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INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

REPORT OF THE PANEL

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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> , WT/DS121/AB/R , adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R , adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , WT/DS238/R , adopted 15 April 2003, DSR 2003:III, p. 1037
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R , WT/DS142/AB/R , adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R , adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R , adopted 12 January 2009, DSR 2009:I, p. 3
<i>Dominican Republic – Safeguard Measures</i>	Panel Report, <i>Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric</i> , WT/DS415/R , WT/DS416/R , WT/DS417/R , WT/DS418/R , and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R , WT/DS48/AB/R , adopted 13 February 1998, DSR 1998:I, p. 135
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R , adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R , adopted 19 November 1999, DSR 1999:VI, p. 2345
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R and Add.1, adopted 20 July 2015
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R , adopted 5 November 2001, DSR 2001:XII, p. 6027
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R , adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R , adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R , WT/DS178/AB/R , adopted 16 May 2001, DSR 2001:IX, p. 4051
<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> , WT/DS177/R , WT/DS178/R , 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 – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R , adopted 8 March 2002, DSR 2002:IV, p. 1403

Short title	Full case title and citation
US – Line Pipe	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R , adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, p. 1473
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R , adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Steel Safeguards	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R , WT/DS249/AB/R , WT/DS251/AB/R , WT/DS252/AB/R , WT/DS253/AB/R , WT/DS254/AB/R , WT/DS258/AB/R , WT/DS259/AB/R , adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Steel Safeguards	Panel Reports, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273
US – Tyres (China)	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R , adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Wheat Gluten	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R , adopted 19 January 2001, DSR 2001:II, p. 717
US – Wheat Gluten	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R , adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779
US – Wool Shirts and Blouses	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
ASEAN	Association of Southeast Asian Nations
BEP	Break Even Point
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FTA	Free trade agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
KPPI	<i>Komite Pengamanan Perdagangan Indonesia</i>
MFN	most-favoured-nation
POI	Period of investigation
Rp	Indonesian Rupiah
RTA	Regional trade agreement
S&D	Special and differential treatment
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaints by Chinese Taipei and Viet Nam

1.1. On 12 February 2015, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (Chinese Taipei) requested consultations with Indonesia pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 14 of the Agreement on Safeguards.¹ On 1 June 2015, Viet Nam requested consultations with Indonesia pursuant to the same provisions.²

1.2. In both complaints, the measures subject to consultations were described as the following³:

- a. The specific duty imposed by Indonesia as a safeguard measure on imports of flat-rolled product 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 1.2mm, under Harmonized System (HS) code 7210.61.11.00.
- b. Indonesia's notification to the WTO Committee on Safeguards of the finding of threat of serious injury caused by increased imports and of a proposal to impose a safeguard measure.
- c. Indonesia's 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.

1.3. Consultations were held between Chinese Taipei and Indonesia on 16 April 2015, and between Viet Nam and Indonesia on 28 July 2015. The consultations failed to resolve the disputes.

1.2 Panel establishment and composition

1.4. Chinese Taipei and Viet Nam each requested, respectively on 20 August 2015 and 15 September 2015, the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article 14 of the Agreement on Safeguards, and Article XXIII of the GATT 1994.⁴

1.5. At its meeting on 28 September 2015, the Dispute Settlement Body (DSB) established a panel pursuant to Chinese Taipei's request in document WT/DS490/2, in accordance with Article 6 of the DSU.⁵ At its meeting on 28 October 2015, the DSB established another panel pursuant to Viet Nam's request in WT/DS496/3, in accordance with Article 6 of the DSU. At the same meeting, the DSB decided that the panel established at its meeting of 28 September 2015 in WT/DS490 would also examine the dispute in WT/DS496, in accordance with Article 9.1 of the DSU.⁶

1.6. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the disputes, the matter referred to the DSB by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS490/2 and Viet Nam in document WT/DS496/3, and to make such findings as will assist the DSB

¹ Chinese Taipei's request for consultations, WT/DS490/1 (Chinese Taipei's consultations request).

² Viet Nam's request for consultations, WT/DS496/1 (Viet Nam's consultations request).

³ Chinese Taipei's consultations request, para. 5; and Viet Nam's consultations request, para. 5.

⁴ Chinese Taipei's request for the establishment of a panel, WT/DS490/2 (Chinese Taipei's panel request); and Viet Nam's request for the establishment of a panel, WT/DS496/3 (Viet Nam's panel request).

⁵ DSB, Minutes of the meeting held in the Centre William Rappard on 28 September 2015 (circulated 23 November 2015), WT/DSB/M/368.

⁶ DSB, Minutes of the meeting held in the Centre William Rappard on 28 October 2015 (circulated 20 January 2016), WT/DSB/M/369.

in making the recommendations or in giving the rulings provided for in those agreements.⁷

1.7. On 1 December 2015, Chinese Taipei and Viet Nam requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 9 December 2015, the Director-General composed the Panel as follows:

Chairperson: Ms Luz Elena Reyes de la Torre

Members: Mr José Pérez Gabilondo
Mr Guillermo Valles

1.8. Australia, Chile, China, the European Union, India, Japan, Korea, the Russian Federation, Ukraine, and the United States reserved their rights to participate in the Panel proceedings as third parties. In addition, Chinese Taipei reserved its right to participate in the Panel proceedings of DS496 as a third party, and Viet Nam reserved its right to participate in the Panel proceedings of DS490 as a third party.⁸

1.3 Panel proceedings

1.3.1 General

1.9. The Panel began its work on this case later than it would have wished due to staff constraints in the WTO Secretariat.⁹ After consultation with the parties, the Panel adopted its Working Procedures¹⁰ and timetable on 1 July 2016, and additional procedures for the protection of Business Confidential Information (BCI) on 22 July 2016.¹¹ The Panel revised its timetable on 22 July and 19 December 2016, and again on 1 May 2017.

1.10. The Panel met with the parties on 5-6 October 2016 and 16 December 2016, and with the third parties on 6 October 2016.

1.11. The Panel submitted its interim report to the parties on 5 April 2017 and submitted its final report to the parties on 18 May 2017.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns the specific duty applied by Indonesia on imports of galvalume defined 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 0.7mm, under HS code 7210.61.11.00. 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).

2.2. The specific duty was adopted for a period of three years pursuant to Regulation No. 137.1/PMK.011/2014 of the Minister of Finance of the Republic of Indonesia, which entered into force on 22 July 2014.¹² Indonesia applies the specific duty to imports of galvalume from all sources, with the exception of 120 allegedly developing countries listed in Indonesia's

⁷ *Indonesia – Safeguard on Certain Iron or Steel Products*, constitution note of the Panel, WT/DS490/3 WTDS496/4, para. 2.

⁸ *Indonesia – Safeguard on Certain Iron or Steel Products*, constitution note of the Panel, WT/DS490/3 WTDS496/4, para. 5.

⁹ Communication from the Panel (circulated 13 June 2016), WT/DS490/4 WT/DS496/5.

¹⁰ See the Panel's Working Procedures in Annex A-1.

¹¹ See the Panel's Additional Working Procedures on Business Confidential Information in Annex A-2.

¹² Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on imposition of safeguarding duty against the import of flat-rolled products of iron or non-alloy steel (22 July 2014), (Exhibits IDN-20 (translated version) and VNM/TPKM-4 (both original and translated versions)).

notification to the WTO Committee on Safeguards under Article 9.1 of the Agreement on Safeguards.¹³ The following table sets out the precise amounts and the timetable of application of the specific duty that was notified to the WTO Committee on Safeguards.

Table 1: Timetable of the Safeguard Duty

Period	Duty
22 July 2014 - 21 July 2015	Rp 4,998,784 per ton
22 July 2015 - 21 July 2016	Rp 4,314,161 per ton
22 July 2016 - 21 July 2017	Rp 3,629,538 per ton

Source: Committee on Safeguards, Notification Under Articles 9, 12.1(b), and 12.1(c) of the Agreement on Safeguards (28 July 2014), G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, G/SG/N/11/IDN/14, (Exhibit TPKM/VNM-5), p. 2

2.3. Indonesia has no binding tariff obligation with respect to galvalume inscribed into its Schedule of Concessions for the purpose of Article II of the GATT 1994. At the time of the request for consultations, the duty rate applied by Indonesia on imports of galvalume on a most-favoured-nation (MFN) basis was 12.5%. This MFN-rate was increased to 20% in May 2015.¹⁴ Indonesia applies duty rates ranging from 0% to 12.5% on imports of galvalume from its trading partners under four separate regional trade agreements (RTAs) – the Association of Southeast Asian Nations (ASEAN)-China Free Trade Agreement (12.5%), the ASEAN-Korea Free Trade Agreement (10%), the ASEAN Trade in Goods Agreement (0%) and the Indonesia-Japan Economic Partnership Agreement (12.5%).¹⁵ The specific duty that is at issue in this proceeding is applied *in addition to* the existing MFN and preferential duty rates.¹⁶

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Chinese Taipei and Viet Nam ("Complainants")¹⁷

3.1. The complainants request the Panel to find as follows:

- a. That the specific duty is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, which Indonesia adopted and applied *inconsistently* with the following obligations:
 - i. Article XIX:1(a) of the 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

¹³ Committee on Safeguards, Notification Under Articles 9, 12.1(b), and 12.1(c) of the Agreement on Safeguards (28 July 2014), G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, G/SG/N/11/IDN/14, (Exhibit TPKM/VNM-5), pp. 2 and 3.

¹⁴ Regulation of the Minister of Finance of the Republic of Indonesia No. 97/PMK.010/2015, (Exhibit TPKM/VNM-40).

¹⁵ Final Disclosure Report concerning the importation of flat-rolled products of iron or non-alloy under HS code 7210.61.11.00 (Final Disclosure Report), (Exhibits IDN-8 (both original and translated versions) and VNM/TPKM-1 (translated version)), Table 3 and para. 30.

¹⁶ Indonesia's response to Panel question No. 53; complainants' comments on Indonesia's response to Panel question No. 53.

¹⁷ Throughout the proceeding, Chinese Taipei and Viet Nam have advanced almost identical claims, and made common submissions, oral statements, and answers to Panel questions. In this Report, claims not advanced by both complainants are identified.

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;
 - 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;
 - vii. Article I:1 of the GATT 1994 because KPPI excluded from the application of the specific duty products originating in the countries listed in the Annex to Regulation No. 137.1/PMK.011/2014, and not according that exemption immediately and unconditionally to like products originating in the territory of some Members, including the complainants;
 - viii. 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 WTO Committee on Safeguards; and
 - ix. 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.
- b. That, were the Panel to find that the specific duty *is not* a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the specific duty is, *in any case*, inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994 to the extent it is applied in a manner that discriminates between sources of imports of galvalume.

3.2. Accordingly, the complainants request the Panel to recommend that Indonesia bring its measures into conformity with the above-cited provisions of the GATT 1994 and the Agreement on Safeguards and, furthermore, that the Panel exercise its discretion under Article 19 of the DSU and suggest that Indonesia do so by withdrawing the specific duty.

3.2 Indonesia

3.3. Indonesia requests the Panel to find that the specific duty is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, which Indonesia adopted and applied *consistently* with its obligations under the GATT 1994 and the Agreement on Safeguards.

3.4. To the extent that the Panel may find that the specific duty *is not* a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, Indonesia requests that the Panel dismiss the entirety of the complainants' claims under the Agreement on Safeguards.

3.5. Finally, in the event that the Panel were to find that Indonesia has failed to comply with its obligations under the GATT 1994 and/or the Agreement on Safeguards, Indonesia asks the Panel to reject the complainants' request for the Panel to suggest that the only manner in which Indonesia may bring its measures into conformity with its obligations is by immediately withdrawing the specific duty, leaving Indonesia the discretion to choose the means by which to implement the Panel's recommendation.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties, as described in the executive summaries of the submissions made throughout the course of this proceeding, are attached to this Report as annexes (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the third parties, as described in the executive summaries of their submissions, are attached to this Report as annexes (see Annexes C-1 to C-5). Third parties that filed third-party submissions were the European Union, Japan, and Ukraine. Third parties that made oral statements at the meeting with the Panel were Australia, the European Union, Japan, Ukraine, and the United States.

6 INTERIM REVIEW

6.1. On 5 April 2017, the Panel issued its Interim Report to the parties. On 13 April 2017, the complainants and Indonesia each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested an interim review meeting. On 27 April 2017, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-3.

7 FINDINGS

7.1 Standard of review, treaty interpretation, and burden of proof

7.1.1 Standard of review

7.1. The Agreement on Safeguards is silent as to the standard of review to be applied by panels in reviewing the WTO-consistency of safeguard measures. However, it is well established that the general standard of review contained in Article 11 of the DSU is applicable to disputes involving claims of violation of the Agreement on Safeguards and Article XIX of the GATT 1994.¹⁸

7.2. Article 11 of the DSU specifies that a panel must make 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.¹⁹ As applied in disputes involving complaints brought under the Agreement on Safeguards, this standard has been interpreted to mean that:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.²⁰

¹⁸ See, e.g. Appellate Body Reports, *Argentina – Footwear (EC)*, para. 120; and *US – Lamb*, paras. 100-102; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.4.

¹⁹ Article 11 of the DSU provides in relevant part that: "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

²⁰ Appellate Body Report, *US – Cotton Yarn*, para. 74 (referring at paras. 71-73 to Appellate Body Reports, *Argentina – Footwear (EC)*, para. 121; *US – Lamb*, para. 103; and *US – Wheat Gluten*, para. 55).

7.3. Thus, a panel's examination of a competent authority's determination in a safeguard proceeding must involve neither a *de novo* review nor "total deference" to the competent authority's determination.²¹ Rather, a panel is required to assess whether the competent authority has examined all relevant facts and provided a reasoned and adequate explanation as to how the facts support its determination.²² A panel can make this assessment:

*[O]nly if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.*²³

7.4. Article 3.1, last sentence, requires competent authorities to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law. Similarly, Article 4.2(c) requires competent authorities to publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

It is precisely by "setting forth findings and reasoned conclusions on all pertinent issues of fact and law", under Article 3.1, and by providing "a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined", under Article 4.2(c), that competent authorities provide panels with the basis to "make an objective assessment of the matter before it" in accordance with Article 11. ... [A] panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities. Therefore, the "reasoned conclusions" and "detailed analysis" as well as "a demonstration of the relevance of the factors examined" that are contained in the report of a competent authority, are the only bases on which a panel may assess whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994.²⁴

7.5. Thus, a panel's assessment of whether a competent authority's determinations are consistent with the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 must be based on the relevant report published by that authority.²⁵

7.6. Panels should not be "left to 'deduce for themselves' from the report of that competent authority the 'rationale for the determinations from the facts and data contained in the report of the competent authority'".²⁶ The explanations contained in a competent authority's published report must be "explicit", "clear and unambiguous", and must not "merely imply or suggest an explanation".²⁷

7.7. Where there is no reasoned and adequate explanation apparent in the published report to support a competent authority's determinations, "the panel has no option but to find that the competent authority has not performed the analysis correctly".²⁸ This implies that reasoning, analysis and demonstrations provided after publication of the report – i.e. *ex post* explanations –

²¹ Appellate Body Reports, *US – Lamb*, para. 101; *US – Tyres (China)*, para. 123; *US – Cotton Yarn*, para. 69; and *Argentina – Footwear (EC)*, para. 119.

²² Appellate Body Reports, *US – Lamb*, para. 103; *US – Line Pipe*, para. 217; and *US – Steel Safeguards*, paras. 296 and 297.

²³ Appellate Body Report, *US – Lamb*, para. 106 (emphasis original). See also Appellate Body Report, *US – Steel Safeguards*, para. 276.

²⁴ Appellate Body Report, *US – Steel Safeguards*, para. 299. (fn omitted)

²⁵ See, e.g. Appellate Body Reports, *US – Steel Safeguards*, para. 299; and *US – Lamb*, para. 105; and Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.9.

²⁶ Appellate Body Report, *US – Steel Safeguards*, para. 288.

²⁷ Appellate Body Reports, *US – Steel Safeguards*, paras. 296 and 297; and *US – Line Pipe*, para. 217.

²⁸ Appellate Body Report, *US – Steel Safeguards*, para. 303.

are irrelevant and cannot be relied upon to remedy any deficiencies of the competent authorities' determinations.

7.1.2 Treaty interpretation

7.8. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.²⁹

7.1.3 Burden of proof

7.9. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.³⁰ Therefore, in this dispute, Chinese Taipei and Viet Nam bear the burden of demonstrating that the challenged measures are inconsistent with Indonesia's obligations under the relevant WTO coverage agreements. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.³¹ It is generally for each party asserting a fact to provide proof thereof.³²

7.2 Introduction

7.10. A fundamental question that arises in this dispute is whether the specific duty applied by Indonesia on imports of galvalume pursuant to Regulation No. 137.1/PMK.011/2014 is a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. Although both sides maintain, albeit for somewhat different reasons, that the challenged measure is a safeguard measure within the scope of the Agreement on Safeguards, their arguments have led us to conclude, in discharging our duty to undertake "an objective assessment of the matter"³³, that we must examine this issue for ourselves, rather than simply proceeding on the basis of the parties' concurring positions. Having done so, we have come to the conclusion that the specific duty at issue in this dispute is *not* a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. We explain the reasons for arriving at this conclusion in the section that follows, before evaluating the merits of the complainants' 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.

7.11. While we do not take a position with respect to the merits of the complainants' claims against the specific duty, *as a safeguard measure*, we address their specific allegations of inconsistency with the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994 in the final section of our findings, where we identify *facts* relevant to an evaluation of their claims as they pertain to KPPI's findings, the conduct of KPPI's investigation and Indonesia's decision to impose the specific duty. However, in the light of our conclusion that the specific duty is *not* a safeguard measure, we do not go on to consider the legal merits of those claims.³⁴

²⁹ Appellate Body Report, *US – Gasoline*, pp. 16-18.

³⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

³¹ Appellate Body Report, *EC – Hormones*, para. 104.

³² Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

³³ We note, in particular, that our duty under Article 11 of the DSU includes the obligation to make an objective assessment of the applicability of the covered agreements invoked in this dispute. Indeed, "the 'fundamental structure and logic' of a covered agreement may require panels 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 the substantive obligations imposed under that provision or covered agreement". (Appellate Body Report, *China – Auto Parts*, para. 139). See, further, e.g. Panel Reports, *Dominican Republic – Safeguard Measures*, para. 7.58; and *US – Gambling*, para. 6.250; and Appellate Body Reports, *US – Shrimp*, para. 119; and *Canada – Autos*, para. 151.

³⁴ See further below, paras. 7.45-7.47.

7.3 Whether the specific duty on imports of galvalume constitutes a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards

7.3.1 Definition of a safeguard measure

7.12. Article 1 of the Agreement on Safeguards specifies that "safeguard measures" "shall be understood to mean those measures provided for in Article XIX of GATT 1994". The text of Article XIX:1(a), which is the relevant subparagraph of Article XIX in this context, reads as follows:

If, as a result of unforeseen developments and of *the effect of the obligations incurred* by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party 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 contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to *suspend the obligation in whole or in part or to withdraw or modify the concession*.³⁵

7.13. It is apparent from this language that the "measures provided for" in Article XIX:1(a) 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".³⁶ The text of Article XIX:1(a) also makes clear that such 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".

7.14. Thus, not *any* measure suspending, withdrawing or modifying a GATT obligation or concession will fall within the scope of Article XIX:1(a). Rather, it is only measures suspending, withdrawing, or modifying a GATT obligation or concession that a Member finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury that will constitute "safeguard measures". For example, where all of the conditions for the imposition of a "safeguard measure" have been satisfied, a Member may choose to suspend its obligations under Article XI of the GATT 1994 for a period of time and restrict the volume of imports to a level that prevents or remedies serious injury to its domestic industry *in a way that would otherwise be inconsistent* with the prohibition on the application of quantitative restrictions in that Article. The suspension of the imposing Member's obligations under Article XI in this manner would allow it to "re-adjust temporarily the balance in the level of concessions between that Member and other exporting Members"³⁷ to prevent or remedy serious injury. In the absence of an obligation preventing a Member's remedial action, there would be obviously no need for that Member to be released from a WTO commitment and, therefore, nothing to "re-adjust temporarily".

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

7.16. We note that certain findings of the panel in *Dominican Republic – Safeguard Measures* suggest that the "measures provided for" in Article XIX:1(a) may be defined by an additional characteristic. In particular, the panel in that dispute found that the words "obligation" and "concession" in the last part of Article XIX:1(a) refer to the "obligations" and "concessions" in the first part of Article XIX:1(a)³⁸, implying that Article XIX:1(a) contemplates the suspension of a

³⁵ Emphasis added.

³⁶ Appellate Body Reports, *Argentina – Footwear (EC)*, paras. 93 and 94; and *Korea – Dairy*, paras. 86 and 87.

³⁷ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 94; and *Korea – Dairy*, para. 87.

³⁸ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.64.

GATT obligation or concession the effect of which has in some way resulted in the increased imports causing or threatening to cause serious injury. The complainants agree with this implication, stating that "under Article XIX:1(a), a WTO Member may suspend a GATT obligation, provided that it has demonstrated that the effect of this obligation resulted in an increase in imports that caused or threatened to cause serious injury to its domestic industry".³⁹ Indonesia, however, argues that the GATT obligation an importing Member chooses to suspend "might not" always have to be the same obligation that results in increased imports.⁴⁰

7.17. We do not believe it is necessary for us to make a finding on this interpretative issue in order to resolve this dispute. We are satisfied that our analysis of the merits of the parties' arguments can proceed on the basis of the understanding of the term "safeguard measures" we have set out above – that is, that one of the defining features of a safeguard measure 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.

7.3.2 The specific duty at issue does not suspend, withdraw, or modify a relevant GATT obligation for the purpose of remedying or preventing serious injury

7.3.2.1 No binding WTO tariff obligation with respect to imports of galvalume

7.18. As described above⁴¹, Indonesia has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions. This means that, as far as its obligations under Article II of GATT 1994 are concerned, Indonesia is free to impose any amount of duty it deems appropriate on imports of galvalume, including the specific duty applied through the operation of Regulation No. 137.1/PMK.011/2014. Indonesia recognizes this fact, noting repeatedly that the absence of a binding tariff obligation means that Indonesia is "free to impose, increase, [or] reduce any tariff towards the product concerned at any time for any period of time".⁴² Indeed, *after* the imposition of the specific duty at issue, Indonesia unilaterally raised the MFN *ad valorem* duty rate on imports of galvalume from 12.5% to 20%.⁴³ Thus, Indonesia's obligations under Article II of the GATT 1994 did not preclude the application of the specific duty on imports of galvalume, implying that the specific duty did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994.

