objective assessment of the matter ... if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute".<sup>117</sup> Moreover, the description of a measure proffered by a party and "the label given to [it] under municipal law" are "not dispositive" of the proper legal characterization of that measure under the covered agreements.<sup>118</sup> Rather, a panel must assess that legal characterization for purposes of the applicability of the relevant agreement on the basis of the "content and substance" of the measure itself.<sup>119</sup>

5.33. 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.

5.34. Viet Nam contends that because the Panel raised the issue of the legal characterization of the measure at issue at a late stage of its proceedings, it improperly excluded the third parties from the debate on such a "fundamental question".<sup>120</sup> In a similar vein, the European Union maintains that the Panel's approach was "highly prejudicial to third party rights".<sup>121</sup>

5.35. While the rights of third parties in panel proceedings differ from, and are more limited than, the rights of parties, Article 10.1 of the DSU requires that panels "fully" take into account the interests of third parties. Article 10.2 of the DSU stipulates that third parties "shall have an opportunity to be heard". Article 10.3 of the DSU provides that third parties "shall receive the submissions of the parties to the dispute to the first meeting of the panel". Finally, the standard panel working procedures set out in Appendix 3 to the DSU contemplate the possibility that third parties be invited to present their views during a dedicated session of the first meeting of the panel. Beyond these "minimum guarantees", panels enjoy "discretion to grant additional participatory rights to third parties in particular cases, as long as such 'enhanced' rights are consistent with the provisions of the DSU and the principles of due process".<sup>122</sup> In order to determine whether, in the current dispute, the Panel duly took into account the interests of the third parties as provided for under the DSU, we find it useful to briefly review the manner in which the issue of the legal characterization of the measure at issue arose and was brought to the parties' and the Panel's attention during the course of the Panel proceedings.

5.36. In their first written submissions to the Panel, the parties proceeded on the assumption that Indonesia's specific duty on imports of galvalume is a safeguard measure. At the first Panel meeting, the Panel asked Indonesia which of its GATT 1994 obligations the measure at issue is suspending. Indonesia answered that the relevant obligation is its tariff binding on

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<sup>116</sup> Appellate Body Report, *EC – Hormones*, para. 156. (emphasis added) See also e.g. Appellate Body Reports, *US – Certain EC Products*, para. 123; *US – Gambling*, para. 280; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.215.

<sup>117</sup> Appellate Body Report, *EC – Hormones*, para. 156. (emphasis added) See also e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 74; *Chile – Price Band System*, paras. 166-168.

<sup>118</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 593. See also *ibid.*, para. 586; Appellate Body Reports, *US – Offset Act (Byrd Amendment)*, para. 259; *US – Softwood Lumber IV*, para. 56; *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127.

<sup>119</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87.

<sup>120</sup> Viet Nam's appellee's submission, para. 5.9.

<sup>121</sup> European Union's third participant's submission, para. 29.

<sup>122</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243.

galvalume under Article II of the GATT 1994, which Indonesia said is 40%.<sup>123</sup> In its written questions to the parties following the meeting, the Panel asked Indonesia to confirm its response.<sup>124</sup> Indonesia replied that, contrary to its prior statement, galvalume is listed as "unbound" in its WTO Schedule of Concessions.<sup>125</sup> In its second written submission to the Panel, Indonesia asserted that "there is no explicit prohibition" in the GATT 1994 or the Agreement on Safeguards on the imposition of safeguard measures on products for which Members "have 'unbound' commitments".<sup>126</sup> Based on Indonesia's clarifications, the Panel circulated a list of questions, focusing on the implications of Indonesia not having a tariff binding on the subject product.<sup>127</sup> Following the second Panel meeting, the Panel continued to pursue this line of inquiry by addressing written questions to the parties concerning the definition of a safeguard measure.<sup>128</sup> The parties exchanged views on these matters in their responses to the written questions and in their comments to each other's responses.

5.37. As these exchanges suggest, the question of the legal characterization of the measure at issue gained prominence *after* the first Panel meeting. Indeed, it was only after that meeting that Indonesia, in answering the Panel's written questions, clarified that it does not have a tariff binding on galvalume, thereby alerting the Panel to the relevance of the issue. We understand the Panel to have drawn the parties' attention to the issue of whether the challenged measure is subject to the disciplines of the Agreement on Safeguards as soon as the opportunity arose. That said, we find it unfortunate that the third parties did not have a more ample opportunity to be heard on that issue. Indeed, the Panel may have benefitted from the views of third parties sharing a systemic interest in the identification of measures to which the WTO safeguard disciplines apply. We do not consider, however, that the Panel exceeded the boundaries of its discretion in not providing third parties with further opportunity to be heard.

5.38. Based on all of the foregoing, we find that the Panel did not err under Article 6.2, 7.1, or 11 of the DSU in carrying out its own assessment of whether the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

### **5.2.3 Whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994**

#### **5.2.3.1 Claims and arguments on appeal**

5.39. Each of the three participants claims that the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 in finding that Indonesia's specific duty on imports of galvalume is not a safeguard measure.

5.40. Indonesia submits that, in determining whether a measure qualifies as a safeguard measure, it is relevant to consider "among other things, the objective and the context" of that measure.<sup>129</sup> Specifically, a measure "taken with the objective to prevent or remedy serious or threat of serious injury to the domestic industry ... as a result of an unforeseen development" constitutes a safeguard measure.<sup>130</sup> Indonesia stresses that Regulation 137 describes the duty imposed thereunder as a "safeguard measure", defines its goal as addressing the "threat of serious injury caused by [the] surge of import" of the subject product, was adopted following a KPPI investigation "under the auspices of Article XIX [of the GATT 1994] and the Agreement on Safeguards", and was notified to the Committee on Safeguards.<sup>131</sup> On this basis, Indonesia contends that, in finding that the measure at issue is not a safeguard measure, the Panel improperly disregarded the stated "nature and objective" of the measure.<sup>132</sup>

<sup>123</sup> See Panel question No. 7 following the first Panel meeting.

<sup>124</sup> See Panel question No. 7 following the first Panel meeting.

<sup>125</sup> Indonesia's response to Panel question No. 7 following the first Panel meeting, para. 8.

<sup>126</sup> Indonesia's second written submission to the Panel, para. 41.

<sup>127</sup> See Panel questions prior to the second Panel meeting. The questions touched on, among other things, the scope of GATT 1994 obligations or concessions that may be suspended, withdrawn, or modified for a measure to be considered as a safeguard measure within the meaning of Article XIX:1(a) of the GATT 1994.

<sup>128</sup> See Panel questions Nos. 47-52 following the second Panel meeting.

<sup>129</sup> Indonesia's appellant's submission, para. 18.

<sup>130</sup> Indonesia's appellant's submission, para. 18.

<sup>131</sup> Indonesia's appellant's submission, para. 15. See also para. 40.

<sup>132</sup> Indonesia's appellant's submission, para. 15.

5.41. Moreover, in Indonesia's view, the Panel erroneously considered that the suspension of Article I:1 of the GATT 1994 cannot be invoked to justify the imposition of a safeguard measure. Indonesia submits that Article XIX:1(a) "does not expressly limit the [GATT] obligations ... that may be suspended by invoking that provision".<sup>133</sup> In particular, according to Indonesia, "the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards result[s] in the suspension of [a] Member's MFN obligations under Article I:1 of the GATT 1994".<sup>134</sup> Indonesia posits that "the sole purpose of the discriminatory application" of its specific duty "is to impose the ... measure only to major exporting countries which contributed the most to the threat of serious injury suffered by Indonesian galvalume producers".<sup>135</sup> Indeed, argues Indonesia, the application of the measure to "all WTO Members regardless of [their] import share would not be necessary to remedy or prevent serious injury".<sup>136</sup>

5.42. Further, Indonesia takes issue with the Panel's reliance on the General Interpretative Note to exclude the suspension of Article I:1 from the scope of application of Article XIX:1(a). For Indonesia, an interpretation of Article XIX:1(a) as encompassing the suspension of the MFN treatment obligation under Article I:1 does not necessarily lead to a conflict between Article XIX:1(a) and the Agreement on Safeguards.<sup>137</sup> Finally, even assuming that the measure at issue does not suspend any obligation under the GATT 1994, Indonesia takes the view that the words "shall be free" in Article XIX:1(a) imply that a Member "has the discretion to or not to suspend a WTO ... obligation when imposing a safeguard measure".<sup>138</sup>

5.43. Chinese Taipei agrees with Indonesia that the Panel erred in finding that the measure at issue is not a safeguard measure. According to Chinese Taipei, Article XIX:1(a) "does not provide any definition" of what constitutes a safeguard measure, but merely "lays down certain criteria and conditions under which a WTO Member may legally impose" such a measure.<sup>139</sup> According to Chinese Taipei, the term "safeguard measure" should be interpreted broadly so as to encompass "all measures taken against serious injury arising from increased imports without any limitation to the particular type of measure".<sup>140</sup>

5.44. On this basis, Chinese Taipei takes issue with the Panel's finding that "where a measure [is] not *necessary* to remedy or prevent serious injury, then such measure is not a safeguard".<sup>141</sup> Chinese Taipei considers that the issue of whether a safeguard measure is applied "to the extent and for such time as may be necessary" to prevent or remedy serious injury does not constitute a definitional aspect of a safeguard measure, but rather pertains to the legality of a safeguard measure under the Agreement on Safeguards.<sup>142</sup> Thus, Chinese Taipei is of the view that, by introducing the notion of "necessity" in its analysis of the legal characterization of the measure at issue, the Panel improperly "subsume[d]" a "requirement[]" for the legality of a safeguard measure" into the definition of a safeguard measure.<sup>143</sup> In Chinese Taipei's view, the Panel's approach would frustrate the object and purpose of the Agreement on Safeguards<sup>144</sup> and would require Members without bound tariff commitments on certain products to impose their

<sup>133</sup> Indonesia's appellant's submission, para. 17 (quoting Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.64).