7.19. Following the second substantive meeting, Indonesia asserted that tariff obligations it incurred under the ASEAN-Korea (10%) and the ASEAN Trade in Goods (0%) RTAs prevented it from "increase[ing] its tariff" on imports of galvalume.⁴⁴ According to Indonesia, "the application of the preferential tariffs under Indonesia FTAs pursuant to Article XXIV of the GATT 1994 results in Indonesia's inability to counter [the] increased imports".⁴⁵ Thus, Indonesia argues that the imposition of the specific duty on imports of galvalume originating in countries *including its RTA partners* means that the "GATT obligation being suspended ... is the GATT exception under Article XXIV of the GATT 1994".⁴⁶

³⁹ Complainants' response to Panel question No. 48, para. 1.7.

⁴⁰ Indonesia's response to Panel question Nos. 47 and 48.

⁴¹ See above, para. 2.3.

⁴² Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 7; closing statement at the second meeting of the Panel, para. 2.

⁴³ Regulation of the Minister of Finance of the Republic of Indonesia No. 97/PMK.010/2015 (25 May 2015), (Exhibit TPKM/VNM-40). We recall that the specific duty that is at issue in this dispute is applied in addition to the existing MFN and preferential duty rates on imports of galvalume. (See above, para. 2.3).

⁴⁴ Indonesia's response to Panel question No. 48, para. 18.

⁴⁵ Indonesia's general comments on complainants' responses to Panel questions following the second meeting with the Panel, para. 8.

⁴⁶ Indonesia's general comments on complainants' responses to Panel questions following the second meeting with the Panel, para. 10.

7.20. We are of the view that Article XXIV of the GATT 1994 does not impose an obligation on Indonesia to apply a particular duty rate on imports of galvalume from its RTA partners.⁴⁷ Article XXIV of the GATT 1994 is a *permissive* provision, allowing Members to depart from their obligations under the GATT to establish a customs union and/or free trade area, in accordance with specified procedures.⁴⁸ Article XXIV does not impose any positive obligation on Indonesia either to enter into free trade agreements (FTAs) or to provide a certain level of market access to its FTA partners through bound tariffs. Indonesia's obligation to impose a tariff of 0% on imports of galvalume from its ASEAN trading partners is established in the ASEAN Trade in Goods Agreement, not in Article XXIV. Similarly, the establishment of a maximum tariff of 10% on imports of galvalume from Korea is found in the ASEAN-Korea Free Trade Agreement, not in Article XXIV.⁴⁹ In other words, Indonesia's 0% and 10% tariff commitments are obligations assumed under the respective FTAs, not the WTO Agreement. There is, therefore, no basis for Indonesia's assertion that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that the specific duty, thereby, "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a).

7.3.2.2 No other relevant GATT obligations preclude the adoption of the specific duty

7.21. Indonesia argues that the imposition of the specific duty also suspended its obligations under Article I:1 of the GATT 1994. In particular, Indonesia submits that the specific duty at issue suspended Indonesia's obligation to provide MFN-treatment under Article I:1 of the GATT 1994 because it is applied on a discriminatory basis (i.e. to all but the 120 countries listed in Regulation 137.1/PMK.011/2014) in order to comply with the special and differential treatment (S&D) requirements of Article 9.1 of the Agreement on Safeguards.⁵⁰

7.22. We note, however, that Indonesia does not argue that the specific duty suspended its MFN obligations under Article I:1 because the S&D afforded in order to comply with Article 9.1 was *necessary to remedy or prevent serious injury*. Indeed, Indonesia acknowledges that the exclusion of imports from qualifying developing country Members pursuant to Article 9.1 is *neither intended nor designed for this purpose*.⁵¹ Rather, according to Indonesia, the exclusion of imports from developing country Members pursuant to Article 9.1 suspends Indonesia's MFN obligations under Article I:1 because such discrimination is a *legal "prerequisite"*⁵² to the imposition of the specific duty, which is itself intended to prevent or remedy serious injury.⁵³ In other words, Indonesia argues that the specific duty imposed on imports of galvalume suspended its MFN obligations under Article I:1 of the GATT 1994 because the MFN principle would otherwise prohibit the discriminatory application of that duty in the way that is *legally required* under Article 9.1 of the Agreement on Safeguards.

7.23. Although the complainants contest Indonesia's assertions regarding the consistency of the exclusion of 120 countries from the application of the specific duty with Article 9.1⁵⁴, the complainants share Indonesia's view that the specific duty suspends Indonesia's MFN obligations under Article I:1 of the GATT 1994. In particular, the complainants argue that the specific duty suspends those obligations because it is applied "on a selective basis, excluding imports from

⁴⁷ The complainants also take this view. (Complainants' comments on Indonesia's response to Panel question Nos. 47 and 48).

⁴⁸ Appellate Body Report, *Turkey – Textiles*, para. 45.

⁴⁹ Complainants' comments on Indonesia's response to Panel question No. 48, para. 1.16.

⁵⁰ Indonesia's first written submission, para. 212; comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 8; and general comments on complainants' responses to Panel questions following the second meeting with the Panel, para. 7.

⁵¹ Indonesia's response to Panel question Nos. 51 and 52; general comments on complainants' responses to Panel questions following the second meeting with the Panel, para. 10; and comments on complainants' response to Panel question Nos. 50 and 51.

⁵² Indonesia's general comments on complainants' responses to Panel questions following the second meeting with the Panel, para. 24.

⁵³ Indonesia's response to Panel question Nos. 51 and 52.

⁵⁴ The complainants claim that six allegedly *developed* country Members of the WTO (Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania) were included in the list of 120 countries excluded from the application of the specific duty. (Complainants' second written submission, paras. 2.132-2.137; opening statement at the second meeting of the Panel, paras. 7.1-7.5).

certain countries (including developing and developed countries)⁵⁵ "with a view to address[ing] the threat of serious injury 'suffered' by the domestic industry".⁵⁶ Thus, the complainants maintain that the specific duty suspends Indonesia's MFN obligation because it is applied on a discriminatory basis (whether consistently or inconsistently with Article 9.1) and is intended to remedy the threat of serious injury found to exist in the underlying investigation.⁵⁷

7.24. We do not agree with the parties. In our view, the parties' arguments are based on a misconceived understanding of Article 9.1 and its relationship with Article XIX:1(a). Article 9.1 reads as follows:

Developing Country Members

1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided 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.[*]

[*fn original]² A Member shall immediately notify an action taken under paragraph 1 of Article 9 to the Committee on Safeguards.

7.25. Article 9.1 imposes an obligation on an importing Member to exclude imports of developing country Members from the scope of application of a safeguard measure in order to provide S&D, provided that certain conditions are satisfied.⁵⁸ Thus, by its express terms, Article 9.1 is legally premised on an importing Member's intention to apply a *safeguard measure*.

7.26. We recall that we have found that the specific duty on galvalume imports does *not* suspend Indonesia's obligations under Article II of the GATT 1994. We have also rejected Indonesia's contention that the specific duty should be considered to have "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a). The consequence of these findings is that the specific duty does not constitute a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. Thus, the fundamental prerequisite for the application of Article 9.1 does not exist, and there is, therefore, no basis for Indonesia's assertion that it was *legally required* to apply the specific duty in the manner required by Article 9.1.

7.27. In any case, even where a Member *is* proposing to apply a safeguard measure⁵⁹, it does not, in our view, follow from the fact that Article 9.1 imposes an *obligation* to apply a safeguard measure in a discriminatory manner in favour of qualifying imports from developing country Members, that the very same safeguard measure, *because of that discrimination*, suspends the obligation in Article I:1 to provide MFN-treatment for the purpose of Article XIX:1(a). Two considerations lead us to this conclusion.

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

⁵⁵ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 1.6.

⁵⁶ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 1.7.

⁵⁷ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, paras. 1.5-1.7; response to Panel question Nos. 49, 51, and 52.

⁵⁸ Panel Report, *US – Line Pipe*, para. 7.175; and Appellate Body Report, *US – Line Pipe*, para. 129.

⁵⁹ We recall here, to avoid confusion, that we have already found that the specific duty *does not* constitute a safeguard measure falling within the scope of the obligation in Article 9.1.

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*.⁶⁰

7.29. Secondly, we recall that the General Interpretative Note to Annex 1A of the WTO Agreement states that in the event of a conflict between a provision of the GATT 1994 and a provision of another covered agreement, the provision of the covered agreement shall prevail to the extent of the conflict. In our view, the effect of this rule is that the discriminatory application of a safeguard measure that is required by Article 9.1, to the extent it is inconsistent with the principle of MFN-treatment, is permissible *without having to suspend the operation of Article I:1 of the GATT 1994*. Indeed, the question of suspension simply does not arise in this context, because the obligation in Article 9.1 to exclude the qualifying imports of developing country Members from the scope of a safeguard measure prevails *as a matter of law* over the MFN obligation in Article I:1. There is, therefore, no legal basis for the assertion that the discriminatory application of a safeguard measure in accordance with Article 9.1 constitutes a suspension of Article I:1, within the meaning of Article XIX:1(a). The authority to exclude qualifying imports of developing country Members from the scope of application of a safeguard measure in accordance with Article 9.1 derives from the fact that the obligation to afford S&D in this manner under the Agreement on Safeguards prevails over the obligation to afford MFN-treatment under Article I:1 of the GATT 1994. It does not derive from Article XIX:1(a).

7.30. We recognize that our views in this respect depart from certain statements and findings of the panel in *Dominican Republic – Safeguard Measures*. In that dispute, the panel found that the discriminatory application of a safeguard measure in accordance with Article 9.1 of the Agreement on Safeguards resulted in the suspension of the importing Member's MFN obligations under Article I:1 of the GATT 1994.⁶¹ The parties in the present dispute have relied upon these findings to support their respective positions.⁶² We have carefully considered the panel's findings and, to the extent those findings would suggest a different outcome in this case, we respectfully disagree. In our view, and for the reasons explained in the preceding paragraphs⁶³, the discriminatory application of a safeguard measure for the purpose of affording S&D pursuant to Article 9.1 *does not* result in a suspension of a Member's obligations under Article I:1, within the meaning of Article XIX:1(a) of the GATT 1994.

7.31. We would come to the same overall conclusion even if we were to find, as the complainants request, that Indonesia included in the list of countries excluded from the application of the specific duty six *developed* country Members not entitled to S&D treatment under the terms of Article 9.1.⁶⁴ While the exclusion of imports of *developed* country Members from the application of a *safeguard measure* would be inconsistent with Article 9.1, it is clear from the findings we have made above that the specific duty is not a "safeguard measure" with respect to which Indonesia

⁶⁰ In articulating this view, we express no opinion on the extent to which Article XIX:1(a) may or may not authorize an importing Member to apply a measure on a discriminatory basis (that would otherwise be inconsistent with Article I:1 of the GATT 1994), *where such discrimination considered by an importing Member to be necessary to prevent or remedy serious injury*. Our views are strictly limited to the discriminatory application of a safeguard measure that may result from compliance with Article 9.1, which is explicitly intended to afford S&D to qualifying developing country Members.

⁶¹ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.70-7.73. We note that the facts in *Dominican Republic – Safeguard Measures* were different to the present controversy in several important respects, including because the measures at issue in that proceeding were found to suspend the obligations of the Dominican Republic under not only Article I:1 of the GATT 1994, *but also Article II:1(b) of the GATT 1994*. Thus, unlike the present dispute, the panel in *Dominican Republic – Safeguard Measures* was not called upon to determine whether compliance with Article 9.1 could be the *sole* basis to find that a particular measure (that did not already meet the definition of a "safeguard measure" on a separate and independent basis) could be characterized as such, simply because of the discrimination that results from the provision of S&D.

⁶² Indonesia's first written submission, paras. 209 and 210; Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 8; complainants' second written submission, para. 2.132; and complainants' opening statement at the second meeting of the panel, para. 7.2.

⁶³ See above, paras. 7.27-7.29. As explained in paragraph 7.27, this part of our analysis is premised on the existence of a safeguard measure falling within the scope of Article 9.1. We recall, however, that we have already found that the specific duty *does not* constitute a safeguard measure, and that Indonesia was, therefore, under no obligation to comply with the S&D requirements of Article 9.1 in its application of the specific duty. (See above, paras. 7.24-7.26).

⁶⁴ We emphasize that we make no finding on the merits of the complainants' assertions concerning the alleged developed country status of the six countries at issue, namely, Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania.

had an obligation to comply with Article 9.1. Thus, the discriminatory application of the specific duty resulted from Indonesia's erroneous view that it was legally required to comply with Article 9.1. In other words, Indonesia excluded imports of the six countries at issue from the application of the specific duty because it was of the view that they were *developing country Members* that qualified for *S&D*.⁶⁵

7.32. It follows that the conduct the complainants maintain would otherwise be precluded by Article I:1 (and, therefore, result in the suspension of Indonesia's MFN obligations for the purpose of Article XIX:1(a)) was not undertaken for the purpose of preventing or remedying serious injury. Indonesia did not decide to apply the specific duty to a limited number of exporting countries because Indonesia considered it was necessary to discriminate between sources of imports of galvalume in order to prevent or remedy serious injury to its domestic industry. Rather, the discrimination resulting from the exclusion of the six countries was pursued for the *sole* purpose of providing them with continued access to the Indonesian galvalume market unencumbered by the specific duty, *as a consequence of Indonesia's erroneous view that it was required to comply with Article 9.1*. Again, we cannot see how the application of the specific duty to imports originating in all but six countries, specifically excluded in order to maintain a pre-existing level of market access *for the purpose of affording those countries with S&D*, falls within the scope of the types of actions that may be authorized under Article XIX:1(a). Thus, even assuming, *arguendo*, that Indonesia did, in fact, exclude six *developed* country Members from the application of the specific duty, the resulting discrimination does not mean that the specific duty should be properly characterized as a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards.

7.3.3 Consequences of the fact that the specific duty was adopted following an investigation conducted by Indonesia's competent authority pursuant to Indonesia's safeguards legislation with a view to complying with the Agreement on Safeguards

7.33. The specific duty that is the subject of this dispute was imposed at the conclusion of an investigation initiated by Indonesia's competent authority in charge of the imposition of safeguard measures, and conducted pursuant to Indonesia's domestic safeguards legislation. The wording of the legal instrument adopting the specific duty, Regulation 137.1/PMK.011/2014, describes the measure as a "safeguard duty". Indonesia notified the investigation and its findings to the Committee on Safeguards pursuant to Articles 12.1(a), (b), and (c) of the Agreement on Safeguards. According to the complainants, these facts, when considered in the context of their submission that the specific duty suspends Indonesia's obligations under Article I:1 of the GATT 1994⁶⁶, all point in the direction of a finding that the specific duty is a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards.⁶⁷

7.34. As we see it, the fact that a Member initiated and conducted an investigation under its domestic safeguards legislation does not necessarily mean that the measures imposed on the investigated product at the end of that process are "safeguard measures" within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards. Although it would *normally* be expected that a measure adopted to prevent or remedy serious injury at the conclusion of a safeguard investigation would be a "safeguard measure", particularly where the domestic implementing instrument described the adopted measure as a "safeguard measure", this would not be because of the existence of an underlying investigation under the Member's domestic safeguards legislation, or the description of the measure by the imposing Member as a safeguard measure. Rather, it would be because of the expectation that the relevant measure is one of the "measures provided for" in Article XIX:1(a) of the GATT 1994, which as discussed above, is a

⁶⁵ Final Disclosure Report, (Exhibit IDN-8), para. 66; Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on imposition of safeguarding duty against the import of flat-rolled products of iron or non-alloy steel (22 July 2014), (Exhibit IDN-20), p. 4 and the appendix; and Committee on Safeguards, Notification Under Articles 9, 12.1(b), and 12.1(c), and Footnote 2 of the Agreement on Safeguards (28 July 2014), G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, G/SG/N/11/IDN/14, (Exhibit TPKM/VNM-5).

⁶⁶ We recall that we have previously dismissed the complainants' submission. (See above, paras. 7.23-7.32)

⁶⁷ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, paras. 1.7 and 1.8; response to Panel question No. 49. Although appearing to initially share the complainants' view, Indonesia ultimately disagrees with the complainants on this point. (Indonesia's comments on complainants' response to Panel question Nos. 50 and 51, paras. 22 and 23).

measure that suspends, withdraws, or modifies 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.

7.35. An importing Member that undertakes an investigation to determine whether to impose a safeguard measure on imports of a particular product will not know at the beginning of its investigation, whether or the extent to which, it may need to suspend, withdraw, or modify a GATT obligation or concession in order to address the serious injury that is allegedly caused by increased imports. It is clear, however, that as long as the *potential* to respond to alleged serious injury to the domestic industry through the imposition of a "safeguard measure" exists, the importing Member would have to initiate and conduct an investigation in accordance with the Agreement on Safeguards, as a WTO-consistent safeguard investigation is a necessary prerequisite to the imposition of a WTO-consistent safeguard measure.

7.36. Thus, an importing Member may initiate a safeguard investigation and find, at the end of that process, that the conditions for imposition of a safeguard measure are satisfied. At that point, the importing Member will have to determine whether it will impose a measure, and if so, what form and level that measure should take. The importing Member will have three choices: (a) impose a measure suspending, withdrawing, or modifying a GATT obligation or concession to the extent necessary to prevent or remedy the serious injury established in the underlying investigation and facilitate adjustment (that is, impose a safeguard measure); (b) take some other WTO-consistent action to otherwise address the serious injury established in the underlying investigation; or (c) take no action and impose no measure at all, despite having established the right to do so.

7.37. It is to be expected that an importing Member, having established that the conditions to impose a safeguard measure exist, will typically exercise its right to impose a safeguard measure. However, an importing Member in that situation might also decide, in the light of the findings made in the underlying investigation and/or other considerations⁶⁸, *not* to suspend, withdraw, or modify a GATT obligation in order to prevent or remedy serious injury.

7.38. In this connection, we note that Indonesia explained its decision to impose the specific duty by resorting to *a process that involved conducting an investigation under its safeguards legislation*, as follows:

Although Indonesia fully understands that it has the right to modify the applied tariff unilaterally, however, Indonesia is of the view that rationalization and proper procedures to increase or reduce tariffs to certain products are necessary as the basis of government policy. This is why Indonesia opted for the safeguard proceeding.⁶⁹

We understand this explanation to mean that Indonesia decided to conduct an investigation under its safeguards legislation and the Agreement on Safeguards *not* because Indonesia considered it was legally bound by its international obligations to do so in order to apply the specific duty on imports of galvalume, but because of other reasons related to "government policy". Recalling that one of the defining features of a safeguard measure 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*, and in the light of our previous finding that the specific duty does not possess this important characteristic, Indonesia's statement is, in our view, clear recognition that the specific duty challenged in this dispute does *not* constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, *notwithstanding the fact that it was imposed following an investigation conducted under Indonesia's safeguard legislation with a view to complying with the Agreement on Safeguards and described as a safeguard measure in the implementing regulation*.

7.39. It follows from the above that while a WTO-consistent investigation is a necessary prerequisite for the application of a WTO-consistent safeguard measure, the fact that an importing Member may have conducted an investigation in accordance with the Agreement on Safeguards

⁶⁸ For instance, considerations of public interest, which are mentioned in Article 3(1) of the Agreement on Safeguards, may lead a Member to decide not to impose a safeguard measure, despite having established the right to do so.

⁶⁹ Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 7.

does not mean that any measures adopted as a result of the conclusions in that investigation suspend, modify, or withdraw any GATT obligation or concession and, therefore, constitute "safeguard measures" within the meaning of Article 1 of the Agreement on Safeguards. Because a Member is free to choose *not* to apply a safeguard measure, even when all of the conditions for application are satisfied, the mere fact that it has undertaken a WTO-consistent safeguard investigation and made all necessary notifications to the WTO Committee on Safeguards does not render that Member's consequent actions a "safeguard measure" for the purpose of WTO law. Ultimately, we do not understand the complainants to disagree with this proposition, as they have themselves explained that their position is *not* that the specific duty is a safeguard measure *solely* because it was described as such in the implementing regulation and adopted following a domestic safeguards investigation that was notified to the WTO Committee on Safeguards. Rather, the complainants have made clear that they consider these facts to lend support to the view that the specific duty is a safeguard measure when considered in the light of their submission that Indonesia's discriminatory application of the specific duty, for the purpose of providing S&D in accordance with Article 9.1 of the Agreement on Safeguards, suspended Indonesia's obligations under Article I:1 of the GATT 1994⁷⁰, a submission, which we recall once again, we have rejected.

7.3.4 Conclusion

7.40. In summary, we have found that one of the defining features of a safeguard measure 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 satisfied⁷¹, and that the specific duty applied by Indonesia on imports of galvalume does not constitute such a measure *for the following reasons*:

- a. the specific duty does not suspend, withdraw, or modify the operation of Indonesia's obligations under Article II of the GATT 1994 for the purpose of Article XIX:1(a)⁷²;
- b. there is no basis for Indonesia to assert that Article XXIV of the GATT 1994 precluded its authorities from raising tariffs on imports of galvalume and that, for this reason, the specific duty "suspended" "the GATT exception under Article XXIV" for the purpose of Article XIX:1(a)⁷³;
- c. the discriminatory application of the specific duty in order to afford S&D treatment to 120 Members, which Indonesia (rightly or wrongly) considered to be developing countries, does not suspend Indonesia's obligation to provide MFN-treatment under Article I:1 of the GATT for the purpose of Article XIX:1(a)⁷⁴; and
- d. the fact that the specific duty was described as a safeguard measure in the implementing regulation and imposed following an investigation conducted pursuant to Indonesia's domestic safeguards legislation, with a view to complying with the disciplines of the Agreement on Safeguards (including notification requirements), does not render the specific duty a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards.⁷⁵

7.41. In coming to this conclusion, we wish to emphasize that contrary to what Indonesia suggests⁷⁶, our finding that the specific duty is not a "safeguard measure" does not mean that Members are precluded from applying "safeguard measures" on imports for which their tariffs are "unbound". Any WTO Member faced with such a situation would be entitled to exercise its rights under the Agreement on Safeguards to prevent or remedy serious injury to its domestic industry, provided that the chosen remedial course of action suspends, withdraws, or modifies a relevant GATT obligation or concession for that purpose. A Member whose tariff is "unbound" with respect to a product that is facing competition from imports that are allegedly causing serious injury, may,

⁷⁰ Complainants' request for interim review, paras. 2.11 and 2.12.

⁷¹ See above, paras. 7.12-7.17.

⁷² See above, para. 7.18.

⁷³ See above, paras. 7.19 and 7.20.

⁷⁴ See above, paras. 7.21-7.32.

⁷⁵ See above, paras. 7.33-7.39.

⁷⁶ Indonesia's comments on paragraphs 40 and 41 of Indonesia's second written submission, paras. 2, 6, and 9.

for example, impose a safeguard measure in the form of an appropriate import quota, thereby suspending its obligations under Article XI of the GATT 1994. Of course, such a measure would have to be based on a WTO-consistent investigation and conclusions. However, the mere fact of having conducted such an investigation does not mean that an otherwise permitted action, such as an increase in an unbound tariff, becomes a safeguard measure subject to review under the Agreement on Safeguards. Indonesia in this case did not undertake any course of action that suspended, withdrew, or modified any GATT obligation or concession. Accordingly, for all of the above reasons, we find that the specific duty applied by Indonesia on imports of galvalume pursuant to Regulation No. 137.1/PMK.011/2014 *does not* constitute a "safeguard measure", within the meaning of Article 1 of the Agreement on Safeguards.

7.4 Whether the exclusion of 120 countries from the application of the specific duty imposed pursuant to Regulation No. 137.1/PMK.011/2014 is inconsistent with Indonesia's obligation to afford MFN-treatment under Article I:1 of the GATT

7.42. The complainants claim that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation No. 137.1/PMK.011/2014 is inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994. According to the complainants, the exclusion of galvalume originating in those 120 countries from the scope of the specific duty is 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.⁷⁷ Although the complainants pursue this claim primarily as part of their complaint against the specific duty *as a safeguard measure*⁷⁸, they also make the same claim on the basis of the same arguments against the specific duty *as a stand-alone measure*.⁷⁹

7.43. Indonesia has not contested the complainants' Article I:1 claim against the specific duty *as a stand-alone measure*. Moreover, in responding to the complainants' Article I:1 claim against the specific duty *as a safeguard measure*, Indonesia's only response has been to argue that the discriminatory application of the duty is: (a) authorized by Article XIX:1(a) of the GATT (to the extent that this provision entitles Indonesia to suspend its obligations under Article I:1); and (b) legally required under the terms of Article 9.1 of the Agreement on Safeguards (which prevails over Article I:1 to the extent of any conflict).⁸⁰ Thus, Indonesia's sole justification for the exclusion of imports of galvalume originating in 120 countries from the application of the specific duty is premised on the view that the specific duty is a measure which, *by definition*, would be inconsistent with Article I:1 of the GATT, *were it not considered to be a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards*. We have previously concluded that the specific duty does not constitute a safeguard measure.⁸¹

7.44. Article I:1 of the GATT requires that "any advantage, favour, privilege or immunity" granted by a Member in relation to the application of *inter alia* "customs duties and charges" on the importation of "any product originating in ... any other country shall be accorded immediately and unconditionally to the like product originating in ... the territories" of all Members. The complainants argue, and we agree, that the specific duty is a "customs duty" within the meaning of Article I:1. We also share the complainants' view that the exclusion of imports of galvalume from the 120 countries listed in Regulation No. 137.1/PMK.011/2014 constitutes an "advantage" granted to "like products" that is not "immediately and unconditionally accorded" to imports of

⁷⁷ Complainants' first written submission, paras. 5.142-5.150; Chinese Taipei's panel request, para. II.a.6, p. 3; and Viet Nam's panel request, para. 1.7.a.vi, p. 3.

⁷⁸ In particular, the complainants argue that Indonesia's application of the specific duty, *as a safeguard measure*, is inconsistent with Article I:1 of the GATT because the exclusion of the 120 countries listed in Regulation No. 137.1/PMK.011/2014 cannot be justified by Article 9.1 of the Agreement on Safeguards due to the fact that six of those countries are European Union member States and, therefore, according to the complainants, not developing countries. (Complainants' first written submission, paras. 5.142-5.150; response to Panel question No. 42; second written submission, paras. 2.128, 2.132, and 2.136; opening statement at the first meeting of the Panel, paras. 7.1 and 7.2; and opening statement at the second meeting of the Panel, para. 7.2).

⁷⁹ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 2.2; response to Panel question No. 51.

⁸⁰ Indonesia's first written submission, paras. 210-212; opening statement at the first meeting of the Panel, paras. 63 and 64; comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 8; and opening statement at the second meeting of the Panel, para. 72.

⁸¹ See above, para. 7.40.

galvalume from all WTO Members. Accordingly, we find that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation No. 137.1/PMK.011/2014 is inconsistent with Indonesia's obligation to afford MFN-treatment under Article I:1 of the GATT 1994.

7.5 The complainants' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994

7.45. Indonesia submits that the consequence of a finding that the specific duty does not constitute a safeguard measure should be the rejection of the entirety of the complainants' claims under the Agreement on Safeguards.⁸² The complainants do not refute this implication, but nevertheless ask that the merits of their claims under the Agreement on Safeguards be fully resolved in order to "secure a positive solution" to this dispute.⁸³

7.46. Having concluded that the specific duty is *not* a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, it is evident to us that there is no legal basis for the complainants' claims under the Agreement on Safeguards (as well as Articles XIX:1(a) and XIX:2 of the GATT 1994). Accordingly, we dismiss the entirety of those claims. In our view, the findings and conclusions we have made in the preceding section of this report are an appropriate and sufficient basis to resolve the matters at issue in this dispute consistent with our terms of reference and Article 11 of the DSU. In this light, we see no need to make any alternative findings on the legal merits of the complainants' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994.

7.47. Nevertheless, in the light of the unique circumstances of this case⁸⁴, we have decided to proceed to address the complainants' claims, but only to the extent of identifying facts relevant to an evaluation of the allegations pertaining to KPPI's findings, the conduct of its investigation, and Indonesia's decision to impose the specific duty. Given our conclusions above, we do not go on to consider the legal merits of the complainants' claims. Thus, in the sub-sections that follow, and for each of the sets of issues raised by the complainants⁸⁵, we firstly describe the parties' arguments and summarize the relevant applicable law (without making any findings on questions of legal interpretation arising from those arguments), before turning to identify the relevant facts.

7.5.1 Unforeseen developments and the effect of GATT 1994 obligations

7.5.1.1 Parties' arguments

7.48. The complainants claim that KPPI's determination is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because KPPI erroneously concluded that the "surge of imports" qualified as an unforeseen development and because, in any case, KPPI failed to: (a) provide a reasoned and adequate explanation of *what* the unforeseen developments were; (b) explain *why* those developments were unforeseen at the relevant time; (c) *identify* any GATT 1994 obligation whose effect(s) led to increased imports; and (d) properly establish a *logical*

⁸² Indonesia's second written submission, para. 41.

⁸³ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 2.2

⁸⁴ We recall that: (a) Indonesia conducted the investigation at issue with a view to complying with its obligations under the Agreement on Safeguards and imposed the specific duty in the light of the outcome of that investigation, despite knowing that it was entitled to raise its applied MFN duty rate on imports of galvalume 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 (b) all three parties have consistently argued from the very beginning of this proceeding that the specific duty *is* a safeguard measure. This is the first time that a WTO dispute settlement Panel has been called upon to rule upon the merits of claims of violation of the Agreement on Safeguards in such a situation.

⁸⁵ Having found Indonesia's application of the specific duty, *as a stand-alone measure*, to be inconsistent with its obligations under Article I:1 of the GATT 1994 (above paras. 7.42-7.44), we believe it is not necessary for the purpose of resolving this dispute to identify facts that might be relevant to the legal analysis of the complainants' *alternative Article I:1 claim* (above para. 7.42).

connection between the alleged unforeseen developments and the effect(s) of the GATT 1994 obligation(s) and the increase in imports of galvalume.⁸⁶

7.49. Indonesia denies the complainants' allegations, submitting that the standard KPPI had to satisfy in making its findings is not as rigorous as the complainants claim, emphasizing that KPPI's conclusion on unforeseen developments must be considered in the light of the totality of KPPI's findings and that the Panel should not be overly focused only on the conclusion. In any case, according to Indonesia, the complainants understood that the unforeseen development was the 2008 global financial crisis. Indonesia also argues that it follows from the simplicity of the facts at issue in the underlying investigation and Indonesia's developing country status that KPPI was not required to support its determination of unforeseen developments with sophisticated economic analyses in order to satisfy Indonesia's obligations.⁸⁷ Furthermore, in responding to the complainants' claims concerning the effect of a GATT 1994 obligation, Indonesia points to the MFN and preferential duty rates applied by Indonesia on imports of galvalume, which were identified in KPPI's Final Disclosure Report.⁸⁸

7.5.1.2 Relevant law

7.50. Article XIX:1(a) of the GATT 1994 provides as follows:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party 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 contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Both clauses of Article XIX:1(a) must be satisfied before a Member may impose a safeguard measure. The first clause sets out two circumstances whose existence must be factually demonstrated before any safeguard may be applied: (a) the existence of unforeseen developments; and (b) the existence of one or several obligation(s) under the GATT 1994.⁸⁹ Demonstration of these two factual pre-requisites must be in the competent authority's published report.⁹⁰ The second clause sets out the "independent conditions" that must also be established in order to impose a safeguard measure. These include an increase in imports in such quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers of like or directly competitive products. A competent authority must demonstrate the existence of a "logical connection" between, on the one hand, the existence of unforeseen developments and the obligations assumed under the GATT 1994 and, on the other hand, the increase in imports of the subject product that is causing or threatening to cause serious injury to the domestic industry of the importing Member.⁹¹ It is not for a Panel to identify linkages that the competent authority failed to make in its published report.⁹²

7.51. The expression "unforeseen developments" is understood to mean developments that were "unexpected" at the time the importing Member incurred the relevant GATT obligation.⁹³ A competent authority's published report must demonstrate how these developments were

⁸⁶ Complainants' first written submission, paras. 5.17-5.30; opening statement at the first meeting of the Panel, paras. 2.1-2.3; response to Panel question Nos. 1-3; and second written submission, paras. 2.4-2.28.

⁸⁷ Indonesia's first written submission, paras. 53-65; response to Panel question Nos. 8 and 9; and second written submission, paras. 24-39.

⁸⁸ Indonesia's response to Panel question No. 6, paras. 3-6.

⁸⁹ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 91; and *Korea – Dairy*, para. 84; and Panel Report, *Ukraine – Passenger Cars*, para. 7.57.

⁹⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.56.

⁹¹ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 92; *Korea – Dairy*, para. 85; *US – Lamb*, para. 72; and *US – Steel Safeguards*, paras. 315-319; and Panel Report, *Ukraine – Passenger Cars*, paras. 7.83 and 7.96.

⁹² Appellate Body Report, *US – Steel Safeguards*, para. 322.

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

unexpected.⁹⁴ A "mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact".⁹⁵ Moreover, because a competent authority must establish that the increase in imports *is a result of* the unforeseen developments, an increase in imports cannot, by definition, constitute an unforeseen development within the meaning of Article XIX:1(a).⁹⁶

7.52. The expression "the effect of the obligations incurred by a Member under this Agreement" requires a competent authority to factually demonstrate "that the importing Member has incurred obligations under the GATT 1994, including tariff concessions".⁹⁷

7.53. Article 3.1 of the Agreement on Safeguards provides in relevant part that:

The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

To comply with this obligation, a competent authority must, with respect to all pertinent issues of law and fact, set out in sufficient detail its findings and its reasoned conclusions in a published report.⁹⁸ A competent authority's findings and conclusions must be expressed in a logical form or have resulted from a logical examination of a matter.⁹⁹ The existence of unforeseen developments qualifies as a "pertinent issue of fact and law" for the purposes of applying Article 3.1.¹⁰⁰ Therefore, Article 3.1 places an obligation on a Member's competent authority to include in its published report a "'reasoned conclusion' on 'unforeseen developments'".¹⁰¹

7.5.1.3 Relevant facts

7.54. KPPI's findings with respect to unforeseen developments are set out in three paragraphs of the Final Disclosure Report. KPPI concludes that the "surge of imports" of galvalume constitutes an "unforeseen development", after describing the alleged impact of the following two events on international trade in galvalume: (a) the 2008 global financial crisis; and (b) a change in Indonesian raw material preferences from wood to light steel.¹⁰²

7.55. The Final Disclosure Report states that the 2008 global financial crisis caused demand for imports of galvalume *outside of Indonesia* to decrease, resulting in a *diversion of trade* from other import markets to the Indonesian market because of above-global-average economic growth in Indonesia.¹⁰³ It also states that a change in domestic market preferences for raw materials (from wood to light steel) had the effect of *increasing* Indonesian demand for imports of galvalume "in line with the growth of roll forming industry".¹⁰⁴ On the basis of these considerations, KPPI concludes in the final paragraph of its analysis that the "surge of imports during the period of investigation ... is considered as unforeseen development".¹⁰⁵

7.56. Although there is no dispute between the parties about whether the 2008 global financial crisis actually took place, the 2008 global financial crisis is neither described in any detail nor explicitly identified in the Final Disclosure Report as an unforeseen development. Rather, as already noted, KPPI stated that the "surge of imports" was the "unforeseen development". KPPI's findings in the relevant paragraphs of the Final Disclosure Report make no specific reference to any data, statistics, submissions, or underlying studies to support the various statements made about: (a) the alleged consequences of the 2008 global financial crisis on international trade in

⁹⁴ Appellate Body Report, *US – Lamb*, paras. 71-73; and Panel Report, *Chile – Price Band System*, para. 7.134.

⁹⁵ Panel Report, *Argentina – Preserved Peaches*, para. 7.33.

⁹⁶ Panel Report, *Ukraine – Passenger Cars*, para. 7.83.

⁹⁷ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 91; and *Korea – Dairy*, para. 84.

⁹⁸ Appellate Body Report, *US – Steel Safeguards*, para. 287.

⁹⁹ Appellate Body Report, *US – Steel Safeguards*, para. 287.

¹⁰⁰ Appellate Body Reports, *US – Lamb*, para. 76; and *US – Steel Safeguards*, paras. 290 and 326; and Panel Report, *Chile – Price Band System*, para. 7.137.

¹⁰¹ Appellate Body Report, *US – Lamb*, para. 76.

¹⁰² Final Disclosure Report, (Exhibit IDN-8), paras. 52-54.

¹⁰³ Final Disclosure Report, (Exhibit IDN-8), para. 52.

¹⁰⁴ Final Disclosure Report, (Exhibit IDN-8), para. 53.

¹⁰⁵ Final Disclosure Report, (Exhibit IDN-8), para. 54.

galvalume; (b) Indonesia's above-global-average economic growth; or (c) the change in the raw materials preferences. To this extent, KPPI's finding of the existence of unforeseen developments rests on unsubstantiated assertions.

7.57. Turning to the identification of Indonesia's obligations under the GATT 1994, we note that the MFN and preferential duty rates in force with respect to imports of galvalume during the period of investigation (POI) are set out in Table 3 of the Final Disclosure Report. The fact that Indonesia has no binding WTO tariff obligation with respect to galvalume is not mentioned. There is, furthermore, no record of any specific consideration of any of Indonesia's obligations under the GATT 1994 in the Final Disclosure Report.

7.5.2 Increased imports

7.5.2.1 Parties' arguments

7.58. The complainants claim that Indonesia acted inconsistently with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 3.1 of the Agreement on Safeguards by failing to make a proper determination of whether galvalume "is being imported" in such increased quantities as to cause or threaten to cause serious injury (KPPI's determination of "increased imports"), and by subsequently imposing the challenged safeguard measure on the basis of the same determination of "increased imports".¹⁰⁶

7.59. The complainants submit that the facts and circumstances surrounding the challenged galvalume investigation demonstrate that Indonesia acted inconsistently with its obligations under these provisions for essentially two reasons. First, because KPPI's finding of "increased imports" was based on import data from a POI that ended 15 months before its substantive determination, without any explanation as to why data from such an allegedly remote POI constituted an appropriate basis to make that finding; and secondly, because the same finding of "increased imports" was relied upon to justify the imposition of the challenged safeguard measure approximately 19 months after the end of the POI, without any explanation as to why the data from such an allegedly remote POI constituted an appropriate basis for that decision.¹⁰⁷

7.60. Indonesia submits that the Agreement on Safeguards does not set a "specific numerical threshold" for the time-gap between, on the one hand, the end of a POI and, on the other hand, the dates on which a Member makes a substantive determination of increased imports in a safeguard investigation or decides to impose a safeguard measure. Moreover, Indonesia points out that, unlike the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards is silent about the maximum duration of a safeguard investigation, leaving Members with a degree of flexibility to decide exactly when to apply a safeguard measure after the issuance of the results of a safeguards investigation.¹⁰⁸

7.61. Indonesia also argues that the complainants' suggestion to take into account the data of the first half of 2013 would be contradictory to the goal of expediting the investigation because by taking into account new data, KPPI would have to update and verify not only its increased imports analysis, but also other relevant requirements. Therefore, Indonesia submits that the implementation of the complainants' suggestion would undoubtedly result in a longer, if not the same, time required to complete the investigation. Moreover, Indonesia draws a parallel between the facts of the galvalume investigation and the facts at issue in *Ukraine – Passenger Cars*, where the panel found that a 16-month time gap between the end of the POI and the date of the competent authority's substantive determination was sufficient to establish that the increased imports were *recent enough*. In contrast, Indonesia asserts that the time-gap between the end of the POI and the date of the substantive determination in the galvalume investigation was only 15 months, which Indonesia argues should be acceptable given the following circumstances:

¹⁰⁶ Complainants' first written submission, paras. 5.35-5.55. Separately, Viet Nam claims that as a consequence of the alleged violations of Article XIX:1(a) of the GATT and Articles 2.1 and 3.1 of the Agreement on Safeguards, Indonesia also acted inconsistently with Articles 4.2(a) and 4.2(c) of the Agreement on Safeguards. (Complainants' first written submission, para. 5.56).

¹⁰⁷ Complainants' opening statement at the first meeting of the Panel, paras. 3.1-3.6; second written submission, paras. 2.33-2.46; and opening statement at the second meeting of the Panel, paras. 3.1-3.10.

¹⁰⁸ Indonesia's first written submission, paras. 86-88 and 92.

(a) Indonesia's status as a developing country; (b) the fact that KPPI was in charge of ten safeguard investigations between 2013 and 2014; (c) the fact that KPPI's chairperson and the Minister of Trade were replaced during the relevant period; (d) the fact that no interested party ever requested KPPI to update the import data; and (e) that, in any case, official import data for 2013 only became available on 4 August 2014.¹⁰⁹ According to Indonesia, the delay between the date of KPPI's substantive determination and the date of the Indonesian Minister of Trade's decision to apply the safeguard measure can also be objectively justified by the various domestic procedures that had to be followed before the decision to apply the safeguard measure could be adopted by the Minister of Trade.¹¹⁰

7.62. In the complainants' view, however, Indonesia relies erroneously on the panel's findings because the facts of that dispute are very different from the facts in the present dispute. In particular, the complainants argue that, in *Ukraine – Passenger Cars*, the panel found that Japan had not put forward specific arguments to suggest that the investigation took longer than needed; and it also highlighted the fact that "the competent authorities were actively engaged [with Japan] right up to the end of the investigation", and "published a notice specifically on the extension of the investigation".¹¹¹ In contrast, the complainants argue that, in the present dispute, "the time gaps at issue were 'abnormal' due to several bureaucratic factors that delayed the issuance of the Final Disclosure Report"; "KPPI had access to data on the volume of imports for, at least, the first half of 2013, which were ignored"; "Indonesia did not issue any notice as to the possible delay and extension of the investigation"; and Indonesia did not "engage actively with exporting countries in the course of the investigation".¹¹²

7.5.2.2 Relevant law

7.63. Article 2.1 of the Agreement on Safeguards provides that:

A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.¹¹³

The underlined text in Article 2.1 (and the parallel language that appears in Article XIX:1(a) of the GATT 1994) has been interpreted to mean that the increase in imports observed in a determination giving rise to the right to apply a safeguard measure must be "recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".¹¹⁴ Moreover, the phrase "is being imported", which is also found in both Article XIX:1(a) and Article 2.1, conveys the need to select a POI "that is sufficiently recent to provide a reasonable indication of current trends in imports".¹¹⁵ Thus, the consideration of an increase in imports that is the focus of a safeguards investigation must be based on data from a POI that ends in the very recent past and is sufficiently representative of current import movements.¹¹⁶

7.64. There are no absolute or abstract standards for determining whether a competent authority's analysis has complied with this requirement. An assessment must be made on a case-by-case basis, considering the relevant facts and circumstances concerning, *inter alia*, the

¹⁰⁹ Indonesia's first written submission, paras. 90 and 93-95; opening statement at the first meeting of the Panel, paras. 29 and 30; second written submission, paras. 44, 53, and 56-59; opening statement at the second meeting of the Panel, paras. 31-35, 37, and 38; response to Panel question Nos. 57 and 59; and comments to complainants' response to Panel question Nos. 60 and 61.

¹¹⁰ Indonesia's first written submission, para. 99; opening statement at the first meeting of the Panel, para. 31; and response to Panel question No. 59.

¹¹¹ Complainants' opening statement at the second meeting of the Panel, para. 3.7 (citing Panel Report, *Ukraine – Passenger Cars*, para. 7.176).

¹¹² Complainants' opening statement at the second meeting of the Panel, para. 3.8.

¹¹³ Fn omitted; emphasis added.

¹¹⁴ Appellate Body Report, *Argentina – Footwear (EC)*, para. 131.