<sup>134</sup> Indonesia's appellant's submission, para. 16 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.70-7.73).

<sup>135</sup> Indonesia's appellant's submission, para. 33.

<sup>136</sup> Indonesia's appellant's submission, para. 34.

<sup>137</sup> Indonesia's appellant's submission, para. 37 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.72).

<sup>138</sup> Indonesia's appellant's submission, para. 39.

<sup>139</sup> Chinese Taipei's other appellant's submission, para. 8.

<sup>140</sup> Chinese Taipei's other appellant's submission, para. 9.

<sup>141</sup> Chinese Taipei's other appellant's submission, para. 13 (referring to Panel Report, paras. 7.17, 7.26, 7.28, and 7.32). (emphasis original)

<sup>142</sup> Chinese Taipei's other appellant's submission, paras. 16-18 (referring to Appellate Body Report, *US – Line Pipe*, paras. 84 and 245; Panel Report, *Chile – Price Band System*, paras. 7.183-7.184). (emphasis omitted)

<sup>143</sup> Chinese Taipei's other appellant's submission, para. 13.

<sup>144</sup> Chinese Taipei's other appellant's submission, paras. 21-23 (quoting the second and third preambular recitals of the Agreement on Safeguards (emphasis omitted by Chinese Taipei); referring to Panel Report, *US – Lamb*, paras. 7.76 and 7.77).

safeguard measures in the form of import quotas, i.e. "more restrictive measures" than tariff duties.<sup>145</sup>

5.45. Viet Nam joins Indonesia and Chinese Taipei in claiming that the Panel erred in finding that the measure at issue is not a safeguard measure. According to Viet Nam, a safeguard measure "is a 'suspension' of GATT obligations, or a 'withdrawal' or 'modification' of GATT concessions, which 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".<sup>146</sup> Viet Nam posits that the fact that a measure "was taken pursuant to the procedures provided for under Article XIX and the Agreement on Safeguards" and "was notified as a safeguard measure to the Committee on Safeguards" provides "strong evidentiary support" for a finding that the measure at issue is a safeguard measure that seeks to prevent or remedy serious injury.<sup>147</sup> Viet Nam further submits that failure to comply with the circumstances and conditions set forth in the first part of Article XIX:1(a) or with the requirement that a safeguard measure be applied only "to the extent and for such time as may be necessary" to prevent or remedy serious injury would entail the inconsistency of a safeguard measure with Article XIX:1(a) and the Agreement on Safeguards. However, such inconsistency "would not put in question the nature of the measure" as a safeguard measure.<sup>148</sup>

5.46. Viet Nam agrees with Indonesia that Article XIX:1(a) "does not expressly limit the [GATT] obligations ... that may be suspended by invoking that provision" and posits that such obligations "must include Article I:1 of the GATT 1994".<sup>149</sup> Indeed, argues Viet Nam, it is "beyond dispute" that the application of the measure at issue "on a selective basis pursuant to Article 9.1" is inconsistent with, and therefore suspends, Indonesia's MFN treatment obligation under Article I:1.<sup>150</sup> Viet Nam recognizes that Article 2.2 of the Agreement on Safeguards "incorporates certain elements of the non-discrimination obligation".<sup>151</sup> However, when read together with Article 9.1, Article 2.2 imposes "a narrower ... requirement than that established under Article I:1".<sup>152</sup> In Viet Nam's view, the Panel erred by "splitting the safeguard measure at issue" into two separate components, namely "the specific duty that applies to the non-excluded countries" and "the exclusion from the application of that duty [of] certain developing countries".<sup>153</sup> According to Viet Nam, such a "bifurcated"<sup>154</sup> analysis led the Panel to focus solely on the purpose of the permissive component of the measure at issue, thereby failing to address "whether the measure *as a whole* was aimed to prevent or remedy serious injury".<sup>155</sup> In Viet Nam's view, the exemption of certain developing countries from the application of the duty "reinforces" the requirement under Article 5.1 of the Agreement on Safeguards that safeguard measures not be applied beyond the extent and the time necessary to prevent or remedy injury.<sup>156</sup>

5.47. Finally, Viet Nam takes issue with the Panel's reliance on the General Interpretative Note to support its finding that the measure at issue did not suspend Article I:1. Viet Nam contends that the Panel did not explain how the prevalence of one provision over another would entail that the unapplied provision can be considered as not "suspended".<sup>157</sup> Viet Nam considers the Panel's approach to rest on the incorrect premise that there is a "conflict" between the rule in Article 9.1 of the Agreement on Safeguards and Article I:1 of the GATT 1994.<sup>158</sup> Instead, argues Viet Nam, Article 9.1 and Article I:1 stand in a "general rule - exception relationship" and cannot, therefore,

<sup>145</sup> Chinese Taipei's other appellant's submission, para. 25. (emphasis omitted)

<sup>146</sup> Viet Nam's other appellant's submission, para. 3.11. See also para. 3.24(i) and (ii). At the oral hearing, Viet Nam clarified that, while most safeguard measures entail the suspension of a GATT obligation, it is nonetheless possible for a Member to adopt a safeguard measure that does not result in any such suspension.

<sup>147</sup> Viet Nam's other appellant's submission, para. 3.11. See also paras. 3.22 and 3.24(iii).

<sup>148</sup> Viet Nam's other appellant's submission, para. 3.15.

<sup>149</sup> Viet Nam's other appellant's submission, para. 3.27 (quoting Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.64, 7.71, and 7.73).

<sup>150</sup> Viet Nam's other appellant's submission, para. 3.30.

<sup>151</sup> Viet Nam's other appellant's submission, para. 3.31.

<sup>152</sup> Viet Nam's other appellant's submission, para. 3.31. (emphasis original)

<sup>153</sup> Viet Nam's other appellant's submission, para. 3.34.

<sup>154</sup> Viet Nam's other appellant's submission, para. 3.34.

<sup>155</sup> Viet Nam's other appellant's submission, para. 3.34. (emphasis original) See also paras. 3.35-3.37 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.20; *EC – Asbestos*, para. 64).

<sup>156</sup> Viet Nam's other appellant's submission, para. 3.44.

<sup>157</sup> Viet Nam's other appellant's submission, para. 3.56.

<sup>158</sup> Viet Nam's other appellant's submission, para. 3.50.

be deemed to conflict with one another.<sup>159</sup> Moreover, given that Articles I:1 and XIX:1(a) are part of the "*same covered agreement*", Viet Nam opines that the General Interpretative Note "does not apply".<sup>160</sup>

5.48. As a third participant, Australia submits that a safeguard measure is a measure that "suspends a Member's obligation under the GATT 1994 or withdraws or modifies a Member's scheduled tariff 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".<sup>161</sup> According to Australia, a link exists between the "content" of the measure (i.e. the suspension or modification) and its "objective" (i.e. remedying or preventing serious injury).<sup>162</sup> In particular, argues Australia, it is not sufficient that a measure suspending a GATT obligation is taken with a view to preventing or remedying serious injury; rather, it is the suspension itself that must have the aim of addressing such injury.<sup>163</sup> Australia further contends that while Article XIX:1(a) does not ostensibly "limit the GATT obligations that can relevantly be suspended"<sup>164</sup>, it implicitly limits the range of such obligations to those that are "capable" of giving rise to a situation where a product is "imported into a Member's territory in such increased quantities and under such conditions as to cause or threaten serious injury".<sup>165</sup> Australia takes issue with the Panel's statement that the defining objective of a safeguard measure is "to pursue a course of action *necessary* to prevent or remedy serious injury".<sup>166</sup> In Australia's view, "considerations of necessity do not form part of the constituent elements of a safeguard measure".<sup>167</sup> However, Australia supports the Panel's overall conclusion that the measure at issue does not suspend Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994 and does not, therefore, qualify as a safeguard measure.<sup>168</sup> This is because, explains Australia, the exemption of 120 countries from the scope of application of the duty does not pursue the objective of preventing or remedying injury to Indonesia's industry.<sup>169</sup>

5.49. The European Union recalls that a panel's assessment of the legal characteristics of a measure does not depend on Members' own characterizations of that measure, but rather must be "objective".<sup>170</sup> In the European Union's view, the definition of a safeguard measure must "discount the conditions" listed in Article XIX:1(a), namely "increased quantities; like/competitive product; injury; causation".<sup>171</sup> As a result, argues the European Union, the defining features of a safeguard measure are the suspension of an obligation and/or the withdrawal or modification of a concession.<sup>172</sup> In this regard, the European Union disagrees with Indonesia that a measure that does not suspend any GATT obligation can nevertheless be characterized as a safeguard measure within the meaning of Article XIX:1(a).<sup>173</sup>

5.50. Japan asserts that the Panel erred in "refrain[ing] from examining" the consistency of Indonesia's specific duty with the substantive provisions under Article XIX:1(a) and the Agreement on Safeguards.<sup>174</sup> Japan notes that because Article XIX:1(a) does not contain an express definition of a safeguard measure, its scope of application extends to the suspension of "any other GATT provision" including Articles I, II, and XI thereof.<sup>175</sup> According to Japan, it is sufficient that any such suspension occur and that a Member invoke Article XIX:1(a) for a panel to be required to undertake an examination of a measure's consistency with Article XIX:1(a) and the

<sup>159</sup> Viet Nam's other appellant's submission, para. 3.53.

<sup>160</sup> Viet Nam's other appellant's submission, para. 3.55. (emphasis original)

<sup>161</sup> Australia's third participant's submission, para. 10.

<sup>162</sup> Australia's third participant's submission, para. 11.

<sup>163</sup> Australia's opening statement at the oral hearing, para. 9.

<sup>164</sup> Australia's third participant's submission, para. 30.

<sup>165</sup> Australia's third participant's submission, para. 31. See also para. 32.

<sup>166</sup> Australia's third participant's submission, para. 15 (quoting Panel Report, para. 7.14). (emphasis added by Australia)

<sup>167</sup> Australia's third participant's submission, para. 16. (emphasis omitted)

<sup>168</sup> Australia's third participant's submission, para. 27.

<sup>169</sup> Australia's third participant's submission, para. 39. See also paras. 40, 43, 47, and 53.

<sup>170</sup> European Union's third participant's submission, para. 41.

<sup>171</sup> European Union's third participant's submission, para. 45.

<sup>172</sup> European Union's third participant's submission, para. 45.

<sup>173</sup> European Union's third participant's submission, para. 50 (referring to Indonesia's appellant's submission, para. 39).

<sup>174</sup> Japan's third participant's submission, section II.

<sup>175</sup> Japan's third participant's submission, para. 6. (emphasis omitted) See also paras. 9 and 13.

Agreement on Safeguards.<sup>176</sup> In particular, Japan takes the view that Article 9.1 of the Agreement on Safeguards "is concerned with the *application*" of a safeguard measure and "is not relevant to the threshold issue of whether the Agreement on Safeguards applies" to a measure.<sup>177</sup> For Japan, the Panel's approach unduly conflates issues of applicability of the Agreement on Safeguards with issues of legality of a safeguard measure under that Agreement.<sup>178</sup> India subscribes to Japan's views on these matters.<sup>179</sup>

5.51. Finally, the United States considers that a safeguard measure may be found to exist only when a Member has suspended a GATT obligation or withdrawn or modified a tariff concession and asserts that it is entitled to do so under Article XIX of the GATT 1994 and the Agreement on Safeguards.<sup>180</sup> The United States also emphasizes the relevance of Members' notifications to the Committee on Safeguards.<sup>181</sup> In the United States' opinion, the Panel correctly found that the measure at issue in these proceedings is not a safeguard measure. Noting the absence of a tariff binding on galvalume in Indonesia's WTO Schedule of Concessions, the United States argues that Indonesia did not explain that the effect of any GATT obligation resulted in an import situation requiring emergency action.<sup>182</sup>

### **5.2.3.2 Analysis of the Panel's interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994**

5.52. The claims and arguments raised by the participants on appeal require us to rule on the scope of measures subject to the disciplines of the Agreement on Safeguards, to the extent that this is required to resolve this dispute. By way of background, we recall the rather unusual circumstances in which this question arose in the Panel proceedings. As noted by the Panel, this is the first time in which claims of violation of the Agreement on Safeguards have been raised in a situation where: (i) the responding Member conducted an investigation with a view to complying with its obligations under the Agreement on Safeguards and imposed a duty in light of the outcome of that investigation, despite the fact that it was entitled to raise its applied MFN duty rate on imports of the subject product at any time and to any level, given that it has no tariff bindings on that product under Article II of the GATT 1994; and (ii) all parties have consistently argued that the duty at issue *is* a safeguard measure.<sup>183</sup>

5.53. The Appellate Body has described safeguard measures as "extraordinary remedies" that "are imposed in the form of import restrictions" in "emergency situations", i.e. "in the absence of any allegation of an unfair trade practice".<sup>184</sup> As the Appellate Body has noted, the WTO disciplines on safeguards give WTO Members "the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that ... makes it necessary to protect a domestic industry temporarily".<sup>185</sup>

5.54. Article 1 of the Agreement on Safeguards specifies that the "safeguard measures" are "measures provided for in Article XIX of GATT 1994". Article XIX is entitled "Emergency Action on Imports of Particular Products". Paragraph 1(a) of Article XIX reads as follows:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions, any product is being imported into the territory of that Member in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the Member shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent

<sup>176</sup> Japan's third participant's submission, para. 7.

<sup>177</sup> Japan's third participant's submission, para. 17. (emphasis original)

<sup>178</sup> Japan's third participant's submission, para. 21.

<sup>179</sup> India's opening statement at the oral hearing, para. 6.

<sup>180</sup> United States' opening statement at the oral hearing, para. 5.

<sup>181</sup> United States' responses to questioning at the oral hearing.

<sup>182</sup> United States' opening statement at the oral hearing, para. 6.

<sup>183</sup> Panel Report, fn 84 to para. 7.47.

<sup>184</sup> Appellate Body Report, *US – Line Pipe*, para. 80. See also Appellate Body Reports, *Korea – Dairy*, para. 86; *US – Steel Safeguards*, para. 347.

<sup>185</sup> Appellate Body Report, *US – Line Pipe*, para. 82.



or remedy such injury, *to suspend the obligation in whole or in part or to withdraw or modify the concession.*<sup>186</sup>

5.55. A plain reading of Article XIX:1(a) suggests that the "measures provided for" in that provision are measures that *suspend a GATT obligation and/or withdraw or modify a GATT concession*, in situations where a product "is being imported" into a Member's territory in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products".<sup>187</sup> In other words, the action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession. Absent such a suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard measure.<sup>188</sup>

5.56. Article XIX:1(a) further indicates that the measures provided for under that provision are those that suspend a GATT obligation or withdraw or modify a tariff concession "to prevent or remedy" serious injury to a Member's domestic industry caused or threatened by imports subject to a GATT obligation or tariff concession. The use of the word "to" in this connection indicates that the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry.<sup>189</sup> Thus, for example, where a measure suspends a GATT obligation or withdraws or modifies a tariff concession, but that suspension, withdrawal, or modification does not have a demonstrable link to the objective of preventing or remedying injury, we do not consider that the measure in question could be characterized as one "provided for" under Article XIX.

5.57. That said, we note that Article XIX:1(a) does not expressly define the scope of measures that fall under the WTO safeguard disciplines. Rather, whether a particular measure constitutes a safeguard measure for purposes of WTO law can be determined only on a case-by-case basis. In carrying out this analysis, it is important to distinguish between the features that determine whether a measure can be properly characterized as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the *WTO-consistency* of a safeguard measure.

5.58. We further note that the text of Article XIX:1(a) does not expressly list the GATT obligations that may be suspended in order for a measure to qualify as a safeguard measure. While the Appellate Body has identified Articles II:1 and XI:1 of the GATT 1994 (addressing tariff concessions and the prohibition on quantitative restrictions, respectively) as typical examples of such obligations<sup>190</sup>, it has not precluded the possibility that other GATT obligations may be relevant to this effect. We recall, however, our understanding that, in order for a measure to constitute a safeguard measure, the suspension of a GATT obligation or the withdrawal or modification of a tariff concession entailed by that measure must be designed to pursue the objective of preventing or remedying serious injury to the Member's domestic industry. This suggests that the range of GATT obligations that may relevantly be suspended for purposes of

<sup>186</sup> Emphasis added.

<sup>187</sup> Indeed, as the Appellate Body has noted, "the remedy that Article XIX:1(a) allows" to address such circumstances "is ... to 'suspend [a GATT] obligation in whole or in part or to withdraw or modify [a GATT] concession'". (Appellate Body Report, *Korea – Dairy*, para. 86)

<sup>188</sup> In this regard, we disagree with Indonesia to the extent it suggests that the words "shall be free" in the second part of Article XIX:1(a) indicate that a measure may be a safeguard measure regardless of whether it suspends a GATT obligation. (See Indonesia's appellant's submission, para. 39) As we see it, those words simply accord to a Member the "freedom" to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met. (Appellate Body Report, *US – Line Pipe*, para. 84)

<sup>189</sup> This reading is buttressed by the third preambular recital of the Agreement on Safeguards, which stresses "the importance of structural adjustment" and "the need to enhance rather than limit competition in international markets".

<sup>190</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 95.

Article XIX is limited to obligations whose suspension has a demonstrable link to the prevention or remediation of serious injury.<sup>191</sup>

5.59. To conclude our reading of Article XIX:1(a), we note that a Member's right to suspend a GATT obligation or to withdraw or modify a GATT concession is not unqualified. Rather, that Member may take such emergency action only "to the extent and for such time as may be necessary" to prevent or remedy serious injury.<sup>192</sup> Articles 5.1 and 7.1 of the Agreement on Safeguards equally specify, respectively, that safeguard measures shall be applied "only to the extent" and "only for such period of time" as may be "necessary to prevent or remedy serious injury and to facilitate adjustment". We do not consider these requirements to be relevant to the legal characterization of a measure as a safeguard measure for purposes of determining the *applicability* of the WTO safeguard disciplines. Instead, they relate to the WTO-conformity of a safeguard measure.<sup>193</sup>

5.60. 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.<sup>194</sup> 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 those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject.<sup>195</sup> 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>196</sup>

5.61. With these considerations in mind, we now turn to the Panel's reading of Article XIX:1(a). We recall that, for the Panel, "one of the defining features" of 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

<sup>191</sup> In this respect, we note that the panel in *Dominican Republic – Safeguard Measures* found that the measure at issue in that dispute suspended not only an obligation under Article II:1(b) of the GATT 1994, but also the Dominican Republic's MFN treatment obligation under Article I:1 of the GATT 1994. (Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.61-7.73 and 7.74-7.88) While the text of Article XIX:1(a) does not expressly exclude the MFN treatment obligation under Article I:1 from the scope of obligations that may be suspended, we consider that, in order for a measure to constitute a safeguard measure, a suspension of Article I:1 must be designed to prevent or remedy serious injury.