¹¹⁵ Appellate Body Report, *US – Tyres (China)*, para. 147.

¹¹⁶ Appellate Body Reports, *Argentina – Footwear (EC)*, fn 130; and *US – Tyres (China)*, para. 146.

market and the product.¹¹⁷ Furthermore, the increase in imports must be "recent enough" in relation to not only the substantive determination made by the competent authority in an underlying investigation but also a Member's decision to apply a safeguard measure.¹¹⁸

7.5.2.3 Relevant facts

7.65. Indonesia initiated the safeguards investigation on 19 December 2012.¹¹⁹ KPPI's analysis of increased imports was based on import volume data from a five-year POI ending on 31 December 2012. It concluded the investigation approximately 15 months later on 31 March 2014¹²⁰, and the specific duty was imposed by the Minister pursuant to Regulation 137.1/PMK.011/2014 four months later, on 22 July 2014, approximately 19 months after the end of the POI.¹²¹ The Chairperson of KPPI changed during the course of the investigation on 25 June 2013.¹²²

7.66. KPPI's determination of increased imports was based on official import volume data from a POI ending on 31 December 2012, produced by the Indonesian Statistics Bureau. Import volume data for the final calendar-year of the POI (2012) were officially released by the Indonesian Statistics Bureau on 2 August 2013¹²³, about seven months before the issuance of KPPI's Final Disclosure Report. Import volume data for calendar-year 2013 were published by the Indonesian Statistics Bureau on 4 August 2014.¹²⁴ The import data relied upon in the petition for the initiation of the safeguards investigation includes data for the first half of calendar-year 2012, explicitly naming the Indonesian Statistics Bureau as the source.¹²⁵ However, Indonesia asserts that the Indonesian Statistics Bureau does not officially publish half-yearly import statistics by country.¹²⁶

7.67. No interested party requested KPPI to extend the POI during the course of the investigation. However, the last interaction between KPPI and the exporters from Chinese Taipei and Viet Nam prior to the Final Disclosure Report was at a public hearing on 23 April 2013¹²⁷, almost one full year before the completion of the investigation on 31 March 2014. The Vietnamese exporter, the Hoa Sen Group, was orally informed by KPPI of the outcome of the investigation around 22 April 2014, and on the same date requested to see a non-confidential version of the Final Disclosure Report.¹²⁸ A copy of the non-confidential version of the Final Disclosure Report was e-mailed by KPPI to the Hoa Sen Group on 20 May 2014.¹²⁹ The Hoa Sen Group provided KPPI with its comments on the Final Disclosure Document on 3 June 2014. Those comments did not challenge the POI in the underlying investigation.¹³⁰

7.68. Indonesian law establishes an internal decision-making process for the imposition of a safeguard after the KPPI has finished its investigation and made a recommendation to the Minister

¹¹⁷ Appellate Body Report, *US – Steel Safeguards*, paras. 358-360.

¹¹⁸ Panel Report, *Ukraine – Passenger Cars*, paras. 7.172 and 7.173.

¹¹⁹ WTO, Committee on Safeguards, Notification Under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it, G/SG/N/6/IDN/22, (Exhibit TPKM/VNM-2), p. 1.

¹²⁰ Indonesia's first written submission, para. 94; and Final Disclosure Report, (Exhibit IDN-8), p. 30.

¹²¹ Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on imposition of safeguarding duty against the import of flat-rolled products of iron or non-alloy steel (22 July 2014), (Exhibit IDN-20), p. 6. Regulation 137.1/PMK.011/2014 was "stipulated" by the Minister of Finance of the Republic of Indonesia on 7 July 2014; "promulgated" by the Minister of Justice and Human Rights of the Republic of Indonesia on 15 July 2014; and entered into legal effect on 22 July 2014.

¹²² Indonesia's response to Panel question No. 59, para. 38.

¹²³ Indonesia's response to Panel question No. 15, para. 24; and Indonesia's Official Import Statistics for 2012, (Exhibit IDN-40).

¹²⁴ Indonesia's second written submission, para. 54; and Publication date of 2013 Import Data Statistics, (Exhibit IDN-43).

¹²⁵ Request for Application of Safeguard Measure (Non-confidential Summary), 12 December 2012, (Exhibit TPKM/VNM-11), section E.

¹²⁶ Indonesia's response to Panel question No. 57, para. 36.

¹²⁷ Indonesia's first written submission, para. 94; and complainants' response to Panel question No. 11.

¹²⁸ Complainants' response to Panel question No. 11; and Letter dated 22 April 2014 from Hoa Sen Group's counsel to KPPI, (Exhibit TPKM/VNM-16).

¹²⁹ Complainants' response to Panel question No. 11; and Email dated 20 May 2014 from KPPI to Hoa Sen Group's counsel, (Exhibit TPKM/VNM-18).

¹³⁰ Indonesia's second written submission, para. 51; and Letter dated 3 June 2014 from Hoa Sen's Legal Counsel Submitting Comments on KPPI's Final Disclosure Report, (Exhibit IDN-42).

of Trade. This process requires the Minister of Trade to inform the Minister of Finance of a decision to impose a safeguard duty within 30 working days of the receipt of the letter of recommendation from KPPI.¹³¹ However, before doing so, the Minister of Trade must forward KPPI's recommendation to various Indonesian government Ministries for the purpose of considering whether the imposition of a safeguard duty would be in the national interest. Under Indonesian law, the consulted Ministries are required to provide their "considerations" to the Minister of Trade within 14 working days¹³², failing which, the relevant Ministries "shall be deemed" to have agreed with KPPI's recommendation.¹³³ The Minister of Finance has 30 working days from the receipt of the letter from the Minister of Trade to issue a decree for the purpose of applying the proposed safeguard measure.

7.69. Following the issuance of the Final Disclosure Report on 31 March 2014, KPPI sent a letter to the Minister of Trade on 10 April 2014 recommending the imposition of the specific duty in accordance with the results of the underlying investigation. This letter initiated the internal decision-making process contemplated under Indonesian law, which would ultimately result in the imposition of the specific duty. The Minister of Trade forwarded KPPI's recommendations to the relevant Ministries on 21 April 2014.¹³⁴ A meeting to consider the "national interest" was held on 12 May 2014 between the Coordinating Ministry of Economic Affairs, the State Ministry of National Development Planning, the Ministry of Finance, the Ministry of Industrial Affairs, the Ministry of Trade, and KPPI.¹³⁵ Following this meeting, the Minister of Trade sent a letter to the Minister of Finance on 26 May 2014 concerning the proposed safeguard measure.¹³⁶ Two "technical" meetings of the "Tariff Team" were held on 20 and 24 June 2014 among officials of the Ministry of Trade, Ministry of Finance, and Ministry of Industry.¹³⁷ Regulation 137.1/PMK.011/2014 was "stipulated" by the Minister of Finance of the Republic of Indonesia on 7 July 2014; "promulgated" by the Minister of Justice and Human Rights of the Republic of Indonesia on 15 July 2014; and entered into legal effect on 22 July 2014.¹³⁸

7.5.3 Threat of serious injury

7.5.3.1 Parties' arguments

7.70. The complainants claim that KPPI's serious injury analysis and threat of serious injury determination are inconsistent with Articles 3.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(c) of the Agreement on Safeguards and, consequently, with Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994. In essence, the complainants advance the following three lines of argument to support their claims: first, the Final Disclosure Report contains no analysis or finding of whether serious injury was "clearly imminent"¹³⁹ in order to establish that the domestic industry was suffering from a threat of serious injury; second, KPPI failed to examine the rate and amount of the increase in imports *relative to domestic production*¹⁴⁰; and third, KPPI failed to provide a reasoned and adequate explanation of its findings because it failed to properly analyze a

¹³¹ Government Regulation No. 34 of 2011 Concerning Anti-dumping Measure, Countervailing Measure, and Safeguard Measure, Article 84(5), GR 34/2011, (Exhibit IDN-6).

¹³² Government Regulation No. 34 of 2011 Concerning Anti-dumping Measure, Countervailing Measure, and Safeguard Measure, GR 34/2011, (Exhibit IDN-6), Article 84(2).

¹³³ Government Regulation No. 34 of 2011 Concerning Anti-dumping Measure, Countervailing Measure, and Safeguard Measure, GR 34/2011, (Exhibit IDN-6), Article 84(3).

¹³⁴ Indonesia's first written submission, Table 1, para. 30.

¹³⁵ Indonesia's first written submission, Table 1, para. 30.

¹³⁶ Indonesia's first written submission, Table 1, para. 30.

¹³⁷ Indonesia's first written submission, Table 1, para. 30.

¹³⁸ Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on imposition of safeguarding duty against the import of flat-rolled products of iron or non-alloy steel (22 July 2014), (Exhibit IDN-20).

¹³⁹ Complainants' first written submission, paras. 5.57, 5.88-5.90, and 5.92; second written submission, paras. 2.74 and 2.75.

¹⁴⁰ Complainants' first written submission, paras. 5.70-5.75; second written submission, paras. 2.50-2.59; and response to Panel question Nos. 18 and 19. According to the complainants, the evaluation of increased imports in "relative terms" that is called for in Article 4.2(a) of the Agreement on Safeguards should be understood, in the context of Article 2.1, to mean that a competent authority's serious injury analysis must involve a consideration of the extent to which imports increased "*relative to domestic production*".

number of factors individually and collectively, including trends in market shares, capacity utilization, captive production, inventories, production, productivity, and employment.¹⁴¹

7.71. Indonesia rejects the complainants' criticisms of KPPI's threat of serious injury determination. While not pointing to any explicit analysis or finding in the Final Disclosure Report regarding whether serious injury was "clearly imminent", Indonesia maintains that it was clear on the basis of KPPI's findings that "serious injury was on the verge of occurring if not for the implementation of this safeguard measure".¹⁴² Moreover, Indonesia contends that the Final Disclosure Report shows that KPPI reviewed all mandatory injury factors in conformity with Article 4.2(a), including the rate and amount of the increase in imports of the product concerned *relative to domestic consumption*. According to Indonesia, KPPI was not required to examine the rate and amount of the increase in imports *relative to production*.¹⁴³ Indonesia argues that, in order to make sense of the textual difference between Article 2.1 (which is focused on an increase in imports that is "relative to *domestic production*") and Article 4.2(a) (which requires the investigating authority to evaluate increased imports in "relative terms", without defining the notion of "relative terms"), the expression "relative terms" in Article 4.2(a) should not be construed as limiting the comparison of increased imports to *domestic production*.¹⁴⁴ Indonesia also submits that the Final Disclosure Report contains a reasoned and adequate explanation of how *all* of the various injury factors supported KPPI's overall conclusion that the increased imports of galvalume threatened to cause serious injury to the domestic industry.¹⁴⁵

7.5.3.2 Relevant law

7.72. Serious injury and threat of serious injury are defined in Article 4.1 of the Safeguard Agreement as follows:

- (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
- (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

7.73. The plain language of Articles 4.1(a) and (b) establishes that a determination of threat of serious injury must be based on a finding that serious injury, i.e. a significant overall impairment in the position of the domestic industry, is clearly imminent. Serious injury has been interpreted to mean a "very high standard" of injury, "much higher" than the standard of material injury contemplated under the AD and SCM Agreements.¹⁴⁶ The difference between a finding of "serious injury" and a "threat of serious injury" is not in terms of the degree or significance of injury itself, but rather whether injury is already occurring or, although not presently occurring, will occur soon. In other words, whereas a finding of "serious injury" implies that a significant overall impairment in the position of the domestic industry has already materialized, a determination of "threat of serious injury" means that such a situation has yet to occur, but is "clearly imminent".¹⁴⁷

¹⁴¹ Complainants' first written submission, paras. 5.77-5.87; second written submission, paras. 2.60-2.73; response to Panel question Nos. 16, 17, and 70; and comments on Indonesia's response to Panel question Nos. 64, 65, and 67.

¹⁴² Indonesia's first written submission, para. 139; response to Panel question No. 22; and second written submission, paras. 71-75.

¹⁴³ Indonesia's first written submission, paras. 124 and 125; response to Panel question Nos. 26 and 27. Indonesia argues, *inter alia*, that the absence of any textual reference to "domestic production" in the requirement in Article 4.2(a) to evaluate increased imports "in relative terms" means that a competent authority is left with a discretion to determine whether to examine imports relative to domestic production and/or consumption in any given investigation.

¹⁴⁴ Indonesia's first written submission, paras. 128, 130, and 131; opening statement at the second meeting of the Panel, para. 41.

¹⁴⁵ Indonesia's first written submission, paras. 134-138; second written submission, paras. 81-84; and response to Panel question Nos. 64-68.

¹⁴⁶ Appellate Body Report, *US – Lamb*, paras. 124-126.

¹⁴⁷ Appellate Body Report, *US – Lamb*, para. 125.

7.74. In making a determination of a *threat* of serious injury, a competent authority must demonstrate, on the basis of facts rather than allegations, conjecture or remote possibility, that serious injury is highly likely to occur in the very near future. Article 4.2(a) identifies a number of factors that must be evaluated for this purpose. This provision reads:

In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

7.75. In the context of a determination of *threat* of serious injury, the fact-based evaluation that is called for in Article 4.2(a) "must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future".¹⁴⁸ Data pertaining to the end of the POI will provide "an essential and, usually, the most reliable basis"¹⁴⁹ for making such a determination. Simply comparing end points will not suffice, particularly when evaluating the rate and amount of the increase in imports in absolute and relative terms.¹⁵⁰ However, any short-term trend associated with the most recent data must be reviewed in the context of the longer-term trends of the entire POI.¹⁵¹ Thus, a competent authority's threat of serious injury determination must be based on an evaluation that considers and gives proper weight to data from the entire POI.

7.76. Similarly, while Article 4.2(a) requires that the existence of injury be determined on the basis of an examination of at least all of the listed factors¹⁵², each one does not necessarily have to show negative development. It follows from the definition of serious injury that, ultimately, what must be shown is that the *overall position* of the domestic industry has been significantly impaired, not simply that certain relevant factors are showing declines.¹⁵³ Thus, where a competent authority's evaluation of injury factors reveals both negative and positive performance, a reasoned and adequate explanation must be provided of why the totality of the factors demonstrates that the *overall position* of the domestic industry is significantly impaired.¹⁵⁴

7.5.3.3 Relevant facts

7.77. KPPI's injury and price effects analyses are set out in paragraphs 40-51 of the Final Disclosure Report¹⁵⁵, where a number of factors are examined, including the rate of increase in imports in absolute terms, the domestic market shares held by the petitioners and imports, and changes in the petitioners' levels of stocks, sales, production, production capacity, production costs, selling prices, productivity, profits, and employment. KPPI's injury determination contains no findings with respect to the amount or rate of increase in imports *relative to domestic production*. However, KPPI discussed the rate of increase in imports relative to domestic consumption.¹⁵⁶

7.78. KPPI's determination identifies a number of indicators showing positive trends over the POI. These include the finding that the "trend" in national consumption was an increase of 34% between 2008 and 2012, with the "trends" in the petitioners' production, sales and employment

¹⁴⁸ Appellate Body Report, *US – Lamb*, para. 136.

¹⁴⁹ Appellate Body Report, *US – Lamb*, para. 137.

¹⁵⁰ Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

¹⁵¹ Appellate Body Report, *US – Lamb*, para. 138.

¹⁵² Appellate Body Report, *Argentina – Footwear (EC)*, paras. 136 and 137.

¹⁵³ Appellate Body Reports, *Argentina – Footwear (EC)*, para. 139; and *US – Lamb*, fn 86.

¹⁵⁴ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.304-7.314.

¹⁵⁵ The introductory section of the Final Disclosure Report reveals that KPPI defined the domestic industry investigated for the purpose of the serious injury analysis by reference to the two petitioners, which it found to account for 77% of total domestic production of the like product. (Final Disclosure Report, (Exhibit IDN-8), para. 8).

¹⁵⁶ Final Disclosure Report, (Exhibit IDN-8), para. 41.

levels being increases of, respectively, 32%, 29%, and 16% over the same period.¹⁵⁷ The petitioners' installed capacity "increased significantly" due to "the beginning of effective operation" of one of the petitioner companies in 2011 and the addition of capacity by the other petitioner company, in both cases to "anticipate the increase of national consumption".¹⁵⁸ Profits were achieved in two of the five years of the POI – 2010 and 2011, while losses were reported in the other three years.¹⁵⁹

7.79. KPPI's determination also identifies a number indicators of performance which showed negative trends. These include the "trend" in the petitioners' stocks, which increased 75%, and the "trend" in the petitioners' selling prices, which declined 4.5% over the POI¹⁶⁰, with import prices undercutting the petitioners' sales prices in all years except in 2008.¹⁶¹ As noted, losses were incurred in three years of the POI¹⁶², and employment fell between 2011 and 2012.¹⁶³ The Final Disclosure Report also reveals that the petitioners were operating below 100% capacity utilization and consistently below the levels of production they had targeted to achieve in each of the years of the POI.¹⁶⁴

7.80. In terms of market shares, the Final Disclosure Report states that the "trend" in the share of domestic consumption held by the petitioners fell by 4% over the POI, while the "trend" in the share of domestic consumption held by imports grew by 6% over the same period. Evidence submitted by the complainants derived from information in the Final Disclosure Report and Exhibit IDN-41 shows that between 2010 and 2012, the petitioners experienced the highest market share increase relative to imports and other domestic producers.¹⁶⁵ In other words, the petitioners' market share grew at a faster rate than those of imports and other domestic producers at the end of the POI. The same evidence also shows that the petitioners' market share between 2010 and 2012 was below their market share in 2008 and 2009. Moreover, the market share held by imports increased in all years with the exception of 2008-2009.

7.81. Indonesia denies the accuracy of the complainants' evidence, asserting that it does not reflect the actual figures used in KPPI's confidential analysis.¹⁶⁶ Indonesia has not, however, revealed the actual figures used by KPPI, and in its submissions refers only to the indexed, non-confidential, numbers identified in the Final Disclosure Report. In the light of the information contained in Exhibit IDN-41 and the complainants' explanation of their calculation methodology¹⁶⁷, we understand the evidence submitted by the complainants' in Exhibit TPKM/VNM-35 (BCI) to accurately reflect figures that, *mathematically*, appear to have been the basis of the indexed numbers used in KPPI's non-confidential analysis.

7.82. During the investigation, an association of importers of galvalume submitted that one of the petitioner companies (PT. NS Bluescope Indonesia) produced galvalume mainly for its own captive production of *painted* galvalume, and that this caused a deficit in domestic supply of the investigated product.¹⁶⁸ KPPI responded by confirming that Bluescope produced both "bare" and "painted" galvalume. However, KPPI noted that "those products were produced based on different manufacturing order and production plan" and that the "production process for those products

¹⁵⁷ Final Disclosure Report, (Exhibit IDN-8), Tables 8, 9, and 14, and paras. 43-44 and 49. The percentage values are labelled as "trends" in the relevant tables, but described in the associated paragraphs as "increases", "decreases", or "declines" without being identified as "trends". Indonesia has explained that the POI "trend" values were determined using the LOGEST function in Excel. (Indonesia's response to Panel question No. 23).

¹⁵⁸ Final Disclosure Report, (Exhibit IDN-8), para. 44.

¹⁵⁹ Final Disclosure Report, (Exhibit IDN-8), Table 13.

¹⁶⁰ Final Disclosure Report, (Exhibit IDN-8), Tables 12 and 15, and paras. 47 and 50. (The percentage values are labelled as "trends" in the relevant tables, but described in the associated paragraphs as "increases", "decreases", or "declines" without being identified as "trends").

¹⁶¹ Final Disclosure Report, (Exhibit IDN-8), para. 50.

¹⁶² Final Disclosure Report, (Exhibit IDN-8), para. 48.

¹⁶³ Final Disclosure Report, (Exhibit IDN-8), para. 49.

¹⁶⁴ Final Disclosure Report, (Exhibit IDN-8), Table 11 and para. 46.

¹⁶⁵ Recalculation of sale volumes and market shares of imports and of the petitioners' products, (Exhibit TPKM/VNM-35) (BCI), Tables 2 and 3.

¹⁶⁶ Indonesia's response to Panel question No. 64, para. 39; comments on complainants' response to Panel question No. 69, para. 44.

¹⁶⁷ Complainants' response to Panel question No. 69.

¹⁶⁸ Final Disclosure Report, (Exhibit IDN-8) para. 25.b.

were also different".¹⁶⁹ There is no further discussion of the extent to which the petitioners produced bare galvalume for their own captive production of painted galvalume in the Final Disclosure Report.

7.83. The complainants accept that bare galvalume cannot be used to produce painted galvalume once it has been "treated with anti-finger resin".¹⁷⁰ Indonesia notes that in order to produce painted galvalume, bare galvalume "needs to go through a 'skin pass mill' to create a rough surface, which is not required in the production of bare galvalume".¹⁷¹ The Final Disclosure Report describes the production process of the investigated product to involve the following two forms of "surface treatment":

Skin Pass Mill to repair the surface, specifically for painting products.

Anti Finger Print to cover the goods with resin to have the Anti Finger Print function so it does not leave any marks when the goods was touched and it can be utilized as lubricant during the forming process, which can be utilized as aesthetics if it is added with color pigments.¹⁷²

7.84. Finally, although KPPI's "causal link" analysis states that the petitioners "suffered serious injury" as a result of the surge in imports¹⁷³, it is apparent from the concluding paragraphs of the Final Disclosure Report that KPPI's ultimate injury finding is that the "Petitioner[] is suffering from the *threat* of serious injury".¹⁷⁴ Indonesia's notification to the WTO confirms that the basis for the safeguard measure is a finding of *threat* of serious injury. However, the Final Disclosure Report does not discuss the extent to which the findings with respect to the injury factors, or any other considerations, demonstrate that "serious injury" was "*clearly imminent*". Indeed, no explicit finding that "serious injury" was "clearly imminent" is set out in the Final Disclosure Report.

7.5.4 Causation

7.5.4.1 Parties' arguments

7.85. The complainants claim that KPPI's determination of causation was inconsistent with 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 provide a reasoned and adequate explanation of its findings in relation to: (a) the coincidence in time between the increased imports of galvalume and the threat of serious injury, in light of the conditions of competition in the Indonesian market; and (b) the impact of factors other than imports of galvalume on the situation of the domestic industry.¹⁷⁵ In particular, according to the complainants, KPPI's causation finding rests entirely on an unsubstantiated assertion about the coincidence in time between an alleged decrease in market share of the domestic industry relative to imports – an assertion the complainants maintain is, in any case, contradicted by the data from the POI. The complainants further argue that KPPI failed to properly analyse and explain how factors other than imports of galvalume (such as competition from other domestic producers, capacity investments, anti-dumping duties and the entry of a new domestic producer in 2011) contributed to serious injury, and how the effects of such factors were not attributed to the imports of galvalume.¹⁷⁶

7.86. Indonesia argues that KPPI properly demonstrated the existence of a causal link between the increased imports of galvalume and the threat of serious injury. Indonesia submits that the data relied upon in the Final Disclosure Report demonstrate a temporal coincidence between, on the one hand, the increased market share of imports and, on the other hand, the

¹⁶⁹ Final Disclosure Report, (Exhibit IDN-8), para. 26.b.

¹⁷⁰ Complainants' response to Panel question No. 70, para. 1.61.

¹⁷¹ Indonesia's opening statement at the second meeting with the Panel, para. 45.

¹⁷² Final Disclosure Report, (Exhibit IDN-8), para. 34.

¹⁷³ Final Disclosure Report, (Exhibit IDN-8), para. 62.

¹⁷⁴ Final Disclosure Report, (Exhibit IDN-8), paras. 63-65. (emphasis added)

¹⁷⁵ Complainants' first written submission, paras. 5.94, 5.105-5.110, and 5.114; opening statement at the first meeting of the Panel, paras. 5.1-5.4.

¹⁷⁶ Complainants' response to Panel question Nos. 28 and 30; second written submission, paras. 2.95-2.104; opening statement at the second meeting of the Panel, paras. 5.1-5.5; and comments on Indonesia's response to Panel question No. 71, para. 1.38, and No. 72, para. 1.39.

petitioners' decreased market share, increased inventories, and losses, thereby justifying KPPI's causation findings.¹⁷⁷ Indonesia rejects the complainants' criticisms of KPPI's non-attribution analysis, arguing that while KPPI did not take into account all relevant factors (which Indonesia accepts "might" have included those identified by the complainants), KPPI did, according to Indonesia, consider "the most relevant factors", thereby fulfilling the requirements of Article 4.2(b) of the Agreement on Safeguards.¹⁷⁸ In any case, Indonesia submits that certain findings made by KPPI demonstrate that the non-attribution factors identified by the complainants did not cause any injury to the petitioners.¹⁷⁹

7.5.4.2 Relevant law

7.87. Article 4.2(b) of the Agreement on Safeguards provides as follows:

The determination referred to in subparagraph (a) [of Article 4.2] shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

7.88. Under the first sentence of Article 4.2(b), competent authorities are required to establish a "genuine and substantial relationship of cause and effect" between the increased imports and serious injury¹⁸⁰ – that is, "a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury".¹⁸¹ The Agreement on Safeguards does not prescribe any particular method or analytical tool for making this determination.¹⁸² However, it is recognized that consideration of the temporal relationship between "movements" in the volume and market share of imports and "movements" in the injury factors will be central to a causation analysis and determination.¹⁸³ Thus, in previous disputes under the Agreement on Safeguards, panels called upon to examine the merits of a competent authority's causation findings have examined whether upward trends in imports coincided with downward (i.e. worsening) trends in the injury factors, and if not, whether an adequate explanation was provided as to why the data nevertheless show causation.¹⁸⁴

7.89. The second sentence of Article 4.2(b) sets out the requirement to ensure that injury caused to the domestic industry by factors other than increased imports is not attributed to the increased imports. It is well established that in order to comply with this requirement, a competent authority must separate and distinguish the injurious effects of the increased imports from the injurious effects of other factors causing injury to the domestic industry at the same time.¹⁸⁵ Competent authorities must not only "identify" the nature and extent of the injurious effects of the known factors other than increased imports, but they must also "explain" satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of increased imports.¹⁸⁶ However, the need to separate and distinguish the effects caused by increased imports and the effects caused by other factors "does *not* necessarily imply ... that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury".¹⁸⁷ The causation

¹⁷⁷ Indonesia's first written submission, para. 162; opening statement at the first meeting of the Panel, para. 52; and opening statement at the second meeting of the Panel, para. 54.

¹⁷⁸ Indonesia's first written submission, paras. 163-165; second written submission, paras. 93-97.

¹⁷⁹ Indonesia's first written submission, paras. 163-167; opening statement at the first meeting of the Panel, para. 54; response to Panel question Nos. 32, 33, and 71-73; second written submission, paras. 94-97; and opening statement at the second meeting of the Panel, paras. 56-59.

¹⁸⁰ Appellate Body Reports, *US – Lamb*, para. 179; and *US – Steel Safeguards*, para. 488.

¹⁸¹ Appellate Body Report, *US – Line Pipe*, para. 209 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 67 and 68).

¹⁸² Panel Reports, *US – Steel Safeguards*, paras. 10.294 and 10.296; and *Korea – Dairy*, para. 7.96.

¹⁸³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

¹⁸⁴ See, e.g. Panel Reports, *US – Wheat Gluten*, paras. 8.95-8.102; and *Argentina – Footwear (EC)*, para. 8.237-8.246.

¹⁸⁵ Appellate Body Reports, *US – Wheat Gluten*, para. 68; *US – Lamb*, para. 179; and *US – Line Pipe*, para. 215.

¹⁸⁶ Appellate Body Report, *US – Line Pipe*, para. 215.

¹⁸⁷ Appellate Body Report, *US – Wheat Gluten*, para. 70. (emphasis original)

requirement in Article 4.2(b) "can be met where the serious injury is caused by the interplay of increased imports and other factors".¹⁸⁸

7.90. A competent authority's non-attribution analysis must establish explicitly, through a reasoned and adequate explanation, that injury caused by other factors is not attributed to increased imports. Such "explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms".¹⁸⁹ Moreover, in cases involving a *threat of serious injury*, a competent authority's analysis must "include a *forward-looking assessment* of whether other factors currently causing injury to the domestic industry will *continue to do so* in the very near future".¹⁹⁰

7.91. Finally, a competent authority's causation determination must analyze the *conditions of competition* between the imported and domestic products in the context of determining the existence of a causal link between the increased imports and serious injury to the domestic industry.¹⁹¹ The factors to be considered in the requisite analysis may include not only those mentioned in Article 4.2(a), but also factors such as price, physical product characteristics, quality, service, delivery, technological developments, consumer tastes, and other supply and demand factors in the market.¹⁹²

7.5.4.3 Relevant facts

7.92. KPPI's non-attribution and causation analyses are set out in Sections D and F of the Final Disclosure Report, as well as in KPPI's specific responses to various submissions made by interested parties. Section D, which is headed "other factors", examines the impact of three factors "other than the surge of imports" of galvalume on the situation of the domestic industry. Section F is headed "causal link" and contains KPPI's analysis and final determination that the "surge in imports" caused a threat of serious injury.

7.5.4.3.1 "Other Factors"

7.93. The first "other factor" examined in Section D is the evolution of the domestic industry's production capacity over the POI relative to national consumption. During the course of the investigation, a number of interested parties had argued to KPPI that the domestic industry could not satisfy domestic demand.¹⁹³ The indexed data presented in Table 17 reveal that the installed production capacity of the domestic industry stayed the same in the first two years of the POI, but then increased more than five-fold in the last three years of the POI. At the same time, national consumption of galvalume decreased between 2008 and 2009, but thereafter increased in the last three years of the POI. On the basis of the indexed data presented in Table 17, KPPI concluded that: (a) "the domestic industry was able to meet ... national demand"; (b) the "increase in production capacity by domestic industry was in line with the increase of national consumption, and thus production capacity was not a factor that caused injury to the Petitioners"; and (c) "the surge of imports was not caused by the domestic industry's inability to meet national consumption".¹⁹⁴

7.94. The second "other factor" examined in Section D is the evolution of the petitioners' sales over the POI. The indexed data presented in Table 18 show that PT. NS Bluescope made fewer sales in 2009 and 2010 compared with 2008, but that its sales increased in each of the remaining two years of the POI and in 2012 were 70% above the 2008 level. The data also show that the second petitioner, PT. NS Sunrise Steel, made its first sales only in 2011 and that its sales more

¹⁸⁸ Appellate Body Reports, *US – Wheat Gluten*, paras. 67 and 68; and *US – Line Pipe*, para. 209.

¹⁸⁹ Appellate Body Report, *US – Line Pipe*, para. 217.

¹⁹⁰ Panel Report, *Ukraine – Passenger Cars*, para. 7.319. (emphasis added)

¹⁹¹ Panel Reports, *Argentina – Footwear (EC)*, paras. 8.229 and 8.250; *US – Wheat Gluten*, paras. 8.91 and 8.108; *US – Lamb*, para. 7.232; and *US – Steel Safeguards*, paras. 10.313-10.321; and Appellate Body Reports, *Argentina – Footwear (EC)*, para. 145; and *US – Wheat Gluten*, paras. 76-78.

¹⁹² Panel Report, *US – Steel Safeguards*, paras. 10.318-10.320 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 73; and Panel Reports, *Argentina – Footwear (EC)*, para. 8.251; and *Korea – Dairy*, para. 7.51).

¹⁹³ Final Disclosure Report, (Exhibit IDN-8), paras. 19e (Hoa Sen Group), 25a (importers' association), and 27a (importers' association).

¹⁹⁴ Final Disclosure Report, (Exhibit IDN-8), Table 17 and para. 55.

than doubled in the following year. After noting that the sales of both petitioners increased between 2011 and 2012, KPPI states that the data shows "that there is no competition between Petitioners since each of the Petitioners' sales increased". Thus, KPPI concludes that "competition between the Petitioners was not the factor that caused the threat of serious injury".¹⁹⁵

7.95. The final "other factor" discussed in Section D is the fact that the petitioners produced galvalume in accordance with "standardization" "based on SNI and International Organization for Standardization (ISO)". KPPI concludes from this fact that "domestic product was able to compete with imports".¹⁹⁶ During the investigation, Viet Nam argued that "representative of the association stated that Galvalum from Vietnam has better quality and already obtained the SNI certificate".¹⁹⁷

7.96. In the final paragraph of Section D, KPPI states that it "did not find any other factors causing serious injury to the petitioner, other than the surge of imports" of galvalume.

7.97. KPPI's examination of "other factors" does not specifically address any of the four "other factors" which the complainants submit should have been considered. First, the complainants' argue that KPPI should have examined the impact of competition from domestic producers *other than the petitioners*. In this respect, we note that the data presented by the complainants in Exhibit TPKM/VNM-35 (BCI) reveals that during the only two years when the market share of the petitioners' declined (2009 and 2010), the market share of Indonesian producers other than the petitioners doubled, while the market share of imports declined in 2009 before returning in 2010 to approximately the same level as reported for 2008. However, the market share of Indonesian producers other than the petitioners fell in the last two years of the POI, dropping below the 2008 level in 2012, while the market share of imports and the petitioners both increased in the last two years of the POI. One of the exporters, the Hoa Sen Group, argued to KPPI that the injury suffered by the domestic industry was caused by factors other than the increased imports, including "domestic competition".¹⁹⁸ KPPI responded by referring to the analysis of "other factors" in Section D of the Final Disclosure Report¹⁹⁹, which as described above focused on the issue of competition *between the petitioners*, and not between the petitioners and other domestic producers.

7.98. Second, according to the complainants, KPPI's examination of installed capacity should have involved more than simply assessing whether there was sufficient domestic production capacity to satisfy total domestic demand. For the complainants, KPPI's analysis should have also determined the extent to which losses could have been attributed to the expansion of the installed capacity.²⁰⁰ The data presented in Exhibit TPKM/VNM-35 (BCI) reveal that there was a notable market presence of imports in each of the five years of the POI, ranging from 35% in 2009 (the lowest point) to 52% in 2012 (the highest), with values of around 45% in 2008, 2010, and 2011. Moreover, according to the indexed figures presented in Table 17 of the Final Disclosure Report, the domestic industry's installed capacity grew five-fold over the course of the POI, exceeding the level needed to satisfy the entirety of national consumption in both 2011 and 2012. During the course of the investigation, an association of importers of galvalume argued that "[e]xpansion from PT. NS Bluescope Indonesia has affected their cash flow significantly".²⁰¹ KPPI responded by stating that "PT. NS Bluescope Indonesia expanded in 2006. However, the performance of PT NS Bluescope Indonesia that supposedly increased, in fact declined due to the surge of imports ...".²⁰² One of the exporters, the Hoa Sen Group, argued that the injury suffered by the domestic industry was caused by factors other than the increased imports, including "expansion, addition in production capacity".²⁰³ KPPI responded to this submission by referring to the analysis of "other factors" in Section D of the Final Disclosure Report.²⁰⁴

¹⁹⁵ Final Disclosure Report, (Exhibit IDN-8), Table 18 and para. 56.

¹⁹⁶ Final Disclosure Report, (Exhibit IDN-8), para. 57.

¹⁹⁷ Final Disclosure Report, (Exhibit IDN-8), para. 19m.

¹⁹⁸ Final Disclosure Report, (Exhibit IDN-8), para. 19k.

¹⁹⁹ Final Disclosure Report, (Exhibit IDN-8), para. 14d.

²⁰⁰ Complainants' second written submission, para. 2.101.

²⁰¹ Final Disclosure Report, (Exhibit IDN-8), para. 25f.

²⁰² Final Disclosure Report, (Exhibit IDN-8), para. 26f.

²⁰³ Final Disclosure Report, (Exhibit IDN-8), para. 19k.

²⁰⁴ Final Disclosure Report, (Exhibit IDN-8), para. 14d.

7.99. Third, the complainants submit that KPPI's non-attribution analysis should have considered the impact on the costs of the domestic industry of the anti-dumping duties applied by Indonesia on imports of certain raw materials used in the production of galvalume. We note that this particular issue was raised before KPPI by the Indonesian Iron and Steel Association, which supported the investigation. In particular, the Indonesian Iron and Steel Association stated that it was "the imposition of anti-dumping measure (BMAD) on the imported CRC, which was the main raw materials to produce Galvalum, that caused the increase of price and lower the competition level, and has slowly and adversely affected the domestic industry".²⁰⁵ KPPI did not respond to this submission, nor otherwise explicitly address the impact of the anti-dumping duties on the performance of the domestic industry in the Final Disclosure Report.

7.100. Fourth, according to the complainants, KPPI's non-attribution analysis should have considered the impact of the fact that one of the two petitioners was a new entrant that started making sales only in 2011. During the investigation, an association of importers of galvalume argued that "PT. Sunrise Steel only started to operate in 2010 and thus has not obtained the optimal result, and has not even reach Break Even Point (BEP). Rendering the current safeguards investigation will be more irrelevant".²⁰⁶ KPPI responded to this submission by noting that "the surge in imports ... reached the highest increase in 2011 and 2012" and that the "effect of imports also suffered by PT. Sunrise Steel, which can't obtain the optimal result and reach BEP".²⁰⁷ There is no other discussion or analysis of the impact of this fact on the petitioners' combined performance statistics anywhere in the Final Disclosure Report.

7.5.4.3.2 "Causal link"

7.101. Section F of the Final Disclosure Report sets out KPPI's causation analysis and conclusions in five sentences contained in paragraphs 60 to 63. KPPI's discussion begins by noting that "national consumption" increased during the POI, but that "it could not be optimized by the Petitioners". KPPI then goes on to find that the "trend" in the petitioners' market share decreased "because it was absorbed by import market shares ... where there is [a] surge of import[s] ... in absolute terms", and that this "has caused their stock to increase and also caused them to suffer loss".²⁰⁸ In this light, and recalling its injury and non-attribution findings, KPPI concludes that the "surge of imports of Galvalum was the cause of threat of serious injury suffered by Petitioners".²⁰⁹

7.102. The indexed data presented in Table 7 reveal that the "trend" in the petitioners' market share over the POI was a decrease of 4 percentage points, while the "trend" in the market share of imports was an increase of 6 percentage points.²¹⁰ The unindexed data reported in Exhibit TPKM/VNM-35 (BCI) shows that during the most recent part of the POI, 2011 and 2012, the petitioners' market share actually increased by almost twice as many percentage points as the market share of imports.²¹¹ The same unindexed data also shows that the petitioners' market share between 2010 and 2012 was below their market share in 2008 and 2009. Moreover, the market share held by imports increased in all years with the exception of 2008-2009.

7.103. The complainants submit that KPPI's causation analysis should have explored the extent to which the introduction in 2009 of a new technical standard by Indonesia's National Standardization Agency impacted competition on the domestic market. This factor had been raised by an association of steel manufacturers from Chinese Taipei, which had argued that the new standard created a "monopolistic" position for the domestic industry, improving their ability to raise prices.²¹² The Final Disclosure Report neither reports nor addresses the exporters' allegation.

²⁰⁵ Final Disclosure Report, (Exhibit IDN-8), para. 12b.

²⁰⁶ Final Disclosure Report, (Exhibit IDN-8), para. 25f.

²⁰⁷ Final Disclosure Report, (Exhibit IDN-8), para. 26f.

²⁰⁸ Final Disclosure Report, (Exhibit IDN-8), paras. 60 and 61.

²⁰⁹ Final Disclosure Report, (Exhibit IDN-8), para. 63.

²¹⁰ Final Disclosure Report, (Exhibit IDN-8), Table 7 and para. 41.

²¹¹ Recalculation of sale volumes and market shares of imports and of the petitioners' products, (Exhibit TPKM/VNM-35) (BCI), Table 2.

²¹² Complainants' response to Panel question 30; second written submission, para. 2.93; and Comments on the Petition and Information Submitted by Taiwan Steel & Iron Industry Association, March 2013, (Exhibit TPKM/VNM-31), pp. 10 and 11.

7.5.5 Application of the specific duty

7.5.5.1 Parties' arguments

7.104. The complainants claim that Indonesia acted inconsistently with its obligations under Articles 2.1, 3.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards by deciding, on the grounds of national interest, to apply the safeguard measure on a narrower range of types of galvalume (i.e. galvalume not exceeding 0.7mm in thickness) compared with the types investigated by KPPI (i.e. galvalume not exceeding 1.2mm in thickness), in the absence of any reasoned and adequate explanation by the competent authority of how the narrowing down of the final safeguard measure's product scope satisfied the increased imports, serious injury and causality requirements.

7.105. The complainants argue that the narrowing of the product scope in the application of the specific duty in the absence of adequate explanation was inconsistent with Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards because Indonesia failed to ensure symmetry between the investigated product and the product subject to the applied safeguard measure and thus disregarded the principle of parallelism.²¹³ For the complainants, the principle of parallelism covers both the situation in which imports from certain Members are being excluded from the geographic scope of the final safeguard measure as well as the situation in which certain products investigated by the competent authority in the course of the safeguard investigation are being excluded from the product scope of the final safeguard measure.²¹⁴ In the complainants' view, any discrepancy between the product scope of the safeguard investigation and the product scope of the final safeguard measure must be properly reasoned consistently with Articles 3.1 and Article 4.2(c) of the Agreement on Safeguards.²¹⁵

7.106. Indonesia submits that the principle of "parallelism" was developed in the context of WTO disputes involving the Agreement on Safeguards in relation to exclusions based on the *source* of imports, and that this principle cannot be extended to the present set of facts.²¹⁶ According to Indonesia, were the Panel to accept the complainants' view, it would "open a 'Pandora's box' where the principle of parallelism could be broadened even more in the future, especially in light of similar languages or terms ... found throughout the Agreement on Safeguards".²¹⁷ In any case, Indonesia argues that its decision to narrow the scope of the products subject to the safeguard measure for reasons of national interest is justified by the requirement in Article 5.1 of the Agreement on Safeguards to apply a safeguard measure "only to the extent necessary to prevent or remedy serious injury ... and to facilitate adjustment".²¹⁸

7.5.5.2 Relevant law

7.107. We understand the parties' arguments to raise the following threshold legal questions about the substance of, and relationship between, the obligations in Articles 2.1 and 5.1 of the Agreement on Safeguards, which have never before been addressed in WTO dispute settlement:

- a. Does the right granted in Article 2.1 to "apply a safeguard measure to a *product*" when it has been demonstrated that "*such product*" is being imported in such increased quantities and under such conditions as to cause serious injury, mean that a safeguard measure must be applied on exactly the same product (and range of product types) examined and found to satisfy the conditions for imposing a safeguard measure in the underlying investigation?

²¹³ Complainants' first written submission, paras. 5.115, 5.119, 5.126, 5.127, 5.130, 5.131, and 5.132; response to Panel question No. 36; and second written submission, para. 2.116.

²¹⁴ Complainants' response to Panel question No. 36.

²¹⁵ Complainants' first written submission, paras. 5.126, 5.130, and 5.132; response to Panel question No. 36; and second written submission, para. 2.115.

²¹⁶ Indonesia's second written submission, paras. 102 and 103; opening statement at the second meeting of the Panel, paras. 61-64.

²¹⁷ Indonesia's second written submission, paras. 104-106; opening statement at the second meeting of the Panel, paras. 65-67.

²¹⁸ Indonesia's second written submission, paras. 108-113; opening statement at the second meeting of the Panel, paras. 68-70.

- b. To what extent does Article 5.1 justify the application of a safeguard measure on a range of product types narrower than the product types examined in the underlying investigation and found to satisfy the conditions for the imposition of a safeguard measure? Does Article 5.1 permit the application of a safeguard measure on a narrower range of product types relative to the investigated product types, in the absence of any finding that the narrower range of products itself satisfies the conditions for the imposition of a safeguard measure?

7.108. Having decided that it is not necessary to make any findings on the legal merits of the complainants' claims under the Agreement on Safeguards in order to resolve this dispute, we consider that we are equally not required to express any views with respect to these legal questions. Nonetheless, as above, we will proceed to identify facts relevant to an evaluation of the merits of the complainants' claims under the Agreement on Safeguards.