<sup>192</sup> Emphasis added. In addition, as the Appellate Body noted in *US – Steel Safeguards*, "the product that may be subject to a safeguard measure ... is, necessarily, *the product* that 'is being imported in such increased quantities'". (Appellate Body Report, *US – Steel Safeguards*, para. 314 (emphasis original))

<sup>193</sup> The Appellate Body has observed that such requirements, along with the other substantive disciplines under the Agreement on Safeguards, pertain to the question of whether the right to impose a safeguard measure has "been exercised ... within the limits set out in the treaty". (Appellate Body Report, *US – Line Pipe*, para. 84)

<sup>194</sup> The Panel in this dispute also noted that the panel in *Dominican Republic – Safeguard Measures* expressed the view that the words "obligation" and "concession" in the second part of Article XIX:1(a) refer to the "obligations" and "concessions" in the first part of that provision. (Panel Report, para. 7.16 (referring to Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.64)) The Panel did not find it necessary to "make a finding on this interpretative issue". (Panel Report, para. 7.17) We, too, do not find it necessary to address this interpretative issue in order to resolve the present dispute. Rather, our task is limited to the question of whether a measure can constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards if: (i) it does not suspend a GATT obligation or withdraw or modify a tariff concession; or (ii) that suspension, withdrawal, or modification is not designed to prevent or remedy serious injury.

<sup>195</sup> Appellate Body Reports, *China – Auto Parts*, para. 171.

<sup>196</sup> Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 586 and 593; *US – Offset Act (Byrd Amendment)*, para. 259; *US – Softwood Lumber IV*, para. 56; *US – Corrosion-Resistant Steel Sunset Review*, fn 87 to para. 87; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.127.

a situation where all of the conditions for the imposition of a safeguard measure are satisfied".<sup>197</sup> On appeal, all participants and a number of third participants take issue with the Panel's approach.<sup>198</sup> In particular, they express the view that the Panel conflated the constituent features of a safeguard measure with the conditions for the WTO-consistent application of a safeguard measure in light of the procedural and substantive requirements of the Agreement on Safeguards.

5.62. We, too, find the Panel's approach to be problematic. First, the 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".<sup>199</sup> 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*".<sup>200</sup> 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.<sup>201</sup> 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.

5.63. We now turn to the Panel's application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 to the measure at issue in these proceedings, which, to recall, relates to Indonesia's specific duty on imports of galvalume. The Panel found that this measure does not constitute a safeguard measure on three grounds. First, it found that, since Indonesia has no tariff binding on galvalume in its WTO Schedule of Concessions<sup>202</sup>, the measure at issue does not "suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994".<sup>203</sup> Second, the Panel dismissed Indonesia's argument that the measure at issue suspends "the GATT exception under Article XXIV of the GATT 1994".<sup>204</sup> In particular, the Panel observed that Indonesia's tariff commitments vis-à-vis its RTA partners are obligations assumed under the respective RTAs, not the WTO Agreement<sup>205</sup>, such that there is "no basis" to assert that the measure at issue suspends "the GATT exception under Article XXIV".<sup>206</sup> Third, the Panel rejected Indonesia's assertion that the exemption of 120 countries from the scope of application of the specific duty, which Indonesia considers to be mandated by Article 9.1, results in a discriminatory application of the measure at issue that suspends Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994.<sup>207</sup> In particular, the Panel considered that: (i) the application of Article 9.1 is "legally premised" on the qualification of a measure as a safeguard, which the Panel had already found not to be the case with the measure at issue<sup>208</sup>; (ii) the exemption of 120 countries from the scope of application of the duty is not "necessary to remedy or prevent

<sup>197</sup> Panel Report, para. 7.15. (emphasis omitted)

<sup>198</sup> See e.g. Indonesia's responses to questioning at the oral hearing; Chinese Taipei's other appellant's submission, para. 13; Viet Nam's other appellant's submission, para. 3.15; Australia's third participant's submission, para. 16; European Union's responses to questioning at the oral hearing; Japan's responses to questioning at the oral hearing; United States' responses to questioning at the oral hearing.

<sup>199</sup> Panel Report, para. 7.15. See also Panel Report, para. 7.13 (where the Panel stated that safeguard measures "must result in the suspension, withdrawal, or modification of a GATT obligation or concession for a particular purpose – that is, they must operate *'to the extent and for such a time as may be necessary to prevent or remedy such injury'*" (emphasis original)).

<sup>200</sup> Panel Report, para. 7.15. (emphasis added)

<sup>201</sup> See e.g. Appellate Body Reports, *US – Line Pipe*, para. 84; *US – Steel Safeguards*, para. 264.

<sup>202</sup> Panel Report, para. 7.18 (referring to Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 7).

<sup>203</sup> Panel Report, para. 7.18.

<sup>204</sup> Panel Report, para. 7.19 (quoting Indonesia's comments on the complainants' joint responses to Panel questions following the second Panel meeting, para. 10).

<sup>205</sup> Panel Report, para. 7.20.

<sup>206</sup> Panel Report, para. 7.20.

<sup>207</sup> Panel Report, para. 7.21 (referring to Indonesia's first written submission to the Panel, para. 212; comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 8; comments on the complainants' joint responses to Panel questions following the second Panel meeting, para. 7).

<sup>208</sup> Panel Report, para. 7.25.

serious injury"<sup>209</sup>, thereby lacking a connection with the "the fundamental objective of Article XIX:1(a)"<sup>210</sup>; and (iii) the General Interpretative Note excludes the possibility that the application of Article 9.1, as the legally prevailing rule, suspends a Member's obligations under Article I:1.<sup>211</sup> On appeal, the participants do not dispute the Panel's findings that the measure at issue does not entail a suspension, withdrawal, or modification of Indonesia's obligations under Articles II and XXIV. They do, however, take issue with the Panel's finding that the discriminatory application of the measure at issue by virtue of the disciplines of Article 9.1 cannot be deemed to suspend Indonesia's MFN treatment obligation under Article I:1.<sup>212</sup>

5.64. We recall that, in order to determine whether a measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement of Safeguards, a panel must objectively assess the design, structure, and expected operation of the measure as a whole, identify all the aspects of the measure that may have a bearing on its legal characterization, and recognize which aspects are the most central to the measure.<sup>213</sup> In the present case, the Panel was required to ascertain whether the suspension, withdrawal, or modification of a GATT obligation or concession entailed by the measure at issue is designed to prevent or remedy serious injury.

5.65. We note that both Regulation 137 and the Final Disclosure Report expressly state that Indonesia's imposition of a specific duty on imports of galvalume seeks to counter a threat of serious injury caused by an alleged increase in imports of galvalume over the period of investigation.<sup>214</sup> This element of the measure at issue may well be designed to pursue the specific objective of preventing or remedying serious injury to Indonesia's domestic industry. However, the imposition of the specific duty does not suspend any of Indonesia's GATT obligations, nor does it withdraw or modify any of Indonesia's GATT concessions. This is because, as the Panel rightly found and no participant has contested, Indonesia "has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions" and is, therefore, "free to impose any amount of duty it deems appropriate" on that product.<sup>215</sup>

5.66. Besides the imposition of the specific duty, the measure at issue provides for the exemption of the 120 countries listed in Regulation 137 from the scope of application of that duty. By its own terms, this exemption could be viewed as suspending Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994. Indeed, the imposition of the duty on imports of galvalume from some, and not all, Members results in the discriminatory application of the measure at issue, as it departs from the obligation to "immediately and unconditionally" accord "any advantage, favour, privilege or immunity" to "like products" originating in all WTO Members. We note, however, that neither Regulation 137 nor the Final Disclosure Report indicates that the exemption is designed to pursue the specific objective of preventing or remedying serious injury. Before the Panel, Indonesia confirmed that the exemption is "*neither intended nor designed*" for that purpose.<sup>216</sup>

5.67. On appeal, Indonesia submits that "the sole purpose of the discriminatory application" of the specific duty "is to impose the ... measure only to major exporting countries which contributed the most to the threat of serious injury suffered by Indonesian galvalume producers".<sup>217</sup> According to Indonesia, the application of the measure to "all WTO Members regardless of [their] import share would not be necessary to remedy or prevent serious injury".<sup>218</sup> Similarly, Viet Nam submits that the selective application of the duty "reinforces" the requirement, under Article 5.1 of the

<sup>209</sup> Panel Report, para. 7.22. (emphasis omitted)

<sup>210</sup> Panel Report, para. 7.28.

<sup>211</sup> Panel Report, para. 7.29.

<sup>212</sup> See e.g. Indonesia's appellant's submission, para. 16; Chinese Taipei's other appellant's submission, para. 9; Viet Nam's other appellant's submission, para. 3.27.

<sup>213</sup> Appellate Body Reports, *China – Auto Parts*, para. 171.

<sup>214</sup> Regulation 137 (Panel Exhibits IDN-20 and JE-4), preambular recital b; Final Disclosure Report (Panel Exhibits IDN-8 and JE-1), paras. 64-65.

<sup>215</sup> Panel Report, para. 7.18 (referring to Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 7).

<sup>216</sup> Panel Report, para. 7.22 (referring to Indonesia's responses to Panel questions Nos. 51 and 52; comments on complainants' joint responses to Panel questions following the second Panel meeting, para. 10; comments on complainants' joint responses to Panel questions Nos. 50 and 51). (emphasis original)

<sup>217</sup> Indonesia's appellant's submission, para. 33.

<sup>218</sup> Indonesia's appellant's submission, para. 34.

Agreement on Safeguards, that safeguard measures not be applied beyond the extent necessary to prevent or remedy injury.<sup>219</sup>

5.68. We observe that neither Regulation 137 nor the Final Disclosure Report refers to the objective of targeting the major contributors to the threat of serious injury. Instead, those instruments expressly indicate that the exemption of 120 countries from the scope of application of the specific duty pursues the objective of complying with the disciplines of Article 9.1 of the Agreement on Safeguards.<sup>220</sup> During the course of the Panel proceedings, Indonesia confirmed that the exemption is aimed at complying with the requirements of Article 9.1.<sup>221</sup> Article 9.1 of the Agreement on Safeguards stipulates that safeguard measures "shall not be applied against a product originating in a developing country Member", provided that "its share of imports of the product concerned ... does not exceed 3 per cent" and that "developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned". The title of Article 9.1, "Developing Country Members", suggests that the purpose of this provision is to set forth S&D treatment requirements in favour of "developing countries whose individual exports are below a *de minimis* level".<sup>222</sup> These disciplines set forth conditions for the WTO-consistent application of safeguard measures, and they do not speak to the question of whether a measure constitutes a safeguard measure for purposes of the *applicability* of the WTO safeguard disciplines. In fact, the design, structure, and expected operation of the measure at issue suggest to us that the central aspect of that measure, through which Indonesia seeks to prevent a threat of serious injury to its domestic industry, is the imposition of the specific duty. By contrast, the exemption of 120 countries from the scope of application of the specific duty has the result of allowing *more* imports of galvalume – albeit *de minimis* – into Indonesia's territory *for purposes of according S&D treatment*. Hence, in our view, it has not been demonstrated in the present case that the alleged suspension of Article I:1 entailed by the exemption is designed to prevent or remedy serious injury to Indonesia's domestic industry.<sup>223</sup>

5.69. Even assuming that, as Indonesia and Viet Nam now argue, the exemption of 120 countries from the scope of application of the specific duty seeks to "reinforce" the "necessity" requirement under Article 5.1 of the Agreement on Safeguards by targeting the major contributors to the threat of serious injury, this does not suffice to show that the alleged suspension of Article I:1 entailed by that exemption is designed to pursue the specific purpose of preventing or remedying serious injury. As discussed in paragraph 5.59. above, the "necessity" requirement under Article 5.1 of the Agreement on Safeguards does not relate to the legal characterization of a measure for purposes of the *applicability* of the WTO safeguard disciplines, but rather pertains to a safeguard measure's *conformity* with those disciplines.

5.70. 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

<sup>219</sup> Viet Nam's other appellant's submission, para. 3.44.

<sup>220</sup> Final Disclosure Report (Panel Exhibits IDN-8 and JE-1), para. 66.

<sup>221</sup> Panel Report, para. 7.22 (referring to Indonesia's responses to Panel questions Nos. 51 and 52; comments on complainants' joint responses to Panel questions following the second Panel meeting, para. 10; comments on complainants' joint responses to Panel questions Nos. 50 and 51). (emphasis added)

<sup>222</sup> Appellate Body Report, *US – Line Pipe*, para. 129. (emphasis original) Before the Panel, Indonesia itself described the disciplines of Article 9.1 as S&D treatment requirements. (See e.g. Indonesia's first written submission to the Panel, para. 199; response to Panel question No. 52, para. 26)

<sup>223</sup> Like the Panel, we express no view as to whether a measure that suspends a Member's MFN treatment obligation under Article I:1 of the GATT 1994 in order to prevent or remedy serious injury could be found to be a safeguard measure. (See Panel Report, fn 60 to para. 7.28) However, we note that, in order to be WTO-consistent, such a measure would have to comply with the disciplines of the Agreement on Safeguards to the extent they are applicable, including Articles 2.2, 5, and 9.1 thereof.

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".

5.71. Based on the foregoing, and despite our reservations on certain aspects of the Panel's interpretation of Article XIX:1(a) of the GATT 1994, expressed in paragraph 5.62. above, we uphold the Panel's overall conclusion, in paragraphs 7.10 and 8.1.a of its Report, that the measure at issue does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Having upheld the Panel's conclusion, there is no legal basis for us to rule on the complainants' request for completion of the legal analysis with respect to their claims under Article XIX of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards.

### 5.3 Whether the Panel's terms of reference include a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure

5.72. Having upheld the Panel's finding that the measure at issue is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, we now turn to the Panel's finding under Article I:1 of the GATT 1994 with respect to the specific duty "as a stand-alone measure".<sup>224</sup> We understand the Panel's reference to the specific duty as a "stand-alone measure" to mean the specific duty irrespective of its legal characterization as a safeguard measure.<sup>225</sup>

5.73. To recall, Indonesia's specific duty excludes imports of galvalume from 120 countries, listed in Regulation 137, from its scope of application. Indonesia's allegation of error with respect to the Panel's finding under Article I:1 of the GATT 1994 relates to the scope of the Panel's terms of reference, rather than to any alleged error in the Panel's substantive analysis or application of Article I:1 of the GATT 1994.<sup>226</sup> We begin our analysis with a summary of the Panel's findings and review of the relevant requirements under Article 6.2 of the DSU, before assessing the participants' arguments on appeal.

#### 5.3.1 The Panel's findings

5.74. Based on its finding that the measure at issue does not qualify as a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Panel did not rule on the complainants' claims "against the specific duty, *as a safeguard measure*"<sup>227</sup>, under the disciplines of the Agreement on Safeguards and Article XIX of the GATT 1994.

5.75. At the same time, the Panel considered that the complainants had put forward an "alternative claim that Indonesia's application of the specific duty, *as a stand-alone measure*, is inconsistent with Article I:1 of the GATT 1994".<sup>228</sup> In particular, according to the Panel, the complainants had claimed that the exclusion of the 120 countries listed in Regulation 137 from the scope of application of the specific duty constitutes "an advantage, favour, or privilege provided in connection with the application of customs duties that Indonesia failed to accord immediately and unconditionally to like products originating in all WTO Members".<sup>229</sup> The Panel stated that the complainants had pursued the claim "primarily as part of their complaint against the specific duty *as a safeguard measure*".<sup>230</sup> However, it took the view that the complainants had made "the same

<sup>224</sup> Panel Report, para. 7.42. (emphasis omitted)

<sup>225</sup> See e.g. Panel Report, paras. 7.10 and 7.42.

<sup>226</sup> As reflected in Indonesia's Notice of Appeal and appellant's submission, and confirmed at the oral hearing, Indonesia also challenges the Panel's finding to the extent it was based on the finding that the measure at issue is not a safeguard. As we have upheld the finding that the measure at issue is not a safeguard, we see no need to consider further this aspect of Indonesia's appeal under Article I:1 of the GATT 1994. (See Indonesia's Notice of Appeal, section 1, p. 1; appellant's submission, paras. 42-43)

<sup>227</sup> Panel Report, para. 7.11. (emphasis original)

<sup>228</sup> Panel Report, para. 7.10. (emphasis original)

<sup>229</sup> Panel Report, para. 7.42. (referring to complainants' joint first written submission to the Panel, paras. 5.142-5.150; Chinese Taipei's panel request, para. II.a.6; Viet Nam's panel request, para. 1.7.a.vi). (fn omitted)

<sup>230</sup> Panel Report, para. 7.42 (referring to complainants' joint first written submission to the Panel, paras. 5.142-5.150; joint response to Panel question No. 42; joint second written submission to the Panel,

claim on the basis of the same arguments against the specific duty *as a stand-alone measure*".<sup>231</sup> In the Panel's view, Indonesia "ha[d] not contested the complainants' Article I:1 claim against the specific duty *as a stand-alone measure*".<sup>232</sup>

5.76. On this basis, the Panel proceeded with its assessment of the consistency of the measure at issue with Indonesia's obligations under Article I:1 of the GATT 1994. It agreed with the complainants that the specific duty is a "customs duty" within the meaning of Article I:1, and that the exclusion of imports of galvalume from the 120 countries listed in Regulation 137 constitutes an "advantage" granted to "like products" that is not "accorded immediately and unconditionally" to imports of galvalume from all WTO Members.<sup>233</sup> The Panel therefore found the application of the specific duty on imports of galvalume to be inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994.<sup>234</sup>

### 5.3.2 The relevant legal standard under Article 6.2 of the DSU

5.77. Article 6.2 of the DSU reads, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

5.78. Article 6.2 of the DSU sets out two principal requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>235</sup> The measure(s) and the legal basis of the complaint – i.e. the claim(s) – constitute the "matter referred to the DSB", which forms the basis of the panel's terms of reference.<sup>236</sup> In defining the scope of the dispute, the panel request serves the function of establishing and delimiting the panel's jurisdiction<sup>237</sup>, but it also fulfils a due process objective. In the context of Article 6.2, due process consists of providing the respondent and third parties with notice regarding the nature of the complainant's case to enable them to respond accordingly.<sup>238</sup>

5.79. In assessing whether a panel request is "sufficiently precise" to comply with Article 6.2, panels must carefully scrutinize the panel request, read as a whole, and on the basis of the

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paras. 2.128, 2.132, and 2.136; joint opening statement at the first meeting of the Panel, paras. 7.1-7.2; joint opening statement at the second meeting of the Panel, para. 7.2). (emphasis original; fn omitted)

<sup>231</sup> Panel Report, para. 7.42 (referring to complainants' joint comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 2.2; joint response to Panel question No. 51). (emphasis original)

<sup>232</sup> Panel Report, para. 7.43. (emphasis original)

<sup>233</sup> Panel Report, para. 7.44.

<sup>234</sup> Panel Report, para. 7.44.