7.5.5.3 Relevant facts

7.109. The Final Disclosure Report reveals that KPPI's safeguard investigation covered imports of "Galvalum", defined as "Flat-rolled products of iron or non-alloy steel ... with thickness not exceeding 1,2 mm, under HS Code of 7210.61.11.00".²¹⁹ KPPI recommended that a safeguard measure in the form of a duty be imposed on imports of galvalume defined in this manner.²²⁰ The analyses and findings in the Final Disclosure Report were focused on the defined product as a whole, and did not include any consideration of a narrower range of product types.

7.110. The safeguard measure adopted pursuant to Regulation 137.1/PMK.011/2014 was applied to a narrower range of products than those identified in KPPI's recommendation – specifically, to "flat-rolled products of iron or non-alloy steel ... with the thickness up to 0,7 mm" falling under HS code ex 7210.61.11.00.²²¹ The decision to apply the safeguard measure to the narrower range of product followed the completion of the national interest process described above.²²² Indonesia's tariff classification system does not list a *separate* HS sub-heading for flat-rolled iron or non-alloy steel products with a thickness of up to 0.7mm, making the availability of official import data for this narrower range of product "virtually (almost) impossible".²²³

7.5.6 Notification

7.5.6.1 Parties' arguments

7.111. The complainants claim that Indonesia's notification to the Committee on Safeguards of 26 May 2014 under Article 12.1(b) of the Agreement on Safeguards is the only relevant notification for the purpose of assessing Indonesia's compliance with its obligations under Article 12.2, as this was the only notification made before the entry into force of the measure. The complainants claim that this notification is inconsistent with Article 12.2 because it fails to provide "all pertinent information", as required by that provision.²²⁴

7.112. Indonesia acknowledges that its notification of 26 May 2014 did not satisfy the requirements of Article 12.2 in that it did not contain a precise description of the proposed measure, its proposed date of introduction, and the expected duration and timetable for progressive liberalization.²²⁵ However, according to Indonesia, information about these elements

²¹⁹ Final Disclosure Report, (Exhibit IDN-8), para. 29.

²²⁰ Final Disclosure Report, (Exhibit IDN-8), paras. 64-66.

²²¹ Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/PMK.011/2014 on imposition of safeguarding duty against the import of flat-rolled products of iron or non-alloy steel (22 July 2014), (Exhibit IDN-20), pp. 3 and 4. See also, Committee on Safeguards, Notification Under Articles 9, 12.1(b), and 12.1(c), and Footnote 2 of the Agreement on Safeguards (28 July 2014), G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, G/SG/N/11/IDN/14, (Exhibit TPKM/VNM-5), p. 1.

²²² Paras. 7.68 and 7.69.

²²³ Indonesia's first written submission, para. 192.

²²⁴ Complainants' first written submission, paras. 5.160-5.164; opening statement at the first meeting of the Panel, paras. 8.1-8.3; second written submission, para. 2.138; and opening statement at the second meeting of the Panel, para. 8.1.

²²⁵ Indonesia's first written submission, para. 241; opening statement at the first meeting of the Panel, para. 70.

did not exist until the Minister of Finance promulgated the implementing regulation on 15 July 2014 – that is, at the time that the final decision to apply the safeguard measure was actually made.²²⁶ Indonesia notes in this regard that, in such cases, the Technical Cooperation Handbook on Notification Requirements issued by the WTO Committee on Safeguards states that the notifying Member must indicate that such information is "not available" for the relevant time. Indonesia maintains that its notification of 26 May 2014 followed this guidance.²²⁷ In any case, Indonesia argues that to the extent that its notification of 26 May 2014 lacked "pertinent information", its second Article 12.1(b) notification, dated 23 July 2014, remedied that deficiency.²²⁸ Moreover, Indonesia asserts that the timing of such notifications falls within the purview of Article 12.1, and that the complainants have neither challenged the timing of Indonesia's Article 12.1(b) notification nor questioned its timeliness.²²⁹ In this connection, and referring to the Appellate Body report in *US – Wheat Gluten*, Indonesia submits that Article 12.2 does not contain any obligation with respect to the *timing* of Article 12.1(b) notifications, which is regulated by Article 12.1(b) itself.²³⁰

7.113. The complainants argue that Indonesia's notification of 23 July 2014 cannot rectify the deficiencies in its notification of 26 May 2014 because it was made after the challenged safeguard measure entered into force, and according to the complainants, it follows from the specific language of Article 12.2 and the related context of Articles 8.1 and 12.3 of the Agreement on Safeguards, that all "pertinent information" required to be provided under Article 12.2 must be provided *prior to the entry into force* of the safeguard measure.²³¹ Moreover, the complainants submit that the Technical Cooperation Handbook on Notification Requirements does not support Indonesia's position because it does not constitute a binding legal instrument, a legal interpretation of the notification obligations, or the context or purpose for the interpretation of the provisions of the Agreement on Safeguards. In addition, the complainants argue that the parts cited by Indonesia are drafted in general terms and do not address the specific question of whether Members may submit all pertinent information *after* the entry into force of the measure.²³² The complainants also submit that Indonesia's reliance on the Appellate Body report in *US – Wheat Gluten* is misplaced because, in their view, the Appellate Body did not address the question of whether, pursuant to Article 12.2, a Member is entitled to notify "all pertinent information", or rectify deficiencies in its notification of a finding of serious injury under Article 12.1(b) *after* it had already applied the safeguard measure. Instead, the Appellate Body addressed a narrower question of whether a Member can submit its notification under Article 12.1(c) after having decided to apply a safeguard measure. In the complainants' view, even though the Appellate Body answered the latter question in the affirmative, this does not mean that a Member is released from its obligation under Article 12.2 to submit all pertinent information prior to the entry into force of the measure. A Member can comply with this obligation, for example, by notifying all pertinent information under Article 12.1(b).²³³

7.5.6.2 Relevant law

7.114. Article 12.1 of the Agreement on Safeguards requires Members to "immediately notify" the WTO Committee on Safeguards upon the occurrence of the following three "events"²³⁴: (a) initiating an investigatory process relating to serious injury or threat thereof (Article 12.1(a)); (b) making a finding of serious injury or threat thereof (Article 12.1(b)); and (c) taking a decision to apply or extend a safeguard measure (Article 12.1(c)).

²²⁶ Indonesia's first written submission, paras. 240 and 241.

²²⁷ Indonesia's first written submission, paras. 241 and 242; opening statement at the first meeting of the Panel, paras. 70 and 71.

²²⁸ Indonesia's first written submission, para. 234; opening statement at the first meeting of the Panel, para. 68; second written submission, para. 132; and opening statement at the second meeting of the Panel, para. 77.

²²⁹ Indonesia's second written submission, para. 132.

²³⁰ Indonesia's opening statement at the first meeting of the Panel, paras. 67-69; second written submission, paras. 130 and 131.

²³¹ Complainants' first written submission, paras. 5.165-5.168; opening statement at the first meeting of the Panel, paras. 8.4-8.7; response to Panel question No. 43; second written submission, paras. 2.141-2.146; and opening statement at the second meeting of the Panel, para. 8.1.

²³² Complainants' second written submission, para. 2.154.

²³³ Complainants' response to Panel question No. 44; second written submission, para. 2.150.

²³⁴ Appellate Body Report, *US – Wheat Gluten*, para 102.

7.115. Article 12.2 sets out the required content of the notifications that must be made pursuant to Articles 12.1(b) or 12.1(c). This provision reads, in relevant part, as follows:

In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

7.116. Notifications made for purposes of Articles 12.1(b) and 12.1(c) must disclose "all pertinent information", which includes evidence of serious injury or threat thereof caused by increased imports, a precise description of the product involved and the proposed measure, the proposed date of introduction, the expected duration of the measure and a timetable for progressive liberalization. These items are "mandatory components" of such notifications, constituting the minimum requirements that must be satisfied if a notification is to comply with Article 12.2.²³⁵

7.117. The "evidence of serious injury" that must be included in an Article 12.1(b) or 12.1(c) notification has been interpreted to refer, "at a minimum, to the injury factors required to be evaluated under Article 4.2(a)".²³⁶ Thus, "so far as evidence of serious injury or threat thereof caused by increased imports is concerned, the relevant notification must include information about each of the eight factors listed in Article 4.2 that are required to be evaluated", including the rate and amount of the increase in imports of the product concerned in absolute and relative terms.²³⁷

7.118. Prior panels have interpreted Article 12.2 to impose an obligation to notify "all pertinent information" *before* the associated safeguard measure enters into force so that affected Members may consult on it *before* it takes effect.²³⁸ However, in *US – Wheat Gluten*, the Appellate Body stated that Article 12.2 did not prescribe "*when* notifications [under Article 12.1(c)] must be made", but rather, only "*what* detailed information must be contained in the notifications under Article 12.1(b) and 12.1(c)".²³⁹ According to the Appellate Body, "timeliness under 12.1(c) is determined by whether a decision to apply or extend a safeguard measure is notified 'immediately'".²⁴⁰ Thus, for the Appellate Body, whether an Article 12.1(b) or 12.1(c) notification satisfies the content requirements in Article 12.2 is a "separate question" which must be answered by examining whether the notification contains "all pertinent information" that is "specifically enumerated in Article 12.2".²⁴¹

7.5.6.3 Relevant facts

7.119. Indonesia submitted three notifications to the WTO Committee on Safeguards in relation to the challenged safeguard measure.

7.120. First, on 20 December 2012, Indonesia notified the initiation of the safeguard investigation into imports of galvalume pursuant to Article 12.1(a) of the Agreement on Safeguards. This notification was circulated to WTO Members on 8 January 2013.²⁴²

7.121. Second, on 26 May 2014, Indonesia notified, pursuant to Article 12.1(b), that it had made a finding of serious injury or threat of serious injury caused by increased imports of galvalume ("notification of 26 May 2014"). This notification did not contain a precise description of the proposed measure, its proposed date of introduction, the expected duration and timetable for progressive liberalization, or information about the rate and amount of the increase in imports of

²³⁵ Appellate Body Report, *Korea – Dairy*, para. 107.

²³⁶ Appellate Body Report, *Korea – Dairy*, para. 108.

²³⁷ Panel Report, *Ukraine – Passenger Cars*, para. 7.509.

²³⁸ Panel Reports, *Ukraine – Passenger Cars*, para. 7.521; *Korea – Dairy*, para. 7.120; and *US – Wheat Gluten*, paras. 8.202, 8.205, and 8.206.

²³⁹ Appellate Body Report, *US – Wheat Gluten*, para. 123. (emphasis original)

²⁴⁰ Appellate Body Report, *US – Wheat Gluten*, para. 123.

²⁴¹ Appellate Body Report, *US – Wheat Gluten*, para. 123.

²⁴² WTO, Committee on Safeguards, Notification Under Article 12.1(a) of the Agreement on Safeguards on initiation of an investigation and the reasons for it, G/SG/N/6/IDN/22, (Exhibit TPKM/VNM-2). There are no issues in this dispute regarding this notification.

the subject product relative to *domestic production*. The notification did provide information with respect to the rate and amount of the increase in imports of the subject product relative to *national consumption*. The notification was circulated to WTO Members on 27 May 2014.²⁴³

7.122. Third, on 23 July 2014 (one day after the safeguard measure entered into legal effect), Indonesia submitted one document intended to serve as the following three separate and distinct notifications: (a) a supplementary notification to Indonesia's Article 12.1(b) notification of 26 May 2014; (b) a notification pursuant to Article 12.1(c) disclosing that Indonesia had taken a decision to apply a safeguard measure; and (c) a notification pursuant to footnote 2 of Article 9 concerning the exemption of developing countries from the scope of the safeguard measure in accordance with Article 9.1. One document constituting all three notifications was circulated to WTO Members on 28 July 2014.²⁴⁴ This document reproduced the document submitted by Indonesia, and contained a precise description of the proposed measure, its proposed date of introduction, and information about the expected duration and timetable for progressive liberalization. It did not provide information with respect to the rate and amount of the increase in imports of the subject product relative to *domestic production*.

7.123. The Technical Cooperation Handbook on Notification Requirements issued by the WTO Committee on Safeguards envisages that where not all of the information required under Article 12.2 is available at the time of a "finding of serious injury or threat thereof", a Member making an Article 12.1(b) notification should indicate that the relevant information is "not available".²⁴⁵ A Note on the cover page of the Handbook explicitly states that it "does not constitute a legal interpretation of the notification obligations under the respective Agreement(s)".²⁴⁶ Indonesia's notification of 26 May 2014 did not include such language or any other explanation concerning the absence of the required information.

7.5.7 Consultations

7.5.7.1 Parties' arguments

7.124. The complainants claim that Indonesia acted inconsistently with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards by failing to provide them with an *adequate opportunity* for consultations *prior* to the entry into force of the safeguard measure. According to the complainants, Indonesia failed to satisfy its obligations under both provisions because: (a) Indonesia did not respond to Chinese Taipei's requests for consultations; (b) Indonesia did not respond quickly enough to Viet Nam's requests for consultations and, when it did, the consultation dates proposed were after the "stipulation" date of the safeguard measure; and (c) Indonesia failed to disclose to both Viet Nam and Chinese Taipei all of the information necessary to hold meaningful consultations under the terms of Article 12.3.²⁴⁷ In addition, the complainants argue that Indonesia's allegation that "critical circumstances" exist is not substantiated by any evidence, and that no consultations were held immediately after the entry into force of the measure.²⁴⁸

7.125. Indonesia argues that the facts demonstrate that the complainants were given an adequate opportunity to hold consultations within the meaning of Article 12.3. First, Indonesia recalls that all qualifying WTO Members were provided with an opportunity to hold consultations when it explicitly invited all such Members to consultations in its notification to the WTO Committee on Safeguards of 26 May 2014, 56 days before the safeguard measure entered into

²⁴³ Committee on Safeguards, Notification Under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, G/SG/N/8/IDN/16, (Exhibit TPKM/VNM-3).

²⁴⁴ Committee on Safeguards, Notification Under Articles 9, 12.1(b), and 12.1(c), and Footnote 2 of the Agreement on Safeguards (28 July 2014), G/SG/N/8/IDN/16/Suppl.1, G/SG/N/10/IDN/16/Suppl.1, G/SG/N/11/IDN/14, (Exhibit TPKM/VNM-5).

²⁴⁵ Technical Cooperation Handbook on Notification Requirements, Agreement on Safeguards, WT/TC/NOTIF/SG/1, 15 October 1996 (Technical Cooperation Handbook), part III – G/SG/1, p. 2.

²⁴⁶ Technical Cooperation Handbook.

²⁴⁷ Complainants' first written submission, paras. 5.183-5.187; opening statement at the first meeting of the Panel, para. 8.7; second written submission, paras. 2.162-2.174; and opening statement at the second meeting of the Panel, paras. 9.1-9.5.

²⁴⁸ Complainants' opening statement at the second meeting of the Panel, para. 9.3.

force. Second, Indonesia asserts that KPPI responded to Viet Nam's requests to hold consultations in a timely manner, inviting its representatives to Jakarta on 8 and 10 July 2014. According to Indonesia, consultations could not be held on these dates and had to be postponed to 20 August and 27 October 2014 only because of Viet Nam's own internal administrative procedures. Indonesia states that it could not have postponed the implementation of the measure while it waited for Viet Nam to avail itself of the opportunity to consult, because of the "critical circumstances and the urgency of the safeguard measure".²⁴⁹ Indeed, according to Indonesia, under Article XIX:2 of the GATT 1994, the alleged "critical circumstances" entitled it to impose a provisional measure *without* prior consultation, provided that consultations were held immediately afterwards.²⁵⁰ Third, Indonesia argues that in the present situation, the only requests for consultations that were relevant for the purpose of Article 12.3 were those made *after* KPPI's determination of serious injury²⁵¹, noting furthermore that in the case of Chinese Taipei, the only relevant request for consultations was made on 24 October 2014, long after the measure had actually entered into force.²⁵²

7.126. Finally, Indonesia argues that its notification satisfied the standards of Article 12.2 and therefore rejects the complainants' assertion that it was impossible to hold meaningful consultations because of a lack of "pertinent information" in its Article 12.1(b) notification. In any case, Indonesia submits that consultations may be adequate even in circumstances where prior notifications are incomplete because the purpose of consultations is to review the content of such notifications.²⁵³

7.5.7.2 Relevant law

7.127. Article XIX:2 of the GATT 1994 reads, in relevant part, as follows:

Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. ... In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

Article 12.3 of the Agreement on Safeguards provides:

A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.

7.128. Article 12.3 requires a Member *proposing* to apply a safeguard measure to provide exporting Members with: (a) sufficient information; and (b) time to allow for the possibility, through consultations, for holding (c) a meaningful exchange on the issues identified.²⁵⁴

²⁴⁹ Indonesia's first written submission, paras. 256-260; opening statement at the first meeting of the Panel, paras. 74 and 75; second written submission, paras. 137 and 138; and opening statement at the second meeting of the Panel, paras. 84-89.

²⁵⁰ Indonesia's first written submission, para. 267; second written submission, para. 139; and opening statement at the second meeting of the Panel, para. 92.

²⁵¹ Indonesia's opening statement at the second meeting of the Panel, para. 86.

²⁵² Indonesia's first written submission, para. 257; opening statement at the first meeting of the Panel, para. 76; and opening statement at the second meeting of the Panel, para. 89.

²⁵³ Indonesia's first written submission, paras. 262 and 263 (referring to Panel Report, *Korea – Dairy*, para. 7.150); opening statement at the first meeting of the panel, paras. 78 and 79; and opening statement at the second meeting of the Panel, para. 92.

²⁵⁴ Appellate Body Report, *US – Wheat Gluten*, para. 136.

Information on the "*proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure".²⁵⁵

7.129. The *information* that is needed to enable meaningful consultations to occur under Article 12.3 is set out in the list of "mandatory components" identified in Article 12.2.²⁵⁶ An exporting Member will not have been provided with an "adequate opportunity" to hold consultations under Article 12.3 unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed measure, including the nature of the remedy.²⁵⁷

7.130. The requirement to provide *sufficient time* to allow for the possibility of a meaningful exchange has been interpreted to mean that exporting Members should obtain the relevant information sufficiently in advance to permit analysis of the measure, and consider the likely consequences of the measure *before it takes effect*.²⁵⁸ An importing Member's failure to provide relevant information sufficiently in advance of a safeguard measure taking effect is not excused by the fact that the exporting Member may not have requested consultations during that inadequate time-period.²⁵⁹ Moreover, the "prior consultations" envisaged by Article 12.3 need not be with respect to a proposed measure that is identical, in every respect, to the one that is eventually applied.²⁶⁰

7.131. The *meaningful exchange* that is called for under Article 12.3 "assumes that the importing Member will enter into consultations in good faith and will take the time appropriate to give due consideration to any comments received from exporting Members before implementing the measure".²⁶¹

7.132. Finally, Article 6 of the Agreement on Safeguards provides that in "critical circumstances where delay would cause damage which it would be difficult to repair", a Member may impose a "provisional" safeguard measure, which must be based on a preliminary determination that increased imports have caused or are threatening to cause serious injury. A provisional safeguard measure may only take the form of a tariff increase, and may not last more than 200 days. During the duration of the provisional safeguard measure, the importing Member must comply with the relevant requirements set out in Articles 2 to 7 and 12 of the Agreement on Safeguards. Article XIX:2 of the GATT 1994 exempts an importing Member from the need to hold prior consultations before applying a provisional safeguard measure whilst requiring it to hold such consultations immediately after imposing it.

7.5.7.3 Relevant facts

7.133. The challenged safeguard investigation was initiated on 19 December 2012. A public hearing was held on 23 April 2013. During the entire investigation, the only document that KPPI sent to the exporters of Chinese Taipei and Viet Nam was the non-confidential version of the Petition.²⁶²

7.134. Viet Nam sent a letter dated 24 April 2014 to KPPI, recalling Indonesia's notification obligations under Articles 12.1 and 12.2 and requesting KPPI to disclose "the pertinent information ... once [KPPI's] findings have been made prior to any final determination during the course of the investigation".²⁶³ The same letter also reminded KPPI of its obligation under Article 12.3 to hold "pre-consultation[s] with ... the Vietnam Government prior to the final determination of KPPI with a

²⁵⁵ Appellate Body Report, *US – Wheat Gluten*, para. 136. (emphasis original)

²⁵⁶ Appellate Body Report, *US – Wheat Gluten*, para. 136.

²⁵⁷ Appellate Body Report, *US – Wheat Gluten*, para. 137.

²⁵⁸ Appellate Body Report, *US – Line Pipe*, para. 108; and Panel Report, *Ukraine – Passenger Cars*, para. 7.534.

²⁵⁹ Appellate Body Report, *US – Line Pipe*, para. 112.

²⁶⁰ Appellate Body Report, *US – Line Pipe*, para. 104.

²⁶¹ Appellate Body Report, *US – Line Pipe*, para. 110. (fn omitted)

²⁶² Request for Application of Safeguard Measure (Non-confidential Summary), 12 December 2012, (Exhibit TPKM/VNM-11).

²⁶³ Letter dated 24 April 2014 from Viet Nam to KPPI, (Exhibit TPKM/VNM-6).

view to, *inter alia*, reviewing the information provided under [Article 12.2, and] exchanging views on the measure".²⁶⁴

7.135. In its Article 12.1(b) notification of 26 May 2014, Indonesia indicated that it was "prepared to consult with those Members having a substantial interest as exporters of the products concerned".²⁶⁵ At the time, Viet Nam possessed a copy of the Final Disclosure Report, which it had received from the Hoa Sen Group on 23 May 2014.²⁶⁶ The Hoa Sen Group obtained the Final Disclosure Report on 20 May 2014²⁶⁷, some two months after it had been issued, in response to its request of 22 April 2014 for the "disclosure of non-confidential information".²⁶⁸

7.136. Viet Nam sent two letters to KPPI on 16 and 30 June 2014, which stated that Viet Nam was ready to communicate with KPPI in relation to the safeguard investigation and explicitly requested consultations under Article 12.3.²⁶⁹ Indonesia responded to Viet Nam's letters on 4 July 2014, inviting Viet Nam to Jakarta to hold consultations on 8 July 2014.²⁷⁰ However, Viet Nam could not attend consultations on "such short notice" due to "strict internal procedures for approval".²⁷¹ By letter of 7 July 2014, Viet Nam requested that an alternative date be agreed and that it was "looking forward to receiving a formal and original confirmation letter" from KPPI.²⁷²

7.137. On the same day, Indonesia replied proposing a meeting on 10 July 2014.²⁷³ Viet Nam responded on 8 July 2014 specifying that it could not meet on 10 July for the same reasons as before. Viet Nam explained that "our strict procedures for approval of overseas trip" requires "a formal and original letter" from KPPI via post.²⁷⁴ KPPI responded by letter of 10 July in which it stated that "we sent you the official invitation letters by fax and e-mail".²⁷⁵

7.138. Viet Nam sent KPPI another letter on 17 July 2014 requesting that consultations be held on 31 July 2014, recalling Indonesia's obligations under Article 12.3.²⁷⁶ Six days later, on 23 July 2014, Viet Nam sent another letter to KPPI protesting about the lack of response to its latest request for consultations, noting that the safeguard measure had already come into force and that the Minister for Finance had "stipulated" the regulation imposing the safeguard measure on 7 July – i.e. one day before the date originally suggested by KPPI to hold consultations with Viet Nam.²⁷⁷ Viet Nam claimed that Indonesia's conduct violated Article 12.3.