<sup>235</sup> In addition, Article 6.2 contains two further requirements: namely, that the request be made in writing and that it indicate whether consultations were held. (See Appellate Body Report, *Korea – Dairy*, para. 120)

<sup>236</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>237</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Continued Zeroing*, para. 161; *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>238</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Carbon Steel*, para. 126; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161; *Argentina – Import Measures*, para. 5.11; *Thailand – H-Beams*, para. 88. However, the Appellate Body has noted that the determination of whether due process has been respected does not necessitate a separate examination of whether the parties suffered prejudice, considering that "[t]his due process objective [under Article 6.2] is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction." Thus, for example, the fact that a respondent's ability to begin preparing its defence is not prejudiced does not *ipso facto* mean that a panel request meets the requirements of Article 6.2. (Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7)

language used therein.<sup>239</sup> Moreover, a panel must determine compliance with Article 6.2 on the face of the panel request as it existed at the time of filing.<sup>240</sup> Thus, parties' subsequent submissions and statements during the panel proceedings cannot "cure" any defects in the panel request<sup>241</sup>, but they can be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>242</sup> The need to examine the panel request "on its face" and "on the basis of the language used" makes the narrative in the panel request a significant part of the assessment of whether the request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>243</sup>

5.80. The Appellate Body has explained that the reference in Article 6.2 of the DSU to the "legal basis of the complaint" refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated<sup>244</sup>, and that it is the *claims*, not the *arguments*, that are to be set out in a panel request in a way that is sufficient to present the problem clearly.<sup>245</sup> For the purposes of Article 6.2, a claim refers to an allegation that "the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement."<sup>246</sup> Arguments, by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".<sup>247</sup> The Appellate Body has stated that the "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary" and is a "minimum prerequisite if the legal basis of the complaint is to be presented at all".<sup>248</sup>

5.81. Regarding the requirement that a complainant provide a "brief summary" that is sufficient to "present the problem clearly", the Appellate Body has explained that a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".<sup>249</sup> A brief summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".<sup>250</sup> Thus, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."<sup>251</sup>

### 5.3.3 Analysis of the Panel's terms of reference

5.82. On appeal, Indonesia submits that the Panel erred in considering that the complainants had made a claim of inconsistency with Article I:1 of the GATT 1994 with respect to the measure at

<sup>239</sup> Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing Measures (China)*, para. 4.7; *EC – Fasteners (China)*, para. 562; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>240</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13.

<sup>241</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>242</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *EC and certain member States – Large Civil Aircraft*, para. 642; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>243</sup> See Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 230-232).

<sup>244</sup> See Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

<sup>245</sup> See Appellate Body Reports, *EC – Selected Customs Matters*, para. 153; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.14.

<sup>246</sup> Appellate Body Report, *Korea – Dairy*, para. 139.

<sup>247</sup> Appellate Body Report, *Korea – Dairy*, para. 139.

<sup>248</sup> Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; *India – Patents (US)*, paras. 89, 92, and 93).

<sup>249</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8 (both quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>250</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (emphasis original)

<sup>251</sup> Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *Korea – Dairy*, para. 124); *EC – Fasteners (China)*, para. 598; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.



issue "*as a stand-alone measure*", i.e. not as a safeguard measure.<sup>252</sup> Indonesia argues that the complainants, in their panel requests, identified the challenged measure as "the specific duty imposed as a safeguard measure"<sup>253</sup> and maintained the same characterization in their second written submission to the Panel.<sup>254</sup> In Indonesia's view, the complainants asserted a claim under Article I:1 against a stand-alone measure only at a "later stage" of the proceedings, namely in their responses to Panel questions after the second meeting.<sup>255</sup> In light of the above, Indonesia contends that the Panel's terms of reference, as set out by the complainants' panel requests, only covered the question of consistency with Article I:1 with respect to the specific duty as a safeguard measure.<sup>256</sup> Indonesia therefore claims that the Panel erred in making a finding of inconsistency with Article I:1 of the GATT 1994 with respect to a measure that was not a safeguard measure, which was not identified in the panel requests.<sup>257</sup>

5.83. Chinese Taipei and Viet Nam emphasize that their panel requests describe the measure at issue as "the *specific duty* imposed as a safeguard measure".<sup>258</sup> In their view, the inclusion of the term "safeguard measure" in such description simply reflects how the measure was imposed by Indonesia<sup>259</sup>, without conditioning the Article I:1 claim upon the legal characterization of the measure at issue.<sup>260</sup> Concerning the legal basis of their complaint under Article I:1, the complainants highlight that their panel requests describe this as being that "the specific duty imposed by Indonesia ... applies to products originating only in certain countries" and that this "constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in all WTO Members".<sup>261</sup> The complainants argue that this provides a brief summary of the legal basis of their Article I:1 claim by connecting the specific duty to the provision they claim to have been infringed.<sup>262</sup> On this basis, the complainants consider that the claim in their panel requests under Article I:1 of the GATT 1994 complied with the requirements of Article 6.2 of the DSU, and therefore the matter was properly within the Panel's terms of reference.<sup>263</sup>

5.84. As a third participant, the European Union takes the view that the complainants "conceived their case as a case against a safeguard measure".<sup>264</sup> The European Union cautions against the Panel's reliance on the complainants' subsequent submissions to conclude otherwise<sup>265</sup>, and considers that "the characterisation of the measure as a safeguard measure was part of the determining parameters of the claim made by the co-complainants".<sup>266</sup> For the European Union, this "fundamental parameter of the claim" could not be extended by the complainants' subsequent submissions to the Panel.<sup>267</sup>

<sup>252</sup> Indonesia's appellant's submission, paras. 44 and 70. (emphasis original)

<sup>253</sup> Indonesia's appellant's submission, paras. 45, 70, and 71 (referring to Viet Nam's panel request, pp. 2-4; Chinese Taipei's panel request, pp. 2-4).

<sup>254</sup> Indonesia's appellant's submission, paras. 46 and 72 (referring to complainants' joint second written submission to the Panel, paras. 2.128 and 2.137).

<sup>255</sup> Indonesia's appellant's submission, paras. 47, 74, and 75 (referring to complainants' joint response to Panel question No. 51, paras. 1.20-1.25; joint comments on paragraphs 40 and 41 of Indonesia's second written submission to the Panel, para. 2.2).

<sup>256</sup> Indonesia's appellant's submission, paras. 78-79.

<sup>257</sup> Indonesia's appellant's submission, para. 80.

<sup>258</sup> Chinese Taipei's appellee's submission, para. 3.11 (referring to Chinese Taipei's panel request, p. 2); Viet Nam's appellee's submission, para. 3.26 (referring to Viet Nam's panel request, para. 1.5.a). (emphasis original)

<sup>259</sup> Chinese Taipei's appellee's submission, para. 3.17; Viet Nam's appellee's submission, para. 3.28.

<sup>260</sup> Chinese Taipei's appellee's submission, paras. 3.13 and 3.15; Viet Nam's appellee's submission, paras. 3.28 and 3.33.

<sup>261</sup> Chinese Taipei's appellee's submission, para. 3.12 (referring to Chinese Taipei's panel request, p. 3); Viet Nam's appellee's submission, para. 3.29 (referring to Viet Nam's panel request, para. 1.7.a.vi).

<sup>262</sup> Chinese Taipei's appellee's submission, para. 3.22; Viet Nam's appellee's submission, paras. 3.30-3.31.

<sup>263</sup> Chinese Taipei's appellee's submission, para. 3.13; Viet Nam's appellee's submission, para. 3.25.

<sup>264</sup> European Union's third participant's submission, para. 60.

<sup>265</sup> European Union's third participant's submission, paras. 58 and 60.

<sup>266</sup> European Union's third participant's submission, para. 64. Therefore, the European Union submits that the complainants' challenge was "in reality" limited to Indonesia's "wrongful application of Article 9.1 of [the Agreement on Safeguards]" and a "*consequential* breach of Article I:1 of GATT 1994".

(European Union's third participant's submission, para. 63. (emphasis original))

<sup>267</sup> European Union's third participant's submission, para. 65.

5.85. The question raised in this appeal is whether a claim of inconsistency with Article I:1 of the GATT 1994 with respect to Indonesia's specific duty on imports of galvalume "as a stand-alone measure"<sup>268</sup> (i.e. not as a safeguard measure) is within the scope of the Panel's terms of reference.<sup>269</sup> In order to assess this question, we examine whether the complainants' panel requests properly articulated a claim that the specific duty as a stand-alone measure (i.e. not as a safeguard measure) is inconsistent with Article I:1 of the GATT 1994, in light of the requirements under Article 6.2 of the DSU.

5.86. Beginning with the first requirement of Article 6.2, we note that both Chinese Taipei's and Viet Nam's panel requests identify the "measures at issue" as including "the specific duty imposed as a safeguard measure, as a result of the investigation initiated on 19 December 2012 and concluded by [Indonesia's investigating authority], on imports of [galvalume]".<sup>270</sup> In our view, this description and presentation of the specific duty as a "measure at issue"<sup>271</sup> clearly identifies it as a measure that is alleged to be causing the violation of an obligation contained in a covered agreement.<sup>272</sup> The identification of the specific duty in this context is not diminished or affected by its legal characterization in connection with the particular obligations that it is alleged to violate. Rather, in accordance with the conceptual distinction between measures and claims in a panel request<sup>273</sup>, what is significant at this stage of the analysis under Article 6.2 is that *the specific duty* is clearly singled out in the panel requests as a measure at issue. Thus, we find that the complainants' panel requests meet the requirement under Article 6.2 to "identify the specific measures at issue" with respect to the specific duty applied by Indonesia on imports of galvalume.

5.87. Turning to the second requirement of Article 6.2, we examine whether the language in the complainants' panel requests sets out the "the legal basis of the complaint" under Article I:1 of the GATT 1994 in a manner "sufficient to present the problem clearly". Chinese Taipei claims as follows in its panel request:

In any event, the specific duty imposed by Indonesia is inconsistent with Article I:1 of the GATT 1994 in that it applies to products originating only in certain countries, and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in all WTO Members.<sup>274</sup>

5.88. Similarly, Viet Nam claims in its panel request that:

The specific duty imposed by Indonesia is inconsistent with Article I:1 of the GATT 1994 in that it applies to products originating only in certain countries, and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in all WTO Members.<sup>275</sup>

5.89. Based on the above passages of their panel requests, the legal basis for a finding of inconsistency with Article I:1 of the GATT 1994 is that "the specific duty imposed by Indonesia ... applies to products originating only in certain countries". At the same time, both complainants set out a prefatory comment under the section of their panel requests concerning the legal basis of the complaint, in which each "notes that according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 ... applied in accordance with the Agreement on

<sup>268</sup> Panel Report, para. 7.42. (emphasis omitted)

<sup>269</sup> We note that the participants do not contest that the Panel's terms of reference include a claim under Article I:1 of the GATT 1994; it is contested, however, whether this claim extends to the specific duty in light of the Panel's finding that the measure at issue is not a safeguard.

<sup>270</sup> Chinese Taipei's panel request, para. I.B.a; Viet Nam's panel request, para. 1.5.a.

<sup>271</sup> We recall that the complainants additionally identified as "measures at issue" the notification of the finding of threat of serious injury caused by increased imports and of the regulation imposing the safeguard measure, and Indonesia's failure to provide an opportunity for consultations on relevant information related to the safeguard measure. The complainants' claims with respect to these measures are not at issue in this appeal. (Chinese Taipei's panel request, paras. I.B.b and I.B.c; Viet Nam's panel request, paras. 1.5.b and 1.5.c)

<sup>272</sup> See Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

<sup>273</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 132.

<sup>274</sup> Chinese Taipei's panel request, para. II.a.6.

<sup>275</sup> Viet Nam's panel request, para. 1.7.a.vi.

Safeguards".<sup>276</sup> This comment precedes the listing of separate claims pertaining to each of the measures at issue identified in the panel requests, including the specific duty. In this regard, both complainants introduce their claims pertaining to the specific duty with the phrase "[w]ith respect to the specific duty imposed as a safeguard measure", under which they list all claims under the Agreement on Safeguards in addition to the claim under Article I:1 of the GATT 1994 in the passages cited above.<sup>277</sup>

5.90. As noted above, in the particular paragraph setting out the legal basis for their complaint under Article I:1, both complainants refer clearly to "the specific duty imposed by Indonesia". This accords with the complainants' identification of the specific duty as a measure at issue. Thus, as required by Article 6.2 of the DSU, the measure at issue has been clearly identified as the specific duty on galvalume. In addition, the panel requests clearly set out a claim under Article I:1 of the GATT 1994. Further, the language used in the panel requests plainly connects the relevant measure, that is, the specific duty, with the MFN treatment obligation provided under Article I:1 of the GATT 1994 by explicitly linking the discriminatory application of that duty with the substantive requirement under that provision that any advantage that is granted to a product be accorded immediately and unconditionally to the like products originating in all WTO Members.<sup>278</sup> The language setting out the Article I:1 claim does not contain any reference to the characterization of the measure or to legal arguments further substantiating the claim. Rather, the panel requests allege that *the specific duty* is inconsistent with Article I:1 due to its discriminatory application among WTO Members. Therefore, the common formulation of the relevant paragraph in both panel requests<sup>279</sup> appears to advance an Article I:1 claim that is not circumscribed by the specific duty's qualification as a safeguard measure.

5.91. Notwithstanding the clear presentation of the problem in the particular paragraph at issue in each panel request<sup>280</sup>, the examination of whether the requirements under Article 6.2 are met requires that a panel request be "read as a whole, and on the basis of the language used".<sup>281</sup> In this light, we turn to consider the significance of the fact that each panel request introduces the claims relating to the specific duty with the phrase "[w]ith respect to the specific duty imposed as a safeguard measure".<sup>282</sup>

5.92. We note that, before setting out the measures at issue and the legal basis of the complaint, each panel request contains a section on "background" providing information on the investigation conducted by "Indonesia's investigating authority on safeguard measures".<sup>283</sup> As part of this background, each panel request provides information concerning the initiation of the investigation, the final determination of the relevant authority, the legal basis of the specific duty, and the corresponding notifications by Indonesia to the Committee on Safeguards.<sup>284</sup> In our view, this factual background forms part of the narrative in each panel request.<sup>285</sup> The "background" set out in each panel request is reflective of the information available to the complainants "at the time of filing"<sup>286</sup> their panel requests. This information includes how the specific duty came into existence and how it was notified to WTO Members at the Committee on Safeguards. In assessing the panel requests *as a whole*, we consider that the reference to the "specific duty imposed as a safeguard measure" is consonant with the factual background in the panel requests that precedes both the identification of the specific measures at issue and the legal basis of the complaint. To the extent this introductory phrase could be read as going beyond providing a factual background for the imposition of the measure, we consider this language to be in the nature of arguments about the

<sup>276</sup> Chinese Taipei's panel request, section II, opening paragraph; Viet Nam's panel request, para. 1.7.

<sup>277</sup> Chinese Taipei's panel request, para. II.a (emphasis omitted); Viet Nam's panel request, para. 1.7.a.

<sup>278</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8. See also e.g. Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *Thailand – H-Beams*, para. 88.

<sup>279</sup> Chinese Taipei's panel request, para. II.a.6; Viet Nam's panel request, para. 1.7.a.vi.

<sup>280</sup> Chinese Taipei's panel request, para. II.a.6; Viet Nam's panel request, para. 1.7.a.vi.

<sup>281</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

<sup>282</sup> Chinese Taipei's panel request, para. II.a (emphasis omitted); Viet Nam's panel request, para. 1.7.a.

<sup>283</sup> Chinese Taipei's panel request, section I.A; Viet Nam's panel request, paras. 1.1-1.4.

<sup>284</sup> Chinese Taipei's panel request, section I.A; Viet Nam's panel request, paras. 1.1-1.4.

<sup>285</sup> Such narrative is "a significant part of the assessment of whether the request provides 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly'". (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 230-232). See also Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.25-4.27)

<sup>286</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

proper legal characterization of the measure at issue, that is, the specific duty. Such arguments about legal characterization do not, and could not, for purposes of Article 6.2, detract from the identification of the specific duty as the measure at issue. Indeed, once the requirements of Article 6.2 (such as the identification of the measure and the claims) are met, it forms part of the next step of the analysis for a panel to assess, in accordance with Article 11 of the DSU, whether the provisions and covered agreements that have been invoked are indeed *applicable* to the measure at issue. However, such arguments speak to the proper assessment of the applicability of WTO provisions and agreements under Article 11 of the DSU, and they do not impose jurisdictional limitations on the Panel's terms of reference under Article 6.2 of the DSU.

5.93. Thus, we do not read the reference to the "specific duty imposed as a safeguard measure" to connote a *legal* characterization of the measure at issue that narrows the scope of the claims under Article I:1 of the GATT 1994. For similar reasons, we are not persuaded that the Article I:1 claims were circumscribed by the language in the panel requests stating that, "according to Article 11.1(a) of the Agreement on Safeguards, a Member shall not take or seek a safeguard action unless such action conforms with the provisions of Article XIX of the GATT 1994 ... applied in accordance with the Agreement on Safeguards."<sup>287</sup> We note that this general statement does not identify a specific measure or a specific claim. We do not consider a general restatement of safeguard disciplines in Article 11 of the Agreement on Safeguards to limit a claim brought under Article I:1 of the GATT 1994 to a claim exclusively challenging a *safeguard measure* under the GATT 1994. Given the plain connection set out in the relevant paragraphs of each panel request between the specific duty and the alleged violation of Article I:1 of the GATT 1994<sup>288</sup>, we understand such additional statements to have foreshadowed legal *arguments* to substantiate the complainants' claims (including claims raised under Article XIX of the GATT 1994 and multiple claims under the Agreement on Safeguards). Thus, this language does not further contribute to, nor detract from, the clear articulation of a "problem" under Article I:1 of the GATT 1994 relating to the discriminatory application of *the specific duty*.<sup>289</sup> As an additional consideration, it would risk "blurr[ing] the distinction between *measures* and *claims*"<sup>290</sup> to interpret the panel requests as having confined the scope of the complainants' Article I:1 claims on the basis of a legal characterization that corresponds to contextual and background descriptions of the measure at issue, as set out in separate sections of each panel request.

5.94. We recognize that the above-mentioned language in the panel requests may have introduced some doubt as to the significance of the measure's legal characterization by having included the Article I:1 claims under prefatory references to safeguard measures and in a list of other claims under Article XIX of the GATT 1994 and the Agreement on Safeguards. In this regard, the complainants might have been more precise, for example, by more clearly structuring the panel requests to reflect the independent legal bases of the complaints as they relate to the specific measures identified. Nevertheless, reading the panel requests based on the terms used and the overall narrative therein, the complainants alleged in clear terms a violation of Article I:1 of the GATT 1994 by the specific duty. We do not consider Article 6.2 of the DSU to have required detailed argumentation in these panel requests as to the precise scope of the violation of Article I:1 in light of other claims raised<sup>291</sup>, including whether that violation results from *non-conformity* with the relevant disciplines on safeguard measures or the *non-applicability* of those disciplines. Rather, in line with the fundamental distinction between claims and arguments, it was to be expected that more specific argumentation would be developed as to the precise contours of an alleged inconsistency and to the applicability of the agreements and provisions invoked, in light of the defences raised and the Panel's objective assessment of the matter as presented in the panel requests. We also recall our earlier considerations that panel requests must

<sup>287</sup> Chinese Taipei's panel request, section II, opening paragraph; Viet Nam's panel request, para. 1.7.