7.139. Indonesia responded to Viet Nam's 23 July letter on 25 July, revealing that it had not received Viet Nam's letter of 17 July requesting consultations until the same day that it received the letter of 23 July. Indonesia informed Viet Nam that due to Eid Mubarak holidays government offices would be closed on 31 July, and proposed that consultations could be held instead on 4 August 2014.²⁷⁸ Viet Nam responded by letter of 4 August 2014, in which it requested that consultations be held on 20 August 2014.²⁷⁹ Indonesia confirmed this proposed date on 7 August 2014.²⁸⁰ Consultations were held on 20 August 2014, and a second round of consultations took place between KPPI and Viet Nam on 27 October 2014.²⁸¹

²⁶⁴ Letter dated 24 April 2014 from Viet Nam to KPPI, (Exhibit TPKM/VNM-6).

²⁶⁵ Committee on Safeguards, Notification Under Article 12.1(b) of the Agreement on Safeguards on finding a serious injury or threat thereof caused by increased imports, G/SG/N/8/IDN/16, (Exhibit TPKM/VNM-3), section H, para. 3.

²⁶⁶ Complainants' response to Panel question No. 45.

²⁶⁷ Email dated 20 May 2014 from KPPI to Hoa Sen Group's counsel, (Exhibit TPKM/VNM-18).

²⁶⁸ Letter dated 22 April 2014 from Hoa Sen Group's counsel to KPPI, (Exhibit TPKM/VNM-16).

²⁶⁹ Letter dated 16 June 2014 from Viet Nam to KPPI, (Exhibit TPKM/VNM-7); and Letter dated 30 June 2014 from Viet Nam to KPPI, (Exhibit TPKM/VNM-8).

²⁷⁰ Letter dated 4 July 2014 from KPPI to Viet Nam, (Exhibit IDN-15).

²⁷¹ Letter dated 7 July 2014 from Viet Nam to KPPI, (Exhibit IDN-16).

²⁷² Letter dated 7 July 2014 from Viet Nam to KPPI, (Exhibit IDN-16).

²⁷³ Letter dated 7 July 2014 from KPPI to Viet Nam, (Exhibit IDN-17).

²⁷⁴ Letter dated 8 July 2014 from Viet Nam to KPPI, (Exhibit IDN-18).

²⁷⁵ Letter dated 10 July 2014 from KPPI to Viet Nam, (Exhibit IDN-19).

²⁷⁶ Letter dated 17 July 2014 from Viet Nam to KPPI, (Exhibit IDN-21).

²⁷⁷ Letter dated 23 July 2014 from Viet Nam to KPPI, (Exhibit IDN-23).

²⁷⁸ Letter dated 25 July 2014 from KPPI to Viet Nam, (Exhibit IDN-24).

²⁷⁹ Letter dated 4 August 2014 from Viet Nam to KPPI, (Exhibit IDN-25).

²⁸⁰ Letter dated 7 August 2014 from KPPI to Viet Nam, (Exhibit IDN-26).

²⁸¹ Indonesia's first written submission, para. 255.

7.140. Chinese Taipei requested Article 12.3 consultations on 30 April 2013, during the course of KPPI's investigation²⁸², after having reminded KPPI of its "pre-consultations" obligations under Article 12.3 on 11 January 2013.²⁸³ Chinese Taipei also requested Article 12.3 consultations at a meeting of the Committee on Safeguards of 22 October 2013.²⁸⁴ KPPI did not specifically contact Chinese Taipei following its requests for consultations, and Chinese Taipei did not subsequently approach KPPI or any other Indonesian government entity again after 22 October 2013 to request consultations. Chinese Taipei obtained the Final Disclosure Report on 7 October 2014 after requesting it on 6 October 2014, more than six months after it had been issued.²⁸⁵

7.141. There is no evidence that KPPI adopted a "provisional safeguard" within the meaning of Article XIX:2 of the GATT 1994 or Article 6 of the Agreement on Safeguards, or that such a measure, assuming *arguendo* that it ever actually existed, was justified on the basis of "critical circumstances".

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set out in this Report, we conclude as follows:

- a. the specific duty applied by Indonesia on imports of galvalume by means of Regulation No. 137.1/PMK.011/2014 *does not* constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards; and
- b. the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation No. 137.1/PMK.011/2014 *is inconsistent* with Indonesia's obligation to afford MFN-treatment under Article I:1 of the GATT 1994.

8.2. Having concluded that the specific duty does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, there is *no legal basis* to support the complainants' claims under the Agreement on Safeguards and the GATT 1994 with respect to the specific duty *as a safeguard measure*. Accordingly, we dismiss the entirety of those claims.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. Thus, to the extent that we have found the measures at issue to be inconsistent with Article I:1 of the GATT 1994, they have nullified or impaired benefits accruing to Chinese Taipei and Viet Nam under that agreement.

8.4. The complainants have requested that were we to confirm the full extent of their complaint against the specific duty *as a safeguard measure*, we should go on to exercise the discretion accorded to panels under Article 19.1 of the DSU and suggest that Indonesia bring its safeguard measure into conformity with its WTO obligations by immediately withdrawing it.²⁸⁶ Having found that there is no legal basis to support the complainants' claims against the specific duty *as a safeguard measure*, there is no need to consider the complainants' request. Accordingly, in the light of our finding that the application of the specific duty is inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994, we recommend, pursuant to Article 19.1 of the DSU, that Indonesia bring its measure into conformity with its obligations under the GATT 1994.

²⁸² Letters dated 11 January 2013 and 30 April 2013 from Chinese Taipei to KPPI, (Exhibit TPKM/VNM-14).

²⁸³ Letters dated 11 January 2013 and 30 April 2013 from Chinese Taipei to KPPI, (Exhibit TPKM/VNM-14).

²⁸⁴ Committee on Safeguards, Minutes of the regular meeting held on 22 October 2013, circulated 27 March 2014, G/SG/M/44, (Exhibit TPKM/VNM-34), para. 53.

²⁸⁵ Email exchange dated 6 and 7 October 2014 between Chinese Taipei and KPPI, (Exhibit TPKM/VNM-17).

²⁸⁶ Complainants' opening statement at the first meeting of the Panel, para. 9.3; second written submission, para. 3.2; and opening statement at the second meeting of the Panel, paras. 10.1-10.3.



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INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS490/R, WT/DS496/R.

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ANNEX A

INTERIM REVIEW AND WORKING PROCEDURES OF THE PANEL

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ANNEX A-1**WORKING PROCEDURES OF THE PANEL***Adopted on 1 July 2016*

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Chinese Taipei¹ or Viet Nam requests such a ruling, Indonesia shall submit its response to the request in its first written submission. If Indonesia requests such a ruling, Chinese Taipei and Viet Nam shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party/parties a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits

¹ Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following either (a) the submission which contains the disputed translation or (b) the date on which the significance of the translation issue first becomes apparent to the objecting party. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Viet Nam could be numbered VNM-1, VNM-2, etc. If the last exhibit in connection with the first submission was numbered VNM-5, the first exhibit of the next submission thus would be numbered VNM-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. on the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall invite Chinese Taipei and Viet Nam to make an opening statement to present their respective cases first. Subsequently, the Panel shall invite Indonesia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its opening statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party/parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Chinese Taipei and Viet Nam presenting their statements first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall ask Indonesia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Indonesia to present its opening statement, followed

by Chinese Taipei and Viet Nam. If Indonesia chooses not to avail itself of that right, the Panel shall invite Chinese Taipei or Viet Nam to present their respective opening statements first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party/parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's/parties' written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions, oral statements and, where relevant, responses to questions, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 30 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's/parties' written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 8 paper copies of all documents, except exhibits, it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD or USB key and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD, a USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXXXX@wto.org. If a CD-ROM or DVD or USB key is provided, it shall be filed with the DS Registry.

- d. Each party shall serve any document submitted to the Panel directly on the other parties. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
 - e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.
 - f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.
26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 July 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.
2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated as confidential within the meaning of Article 3.2 of the Safeguards Agreement by the investigating authorities of the Indonesia in the safeguards investigation at issue in this dispute, unless the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.
3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.
4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.
5. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.
6. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.
7. Submission of BCI by parties or third parties:
 - (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document, and each page of the document, shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)).

- (ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".
- (iii) In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7 (i).

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents or other media containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

10. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the report of the Panel.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion and disposition of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, a number of changes of an editorial nature have been made to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the parties.¹

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Final Report, unless otherwise specified.

2 COMPLAINANTS' NON-SPECIFIC REQUESTS FOR REVIEW OF SECTION 7.3

2.1 Panel's overall analysis and findings

2.1. The complainants maintain that the Panel's finding that the specific duty is *not* a safeguard measure is based on a "theory" that was not argued by the parties, who in fact all agreed and argued that the specific duty *is* a safeguard measure within the meaning of the Agreement on Safeguards and Article XIX of the GATT 1994. The complainants assert that the parties were not given "a full opportunity to present arguments on the Panel's theory"², and "[i]n these circumstances", that "it is incumbent on the Panel to consider carefully and to address in detail in its final report" the "arguments" presented in their comments on the Interim Report³, which call upon the Panel to: (a) "clarify" and "explain" various aspects of the analysis and findings set out in Section 7.3 of the Interim Report; (b) "provide its views" on a number of alleged implications of that analysis and those findings; and (c) "review its reasoning" in the light of three sets of considerations.⁴

2.2. Indonesia submits that the complainants' requests should be denied because they "clearly do not serve the purpose of interim review"⁵, which according to Indonesia should not be used to enter into a debate about the merits of a panel's findings. Indonesia considers that parties to a dispute should respect the findings and conclusions of a panel, and pursue any disagreements through the appeal procedure provided for in the DSU.⁶

2.3. It is well established that the interim review stage of a panel proceeding is intended to allow parties to "submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'".⁷ The interim review process is not an opportunity for parties to advance arguments as to why they consider a particular "theory" allegedly relied upon by a panel in its Interim Report to be incorrect. Neither is it a time for parties to enter into a debate about the merits of a panel's interpretation of relevant legal provisions⁸, *a fortiori* when they have exchanged views on the subject matter during the course of a proceeding (as the parties have done in this dispute⁹). Panels are not required to defend their findings and

¹ These include changes in paragraphs 7.47, 7.63, 7.67, 7.93, 7.95, 7.96, 7.126, 7.132, and 7.139, and in footnotes 12, 51, 65, 109, 133, 134, 139, 177, 182, 231, 250, and 272.

² Complainants' request for interim review, paras. 2.1 and 2.2.

³ Complainants' request for interim review, para. 2.3.

⁴ Complainants' request for interim review, paras. 2.6-2.9.

⁵ Indonesia's comments on complainants' request for interim review, para. 8.

⁶ Indonesia's comments on complainants' request for interim review, paras. 3, 8, 10, and 11.

⁷ Appellate Body Report, *EC – Sardines*, para. 301. (fn omitted)

⁸ Panel Report, *Japan – Alcoholic Beverages II*, para. 5.2.

⁹ See below, paras. 2.5-2.7

conclusions during the interim review stage.¹⁰ Issues of law addressed in a panel report and the legal interpretations developed by a panel may always be raised on appeal.

2.4. In our view, the complainants' requests raise questions about the merits of our analysis and findings, challenging the very basis of our conclusions and, therefore, go beyond the kinds of requests that properly fall within the scope of the interim review process envisaged in Article 15.2 of the DSU. The complainants' requests in paragraphs 2.6 to 2.9 of their request for interim review do not ask us to modify any specific paragraphs of the Interim Report. In effect, the complainants ask us to reconsider our objective evaluation of, and conclusions, regarding the issues addressed in our Report.

2.5. The complainants argue that the parties were not given a full opportunity to make submissions in relation to the "Panel's theory". We note, however, that while a panel must fully explore all pertinent issues with the parties, it is not required to engage with the parties upon the findings and conclusions that it intends to make in resolving a dispute.¹¹ The complainants in this dispute acknowledge that the parties "had the opportunity late in the proceedings to respond to questions from the Panel that are relevant to the legal theory developed by the Panel in the Interim Report".¹² Indeed, following Indonesia's confirmation that it did not have a binding tariff obligation with respect to imports of galvalume inscribed into its GATT Schedule of Concessions¹³, the parties were specifically requested to come to the second substantive meeting prepared to discuss the consequences of this fact for our evaluation of the merits of the complainants' claims, including as elaborated in paragraphs 40 and 41 of Indonesia's second written submission.¹⁴ At the same time, the parties were given advance notice of four questions we intended to pose during the second substantive meeting with respect to the definition of a safeguard measure.¹⁵ Thus, the timing of our decision to explore the parties' shared characterization of the specific duty as a safeguard measure reflects the fact that the issue did not concretely arise until after the first substantive meeting, when Indonesia confirmed that it was "unbound" with respect to the level of tariffs it was entitled to apply on imports of galvalume.¹⁶

2.6. After hearing the parties' views and exchange of opinions at the beginning of the second substantive meeting, the parties were asked to respond to, and comment upon each other's answers to, nine questions focused on *inter alia* understanding their views on the defining features of a safeguard measure and the extent to which the specific duty challenged in this dispute possessed those features. This initial exchange of views and opinions lasted over 90 minutes. We returned to these issues at the very end of the meeting and asked one additional question. Subsequently, the parties were invited to respond to and comment upon each other's answers to several of the questions asked during the second substantive meeting in writing.

2.7. Thus, not only were the parties aware that we had decided to closely examine the merits of their jointly-held view that the specific duty constituted a safeguard measure, but they were also given multiple opportunities to address the relevant issues and, thereby, inform our evaluation of the legal and factual questions that would guide our analysis. The parties were not left to guess about the focus of our analysis. Indeed, the possibility that our objective evaluation might lead to a finding that the specific duty was not a safeguard measure must have been understood and anticipated by the complainants, as they requested that we make alternative findings in that event.¹⁷ Likewise, Indonesia argued for the rejection of the entirety of the complainants' claims

¹⁰ Panel Report, *Japan – DRAMS (Korea)*, para. 6.2.

¹¹ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1137.

¹² Complainants' request for interim review, para. 2.2.

¹³ Indonesia's response to Panel question No. 7.

¹⁴ Panel communication to the Parties of 14 December 2016.

¹⁵ Panel communication to the Parties of 14 December 2016.

¹⁶ We note, in this respect, that Indonesia was asked at the first substantive meeting to identify the relevant GATT 1994 obligation suspended as a result of the specific duty imposed on imports of galvalume. Indonesia responded by saying that it believed, but could not confirm at that stage, that it was a 40% duty rate inscribed into its GATT Article II Schedule of Concessions. Indonesia subsequently confirmed in its written answer to Panel questions following the first substantive meeting that it had no tariff obligation inscribed into its GATT Schedule of Concession for galvalume, and that it was, therefore, "unbound" with respect to that product. (Indonesia's response to Panel question No. 7).

¹⁷ Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 2.2.

premised on the existence of a safeguard measure, were we to find that the specific duty was not a safeguard measure.¹⁸

2.8. In the light of these considerations, we decline the complainants' requests for review of Section 7.3 of the Interim Report, as set out in paragraphs 2.6 to 2.9 of their request for interim review. Moreover, having closely reviewed those comments, we believe that much of the complainants' criticism stems from their misunderstanding of our analysis and findings. We have made some adjustments to paragraphs 7.27 and 7.29, and footnote 63, in order to facilitate a clearer understanding.

2.2 Analysis of the consequences of the fact that the specific duty was adopted following an investigation conducted by Indonesia's competent authority pursuant to Indonesia's safeguards legislation with a view to complying with the Agreement on Safeguards

2.9. The complainants request that we reconsider the reasoning set out in paragraphs 7.34-7.39 and "recognize the deference that Members should enjoy in the qualification of their own measure as a safeguard measure".¹⁹ According to the complainants, the "fact that a member initiated, conducted and concluded an investigation pursuant to the disciplines of Article XIX and the Agreement on Safeguards must be relevant for the purpose of qualifying the measure at issue".²⁰ Moreover, the complainants argue that "from a systemic perspective, to fail to give deference in the characterization of a safeguard measure to the Member imposing that measure would seriously undermine the value of the procedural, notification and consultations requirements contained in the Agreement on Safeguards".²¹

2.10. Indonesia argues that the complainants' requests should be denied because they "clearly do not serve the purpose of interim review".²²

2.11. Contrary to the complainants' suggestion, the analysis set out in paragraphs 7.34-7.39 does not state that the fact that a Member may have conducted a safeguard investigation prior to the adoption of a measure is *irrelevant* for the purpose of the legal characterization of that measure. It merely emphasizes that a defining feature of a safeguard measure is not whether a measure is adopted following a WTO-consistent safeguards investigation, but rather whether that measure suspends, modifies or withdraws the implementing Member's GATT obligations or concessions.

2.12. While we do not deny that a Member adopting a measure following the outcome of an investigation conducted under its domestic safeguard legislation will be better placed than a panel to describe the motivations for the imposition of that measure, this does not mean that we must abandon our duty to perform an objective assessment of the matter as required by Article 11 of the DSU. Moreover, we fail to see how undertaking an objective assessment of the merits of the imposing Member's legal characterization of a measure imposed following the outcome of a domestic safeguards investigation "undermine[s] the value of the procedural, notification and consultations" requirements of the Agreement on Safeguards. As explained in our report, compliance with such obligations is a prerequisite for the application of a WTO-consistent safeguard measure, which obviously means that those obligations cannot be avoided by a Member seeking to apply a valid safeguard measure. In our view, however, a "systemic" concern would arise if, as the complainants suggest, a panel were precluded from making an objective assessment of the legal characterization of a challenged measure in a particular dispute and defer to the imposing Member's, or the parties' jointly held, characterization, where the panel considered there were grounds to doubt the merits of the parties' characterization of that measure. Accordingly, we deny the complainants' requests that we reconsider the reasoning set out in paragraphs 7.34-7.39 and that we "recognize the deference that Members should enjoy in the qualification of their own measure as a safeguard measure".²³

¹⁸ Indonesia's second written submission, para. 41.

¹⁹ Complainants' request for interim review, para. 2.18.

²⁰ Complainants' request for interim review, para. 2.15.

²¹ Complainants' request for interim review, para. 2.16.

²² Indonesia's comments on complainants' request for interim review, para. 8.

²³ Complainants' request for interim review, para. 2.18.

3 COMPLAINANTS' NON-SPECIFIC REQUESTS FOR REVIEW OF SECTION 7.5

3.1 The complainants' claims under the Agreement on Safeguards and Article XIX of the GATT 1994 must be addressed irrespective of whether the specific duty is a safeguard measure

3.1. The complainants request that we reconsider our decision not to make any findings on the merits of their claims under the Agreement on Safeguards and Article XIX of the GATT 1994 because they consider those claims stand alone, irrespective of our legal conclusion that the challenged measure, a specific import duty, is not a safeguard measure. The starting point of the complainants' request is the following submission:

[T]he reference in Article 1 of the Agreement on Safeguards to "measures provided for in Article XIX of GATT 1994" cannot be construed as excluding from the application of the Agreement on Safeguards actions other than "suspensions" of obligations.²⁴

3.2. The complainants go on to find support for their argument in Article 11.1(a) of the Agreement on Safeguards, which provides that Members "shall not ... seek any emergency action ... unless such action conforms" with the provisions of Article XIX applied in accordance with the Agreement on Safeguards. For the complainants, the prohibition on "seeking" emergency action means that actions such as "substantive determinations, notifications, or consultations, would clearly fall under the scope of Article 11.1(a) ... regardless of whether they are characterized as a 'safeguard' measure".²⁵ Moreover, the complainants maintain that "several provisions of the Agreement on Safeguards apply, by their express terms, to *investigations* conducted under domestic safeguards law, irrespective of the outcome of that investigation process".²⁶ In this respect, the complainants refer specifically to Articles 4.2(a), 8, 12.2, and 12.3 of the Agreement on Safeguards. However, it is apparent from the complainants' request for review that they consider the same is true for all of the provisions of the Agreement on Safeguards pursuant to which they have brought claims (as well as Article XIX of the GATT 1994).²⁷ Thus, the complainants submit that given "the text of the specific obligations on the substantive determinations – which apply to the conduct of the investigation and not to the nature of the measure itself – the complainants request the Panel to make rulings on their claims under the Agreement on Safeguards and Article XIX of the GATT 1994".²⁸

3.3. Indonesia argues that the complainants' requests should be denied because they "clearly do not serve the purpose of interim review".²⁹

3.4. The fundamental premise underlying the complainants' request is that Article XIX of the GATT 1994 and the rules and disciplines of the Agreement on Safeguards apply to measures other than "those provided for in Article XIX". We disagree.

3.5. Article 1 of the Agreement on Safeguards expressly states that the Agreement on Safeguards "establishes rules for the application of safeguard measures", which the same provision defines as "those measures provided for in Article XIX of GATT 1994". It must logically follow that in the absence of a "safeguard measure" as "provided for in Article XIX", a Member cannot be held to the disciplines of the Agreement on Safeguards. A Member cannot be required to comply with rules governing the application of a particular kind of measure that it is not proposing to adopt or that does not exist. The fact that the Agreement on Safeguards contains various provisions prescribing multiple obligations with respect to *inter alia* substantive determinations, investigations, consultations and notifications, does not imply that a Member can be found to have acted inconsistently with those obligations if it has not applied, or is not proposing to apply, a *safeguard measure*, within the meaning of Article 1 of the Agreement on Safeguards. Indeed, the express terms of Article 2 stipulate that a Member must comply with the substantive requirements of that provision (which include a demonstration of serious injury as provided for in Article 4.2(a)) only if that Member attempts to "apply a *safeguard measure* to a product". Likewise, Article 3 imposes an

²⁴ Complainants' request for interim review, para. 2.26.