<sup>288</sup> Chinese Taipei's panel request, para. II.a.6; Viet Nam's panel request, para. 1.7.a.vi.

<sup>289</sup> See Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

<sup>290</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 132. (emphasis original)

<sup>291</sup> In this connection, we note certain arguments before the Panel concerning the precise scope of the discrimination alleged to be inconsistent with Article I:1 of the GATT 1994. We understand these to concern Indonesia's defence against the Article I:1 claim under the GATT 1994 based on the requirement in Article 9.1 of the Agreement on Safeguards to exclude developing country Members meeting certain conditions. (See Indonesia's first written submission to the Panel, paras. 210-219; second written submission to the Panel, paras. 117-120; complainants' joint opening statement at the first Panel meeting, para. 7.2; joint response to Panel question No. 42; joint second written submission to the Panel, paras. 2.132-2.134; joint opening statement at the second Panel meeting, paras. 7.1-7.5)

be read as they existed at the time of filing.<sup>292</sup> The fact that the applicability of the WTO safeguard disciplines to the specific duty at issue gained prominence in the course of the panel proceedings should not be taken as a reason to reread the panel requests with the hindsight of this debate.

5.95. It is in this light that we review the complainants' arguments in their submissions to the Panel to find *confirmation* of the meaning of the words used in their panel requests. Although we have found that the panel requests clearly identified the measure at issue and the claims, we recall that the text and content of panel requests may be confirmed based on the subsequent filings of submissions.<sup>293</sup> In their first written submission, the complainants framed their claim under Article I:1 of the GATT 1994 by arguing that "[s]ubject products originating in the ... Members listed in [Regulation 137] are exempt from the application of the specific duty. Like products originating in the territory of Members that are not on the list are subject to the specific duty."<sup>294</sup> In arguing that the specific duty is a measure falling within the scope of Article I:1, the complainants *confirmed* their position that the specific duty imposed by Regulation 137 on galvalume results in "duties or charges that are imposed on those products as they enter Indonesian territory by virtue of their importation (or on their importation)".<sup>295</sup> Notably, the presentation of this argument accords with the allegation of inconsistency with the MFN treatment obligation under the GATT in their panel requests by focusing on the specific duty without regard to its qualification as a safeguard measure. Further, the complainants argued that the exemption from the specific duty grants an "advantage, favour, privilege or immunity" within the meaning of Article I:1 without any reference to the measure's imposition or status as a safeguard measure, stating that "[t]he exemption from the specific duty affects competitive opportunities between products imported from the exempted Members and the like products originating in other Members that are subject to the specific duty."<sup>296</sup> The complainants subsequently argued in support of their Article I:1 claim that "Indonesia exempts the subject products originating in the listed 120 Members ('exempted Members') from the application of the specific duty", whereas "'like' products originating in the territory of Members that are not on the list, including the complainants, are subject to the specific duty."<sup>297</sup> Finally, the complainants maintained that, "[i]n any event, if the Panel were to consider that the suspension of Article I:1 in this dispute does not amount to a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the consequence of that finding would be that the specific duty remains as a measure inconsistent with Article I:1" of the GATT 1994.<sup>298</sup>

5.96. Read together with the panel requests, the complainants' successive submissions to the Panel confirm that their claims under Article I:1 of the GATT 1994 encompass alleged discrimination between countries exempted from the scope of application of the specific duty and countries to which such an exemption does not apply (including the complainants themselves). The elaboration of more detailed arguments in the course of panel proceedings does not negate the fact that a claim under Article I:1 of the GATT 1994 with respect to the specific duty was made with sufficient clarity in the panel requests so as to give notice of the nature of the complainants' case. In light of the foregoing, the formulations used in the panel requests in this dispute, particularly in the paragraph setting out the legal basis of the complaint against the specific duty under Article I:1 of the GATT 1994, are sufficient in our view to articulate a claim against the specific duty irrespective of its characterization as a non-safeguard measure.

5.97. We therefore find that the Panel did not err in concluding that the complainants properly raised a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure (i.e. as a non-safeguard measure). As the Panel did not err in identifying the matter within its terms of reference, and given that Indonesia does not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994, we uphold the Panel's finding in paragraphs 7.44 and 8.1.b of its Report that the application of the specific duty on imports of

<sup>292</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

<sup>293</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 642; *US – Carbon Steel*, para. 127.

<sup>294</sup> Complainants' joint first written submission to the Panel, para. 5.133.

<sup>295</sup> Complainants' joint first written submission to the Panel, para. 5.143.

<sup>296</sup> Complainants' joint first written submission to the Panel, para. 5.148.

<sup>297</sup> Complainants' joint second written submission to the Panel, para. 2.128.

<sup>298</sup> Complainants' joint response to Panel question No. 51, para. 1.25. This latter argument accords with Chinese Taipei's panel request stating in clear terms that the specific duty is "[i]n any event" inconsistent with Article I:1. (Chinese Taipei's panel request, para. II.a.6)

galvalume originating in all but the 120 countries listed in Regulation 137 is inconsistent with Indonesia's obligation to accord MFN-treatment under Article I:1 of the GATT 1994.

## **6 FINDINGS AND CONCLUSIONS**

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

### **6.1 Whether Indonesia's Notice of Appeal and appellant's submission comply with the Working Procedures for Appellate Review**

6.2. We consider that Indonesia's Notice of Appeal identifies the alleged errors in the issues of law covered in the Panel Report and legal interpretations developed by the Panel, as required under Rule 20(2)(d). Furthermore, as we see it, the complainants' objection under Rule 21(2)(b)(i) is not pertinent to the scope of appellate review. Accordingly, we decline the complainants' request that we "reject Indonesia's appeal" with respect to "allegations set out in Section [1] of Indonesia's Notice of Appeal and paragraphs 42 to 48, 51, and 70 to 82 of Indonesia's appellant's submission".

### **6.2 Whether the Panel erred in finding that Indonesia's specific duty on imports of galvalume is not a safeguard measure**

#### **6.2.1 Whether the Panel erred under Article 6.2, 7.1, or 11 of the DSU**

6.3. Article 11 of the DSU requires panels to examine, as part of their "objective assessment of the matter", whether the provisions of the covered agreements invoked by complainants as the basis for their claims are applicable and relevant to the case at hand. The Agreement on Safeguards applies to the "measures provided for in Article XIX of GATT 1994". A panel's assessment of claims brought under that agreement may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. A panel is not precluded from determining the applicability of a particular covered agreement in cases where the issue has not been raised by the parties. Indeed, the duty to conduct an "objective assessment of the matter" may, at times, *require* a panel to depart from the positions taken by the parties and determine for itself whether a measure falls within the scope of a particular provision or covered agreement. Moreover, the description of a measure proffered by a party and the label given to it under municipal law are not dispositive of the proper legal characterization of that measure under the covered agreements.

6.4. 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.

6.5. We, therefore, find that the Panel did not err under Article 6.2, 7.1, or 11 of the DSU in carrying out its own assessment of whether the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

#### **6.2.2 Whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994**

6.6. 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 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 of whether a measure is a safeguard measure, a panel should evaluate and give due consideration, where relevant, to 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, none of these 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.

6.7. Having reviewed the design, structure, and expected operation of the measure at issue, together with all the relevant facts and arguments on record, we find that this 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 issue of legal characterization, does not constitute one of the "measures provided for in Article XIX of GATT 1994".

6.8. Accordingly, we uphold the Panel's overall conclusion, in paragraphs 7.10 and 8.1.a of its Report, that the measure at issue does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Having upheld the Panel's conclusion, there is no legal basis for us to rule on the complainants' request for completion of the legal analysis with respect to their claims under Article XIX of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards.

### **6.3 Whether the Panel's terms of reference include a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure**

6.9. We consider that the description and presentation of the specific duty as a "measure at issue" in Chinese Taipei's and Viet Nam's panel requests clearly identify it as a measure that is alleged to be causing the violation of an obligation contained in a covered agreement. We further note that the language used in the panel requests plainly connects the relevant measure, that is, the specific duty, with the MFN treatment obligation provided under Article I:1 of the GATT 1994 by explicitly linking the discriminatory application of that duty with the substantive requirement that any advantage that is granted to a product be accorded immediately and unconditionally to the like products originating in all WTO Members. In our view, the additional language in the panel requests in the nature of factual background or legal argument concerning the characterization of the measure does not narrow the claims raised under Article I:1 of the GATT 1994. We further find that the complainants' submissions to the Panel confirm that their claims of inconsistency with Article I:1 of the GATT 1994 encompass alleged discrimination between countries exempted from the scope of application of the specific duty and countries to which such an exemption does not apply (including the complainants themselves). In light of the foregoing, the formulations used in the panel requests in this dispute are sufficient in our view to articulate a claim against the specific duty as a stand-alone measure (i.e. as a non-safeguard measure).

6.10. Accordingly, we find that the Panel did not err in concluding that the complainants properly raised a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure. As the Panel did not err in identifying the matter within its terms of reference, and given that Indonesia does not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994, we uphold the Panel's finding in paragraphs 7.44 and 8.1.b of its Report that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation 137 is inconsistent with Indonesia's obligation to accord MFN treatment under Article I:1 of the GATT 1994.

#### 6.4 Recommendation

6.11. The Appellate Body recommends that the DSB request Indonesia to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Article I:1 of the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 10th day of July 2018 by:

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Hong Zhao  
Presiding Member

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Shree Baboo Chekitan Servansing  
Member

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Peter Van den Bossche  
Member

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