²⁵ Complainants' request for interim review, para. 2.26.

²⁶ Complainants' request for interim review, para. 2.26. (emphasis original)

²⁷ Complainants' request for interim review, paras. 2.27 and 2.32 (including fn 20).

²⁸ Complainants' request for interim review, para. 2.27.

²⁹ Indonesia's comments on complainants' request for interim review, para. 8.

obligation to conduct an investigation consistent with the provisions of that Article as a prerequisite to the application of a "*safeguard measure*". The existence of a safeguard measure or a proposal to apply or extend a safeguard measure triggers the obligation in Article 12.2 to provide "all pertinent information" when making notifications required pursuant to Article 12.1(b) and 12.1(c), and the requirement in Article 12.3 to provide "adequate opportunity for prior consultations". We fail to understand how a Member may be found to have violated any of these obligations in the absence of the existence of a *safeguard measure* or a proposal to apply or extend a *safeguard measure*, within the meaning of Article 1 of the Agreement on Safeguards.

3.6. Finally, we note that the focus of the prohibition set out in Article 11.1(a) is "emergency action ... *as set forth in Article XIX*" that does not conform with Article XIX "applied in accordance" with the Agreement on Safeguards. Thus, contrary to the complainants' suggestion, the prohibition in Article 11.1(a) is expressly limited to the same universe of measures covered by Article XIX – that is, measures which Article 1 of the Agreement on Safeguards identifies to be "safeguard measures".

3.7. In the light of these considerations, we decline the complainants' request to reconsider our decision not to make findings on the merits of their claims under the Agreement on Safeguards and Article XIX of the GATT 1994.

3.2 The Panel's decision not to make alternative findings does not provide a prompt and positive solution to the dispute

3.8. The complainants request that the Panel rule on its claims under the Agreement on Safeguards and Article XIX of the GATT 1994 in order to achieve a prompt and positive solution to the dispute in accordance with Articles 3.3 and 3.7 of the DSU. According to the complainants, alternative findings would "be crucial to the resolution of this dispute, should it proceed to the appellate level".³⁰ Moreover, the complainants submit that their request is supported by the following two additional considerations: First, because the Panel acknowledged in the Interim Report that "this is the first time that a WTO dispute settlement Panel has been called upon to rule upon the merits of claims of violation of the Agreement on Safeguards in ... a situation" where "all three parties have consistently argued from the very beginning of this proceeding that the specific duty is a safeguard measure"; and second, because the Panel has also recognized that its decision "departed from the view of the Panel in the adopted panel report in *Dominican Republic – Safeguard Measures*".³¹

3.9. Indonesia argues that the complainants' requests should be denied because they "clearly do not serve the purpose of interim review".³²

3.10. By finding that the specific duty is *not* a safeguard measure, we determined that the complainants' claims under the Agreement on Safeguards and Article XIX of the GATT 1994 have no legal merit and, therefore, must be dismissed. Our "objective assessment" of those claims led us to reject them in their entirety, and consequently to examine the complainants' alternative claim under Article I:1 of the GATT 1994, which we ultimately accepted. In our view, these findings resolve the matter in dispute in accordance with the terms of reference of this proceeding and our duty under Article 11 of the DSU. We fail to see how making alternative findings on the merits of claims we have determined to be unfounded could "secure a positive resolution to the dispute" or assist the DSB to discharge its responsibilities under the DSU.

3.11. Having said that, we recognize that the particular findings we have made leave open the possibility that the parties could be left with no final resolution of the matter, were our legal characterization of the specific duty to be appealed and overturned. In this light, and bearing in mind that our task under Article 11 of the DSU includes not only a duty to "make an objective assessment of the matter" but also a duty to "make such other findings as will assist the DSB in making recommendations or in giving rulings", we have set out an exposition of relevant facts, which we believe would be helpful to any potential subsequent evaluation of the merits of the parties' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994.

³⁰ Complainants' request for interim review, para. 2.31.

³¹ Complainants' request for interim review, para. 2.31.

³² Indonesia's comments on complainants' request for interim review, para. 8.

3.12. Finally, we note that it is well established that the common understanding of the parties in dispute is not "in and of itself dispositive" of a particular issue and it cannot, therefore, supplant the objective assessment that a panel is required to perform under the terms of Article 11 of the DSU.³³ It follows that, as a matter of law, the fact that the parties in this proceeding may have argued that the specific duty is a safeguard measure is not determinative of the legal characterization of that duty under Article XIX of the GATT 1994 and the Agreement on Safeguards. As our detailed analysis shows, we did not lightly dismiss the parties' arguments, but very carefully examined and explored them with the parties at the first available opportunity after Indonesia confirmed that it had no binding tariff obligation inscribed into its GATT Schedule of Concessions for imports of galvalume. Ultimately, the parties' submissions (including their reliance on the unappealed panel report in *Dominican Republic – Safeguard Measures* – which we have explained differed in several important respects from the present dispute³⁴) did not convince us of the merits of their position.

3.13. Accordingly, we deny the complainants' request that the Panel rule on its claims under the Agreement on Safeguards and Article XIX of the GATT 1994.³⁵

4 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

4.1 Paragraph 7.24 of the Interim Report

4.1. The complainants request that we reformulate the description of their arguments in paragraph 7.24 of the Interim Report by deleting the terms "the parties argue that".³⁶ Indonesia did not specifically comment on the complainants' request. We have deleted the entirety of paragraph 7.24 from the Interim Report.

4.2 Paragraph 7.30

4.2. The complainants request that we identify the specific "statements and findings" of the panel report in *Dominican Republic – Safeguard Measures* from which our views depart.³⁷ Indonesia did not specifically comment on the complainants' request. We decline the complainants' request. In our view, paragraph 7.30 and its accompanying footnotes are sufficiently clear and explain the divergence between the views we express in the preceding paragraphs and those of the panel in *Dominican Republic – Safeguard Measures*.

4.3 Paragraph 7.33

4.3. The complainants request that we modify this paragraph to more accurately reflect their argument that the alleged suspension of Article I:1 of the GATT 1994, in connection with the fact that Indonesia conducted a safeguard investigation and made all relevant notifications under Article 12 of the Agreement on Safeguards, indicate that the specific duty is a safeguard measure.³⁸ Indonesia did not specifically comment on the complainants' request. We have made the requested modification and made consequential adjustments to paragraphs 7.34 and 7.39.

4.4 Paragraphs 7.38 and 7.39

4.4. The complainants submit that in these paragraphs, the Panel made an "inference that ... Members could make a policy choice not to impose a safeguard measure (and that Indonesia did so)", and that such an "inference" is "nothing more than conjecture".³⁹ According to the complainants, there "was no evidence before the Panel that Indonesia, at the end of the safeguard investigation, considered imposing something other than a safeguard measure or might have

³³ Panel Report, *China – Publications and Audiovisual Products*, para. 6.46.

³⁴ Panel Report, fn 61.

³⁵ Our findings on this point also cover the complainants' analogous requests for alternative findings on the merits of their claims in Sections 7.5.3 and 7.5.4 of the Final Report. (Complainants' request for interim review, paras. 2.46, 2.47, and 2.49).

³⁶ Complainants' request for interim review, para. 2.10.

³⁷ Complainants' request for interim review, para. 2.10.

³⁸ Complainants' request for interim review, para. 2.12.

³⁹ Complainants' request for interim review, para. 2.21.

policy reasons for doing so".⁴⁰ The complainants request us to identify "where in the record there was evidence that Indonesia made a policy decision not to impose a safeguard measure in this case" or otherwise "delete the relevant paragraphs".⁴¹ Indonesia has not specifically responded to the complainants' request.

4.5. Paragraph 7.38 quotes Indonesia's *own explanation* of why it decided to impose the specific duty by resorting to a process that involved conducting an investigation under its domestic safeguard legislation. As we note in the same paragraph, Indonesia's explanation reveals that Indonesia was fully aware that it was entitled to unilaterally increase its applied tariff on imports of galvalume, but that, nevertheless, it considered that "rationalization and proper procedures to increase or reduce tariffs ... are necessary as the basis of government policy". Indonesia identified "this" – i.e. "rationalization and proper procedures to increase or reduce tariffs ... as the basis of government policy" – as the reason "why Indonesia opted for the safeguard proceeding" under its domestic law.

4.6. As we highlight in paragraph 7.38, absent from Indonesia's explanation of why it opted for a safeguard proceeding is any statement, or even implication, that it considered itself bound to do so, by its obligations under the Agreement on Safeguards and Article XIX of the GATT 1994, before imposing the specific duty at issue. Rather, Indonesia explicitly states that it followed its chosen course of action for reasons related to "government policy".

4.7. In our judgement, the analysis contained in paragraphs 7.38 and 7.39 does not need to be explained any further and is sufficiently justified and supported by relevant evidence. In this regard, we note that Indonesia did not request any changes to our analysis, including our characterization of its statement quoted in paragraph 7.38, either in its requests for interim review, or in its comments on the complainants' requests for interim review. Accordingly, we deny the complainants' requests. Nevertheless, to avoid confusion, we have modified parts of the text of paragraph 7.38 to facilitate a clearer understanding of our reasoning.

4.5 After paragraph 7.39

4.8. The complainants request that we account in the Final Report for the wording of Regulation No. 137.1/PMK.011/2014, which expressly describes the specific duty as a safeguard measure, and for the differences between this regulation and Regulation No. 97/PMK.010/2015, pursuant to which Indonesia imposed an ordinary duty on imports of galvalume.⁴² Indonesia has not specifically responded to the complainants' request.

4.9. We have modified paragraphs 7.33, 7.34, 7.38, 7.39 and 7.40d to address the complainants' request concerning Regulation No. 137.1/PMK.011/2014. However, in the light of our analysis and reasoning, we do not believe it is necessary to address the differences between the wording of Regulation No. 137.1/PMK.011/2014 and Regulation No. 97/PMK.010/2015. We, therefore, decline this part of the complainants' request.

4.6 Paragraph 7.43

4.10. Indonesia requests that two sentences be inserted into this paragraph to record its view that the complainants' shifted the focus of their arguments with respect to the exclusion of 120 countries from the scope of application of the specific duty during the course of the proceeding.⁴³ The complainants ask us to deny Indonesia's request, arguing *inter alia* that Indonesia has not explained why the statements made in the two sentences are essential to our findings under Article I:1 of the GATT 1994.⁴⁴

4.11. Paragraph 7.43 describes Indonesia's response to the complainants' claim that the specific duty, as a stand-alone measure, is inconsistent with Article I:1 of the GATT 1994. We do not find the substance of the two sentences at issue to be relevant to the exposition of Indonesia's

⁴⁰ Complainants' request for interim review, para. 2.21.

⁴¹ Complainants' request for interim review, para. 2.21.

⁴² Complainants' request for interim review, paras. 2.22 and 2.23.

⁴³ Indonesia's request for interim review, paras. 4-6.

⁴⁴ Complainants' comments on Indonesia's request for interim review, para. 2.3.

arguments in this paragraph and, more generally, to our disposition of the complainants' claims under Article I:1 of the GATT 1994. Accordingly, we deny Indonesia's request.

4.7 Paragraph 7.48

4.12. The complainants request that we refer in this paragraph to their argument that a mere reference to Indonesia's MFN and preferential duty rates is different from the identification of "obligations incurred under the GATT" and that, to comply with the requirement of Article XIX:1(a), KPPI should have identified those relevant obligations with a reasoned and adequate explanation.⁴⁵ Indonesia has not specifically responded to the complainants' request.

4.13. We deny the complainants' request. In our view, the specific argument is sufficiently captured in the broader argument that is summarized at point (c) of this paragraph.

4.8 Paragraph 7.49

4.14. Indonesia requests that this paragraph be modified to more fully reflect its arguments concerning KPPI's findings of unforeseen developments.⁴⁶ Indonesia and the complainants request that the word "knew" be replaced with "understood" in the first sentence.⁴⁷ We have amended paragraph 7.49 to more accurately reflect Indonesia's arguments.

4.9 Paragraph 7.56

4.15. Indonesia requests that three specific changes be made to our exposition in this paragraph of the relevant facts surrounding KPPI's findings in relation to "unforeseen developments" in the Final Disclosure Report. Indonesia asks that we: (a) add a sentence stating that the 2008 global financial crisis was described in section C.5 of KPPI's Final Disclosure Report, which is entitled "Unforeseen Development"; (b) delete the statement that the Final Disclosure Report contained no specific reference to any data, statistics, submissions, or underlying studies to support "the change in the raw materials preferences", as Indonesia considers that such data was referred to in the consumption information provided in section C.3.1; and (c) delete our conclusion with respect to the quality of the evidentiary basis for KPPI's unforeseen development findings.⁴⁸ The complainants request that we deny all three of Indonesia's specific requests.⁴⁹

4.16. We decline all three of Indonesia's requests. In our view, paragraph 7.56 accurately describes the relevant facts regarding KPPI's findings of "unforeseen developments" as presented in the Final Disclosure Report.

4.10 Paragraph 7.57

4.17. Indonesia requests that the last sentence in this paragraph be deleted and replaced with a statement of its argument that KPPI identified Indonesia's obligations under Article I:1 of the GATT 1994 in Table 3 of the Final Disclosure Report.⁵⁰ The complainants consider that Indonesia's request is factually incorrect and misplaced, and ask that we deny it.⁵¹ Separately, the complainants request that we make a finding on whether the relevant facts demonstrate that KPPI provided a reasoned and adequate explanation of the unforeseen developments and effect of Indonesia's GATT obligations in the Final Disclosure Report.⁵² Indonesia did not specifically respond to the complainants' request.

4.18. In our view, the contents of Table 3 of the Final Disclosure Report are already accurately described in paragraph 7.57. Likewise, we consider the final sentence of paragraph 7.57 to accurately reflect the extent to which the Final Disclosure Report contained any specific

⁴⁵ Complainants' request for interim review, para. 2.33.

⁴⁶ Indonesia's request for interim review, paras. 7-10.

⁴⁷ Indonesia's request for interim review, para. 9; complainants' request for interim review, paras. 2.34 and 2.35.

⁴⁸ Indonesia's request for interim review, paras. 11-14.

⁴⁹ Complainants' comments on Indonesia's request for interim review, paras. 2.8-2.17.

⁵⁰ Indonesia's request for interim review, paras. 15-18.

⁵¹ Complainants' comments on Indonesia's request for interim review, paras. 2.18-2.20.

⁵² Complainants' request for interim review, para. 2.36.

consideration of Indonesia's obligations under the GATT 1994 by KPPI. We therefore, deny Indonesia's request.

4.19. Turning to the separate request made by the complainants to make findings on whether KPPI complied with its obligation to provide a reasoned and adequate explanation of its determination, we recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Accordingly, we deny the complainants' request.

4.11 Paragraph 7.61

4.20. Indonesia requests that this paragraph be amended to capture the full range of arguments it presented during the course of the proceeding.⁵³ The complainants submit that the additional arguments that are the subject of Indonesia's request are not essential to our analysis, and accordingly consider that it is not necessary to include them in the Final Report.⁵⁴ Separately, the complainants request that we insert an additional paragraph after paragraph 7.61 to reflect their response to Indonesia's arguments already recorded in paragraph 7.61.⁵⁵

4.21. We have added the first two sentences of the text proposed by Indonesia in order to more fully reflect its arguments, and we have likewise inserted an additional paragraph after paragraph 7.61 to reflect the complainants' response to Indonesia's arguments concerning *Ukraine – Passenger Cars*.

4.12 Paragraph 7.66

4.22. Indonesia requests that the following two additional pieces of information be added to the description of relevant facts set out in this paragraph: (a) that imports of galvalume increased in 2013; and (b) that the import data in the petition (including data relating to the first half of 2012) was prepared by the petitioners with a view to providing *prima facie* evidence of the increase in imports.⁵⁶ The complainants invite us to reject Indonesia's requested changes, arguing that the Panel is not empowered to review or make a finding on a fact in relation to the level of imports in 2013, as it was not assessed by KPPI in its Final Disclosure Report. As regards the import data shown in the petition, the complainants contend that they could not have been prepared by the petitioners since the information on KPPI's record points to the Indonesian Statistics Bureau as the source of this import data.⁵⁷

4.23. Separately, the complainants request that paragraph 7.66 be modified to correctly state the POI used in the underlying investigation and to note their opposition to Indonesia's assertion that the Indonesian Statistics Bureau does not officially publish half-yearly import statistics by country.⁵⁸ The complainants also request that we make a finding on the question of whether KPPI had access to the data for the first half of 2013.⁵⁹ Indonesia did not specifically respond to the complainants' requests.

4.24. We do not believe it is necessary or appropriate, given the purpose of this part of our report and the fact that part of the additional information Indonesia seeks to add was not on the record of KPPI's investigation, to incorporate that additional information into paragraph 7.66. We have, however, modified paragraph 7.66 to address the complainants' specific requests, but have not made any findings on the question identified in the complainants' request for review because of a lack of relevant facts on the record.

4.13 Paragraph 7.67

4.25. The complainants request several modifications to this paragraph. Indonesia has not specifically commented on any of the complainants' requests. The first modification requested by

⁵³ Indonesia's request for interim review, paras. 19-22.

⁵⁴ Complainants' comments on Indonesia's request for interim review, paras. 2.21 and 2.22.

⁵⁵ Complainants' request for interim review, para. 2.37.

⁵⁶ Indonesia's request for interim review, paras. 23-26.

⁵⁷ Complainants' comments on Indonesia's request for interim review, paras. 2.28-2.31.

⁵⁸ Complainants' request for interim review, paras. 2.38-2.41.

⁵⁹ Complainants' request for interim review, para. 2.42.

the complainants is an amendment to reflect the allegation that Chinese Taipei and Viet Nam were not kept informed by KPPI about the evolution of Indonesia's safeguard investigation "until the period immediately preceding Indonesia's notification of 27 May 2014".⁶⁰ We have examined the alleged evidentiary basis referred to by the complainants (Exhibit TPKM/VNM-16) and consider that it does not support the allegation. In addition, we note that the extent to which the complainants communicated with KPPI is elaborated in paragraphs 7.133 through 7.141, where it is explained that the complainants were not informed by KPPI about the progress of the domestic safeguard investigation before 27 May 2014. In light of this, we do not consider it is necessary to make the requested changes to this paragraph.

4.26. The complainants remaining requests for changes to paragraph 7.67 are the replacement of the adverb "verbally" with "orally", the insertion between "KPPI" and "around" of "of the outcome of the investigation", and the use of the adjective "Vietnamese" instead of "Viet Nameese".⁶¹ We have made the requested changes.

4.14 Paragraph 7.69

4.27. The complainants request that findings be made on whether KPPI's determination was consistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards or, alternatively, that a factual finding be made on whether, and if so, when KPPI, had access to the import data relating to the first part of 2013 in the course of the safeguard investigation.⁶²

4.28. We recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Moreover, in our view, the facts described in paragraphs 7.65 to 7.69 are a sufficient basis to determine the merits of the complainants "increased imports" claims. Accordingly, we deny the complainants' request.

4.15 Paragraph 7.71

4.29. Indonesia requests that this paragraph be modified to more accurately reflect its arguments relating to the meaning of the words "relative terms" in Article 4.2(a) of the Agreement on Safeguards and, in particular, to convey that Indonesia believes compliance with this provision does not require Members to examine increased imports in each and every case only relative to production.⁶³ The complainants ask that we deny Indonesia's request, arguing that Indonesia's request is inconsistent with its position in this proceeding.⁶⁴

4.30. We believe that the complainants may have misunderstood Indonesia's requested change. Indonesia has never suggested during the course of this proceeding that the expression "relative terms" in Article 4.2(a) could not include "domestic production". Rather, Indonesia views this expression as allowing the competent authority to compare the increase in imports of the subject product with a range of factors which may, *but need not necessarily*, include domestic production. We have decided to grant Indonesia's request and have reformulated its argument in paragraph 7.71 to reflect the requested change.

4.16 Paragraph 7.77

4.31. Indonesia requests that the fact that KPPI made a finding with respect to increased imports relative to domestic consumption be recorded in this paragraph.⁶⁵ The complainants have not specifically commented on Indonesia's request. We have made an appropriate change in accordance with Indonesia's request.

⁶⁰ Complainants' request for interim review, para. 2.43.

⁶¹ Complainants' request for interim review, para. 2.44.

⁶² Complainants' request for interim review, para. 2.45.

⁶³ Indonesia's request for interim review, paras. 27-30.

⁶⁴ Complainants' comments on Indonesia's request for interim review, paras. 2.32 and 2.33.

⁶⁵ Indonesia's request for interim review, paras. 31 and 32.

4.17 Paragraph 7.78

4.32. Indonesia requests that the observation about the petitioners' performance in the first sentence of this paragraph be rephrased using more neutral language. In addition, Indonesia asks that the reference to the 34% increase in national consumption be deleted from this paragraph as, in its view, it does not qualify as an indicator of the performance of the petitioners.⁶⁶ The complainants argue that Indonesia's first requested change is unjustified as the Panel is entitled to evaluate the facts and reflect that perspective in its findings.⁶⁷

4.33. We have reformulated the first sentence of paragraph 7.78 to grant Indonesia's first request, but have not accepted Indonesia's second requested change, in the light of the changes made to the first sentence of this paragraph.

4.18 Paragraph 7.80

4.34. Indonesia requests that the description of the relevant facts in paragraph 7.80 be modified to: (a) explain that the "trend" was determined using the LOGEST function, which Indonesia submits ensured that "KPPI was not comparing the number based on end-to-end points"; (b) clarify that the complainants' evidence (Exhibit TPKM/VNM-35) (BCI) is disputed by Indonesia; and (c) indicate as a relevant fact that the petitioners' highest market share between 2010 and 2012 remained lower than their market shares at the beginning of the POI in 2008 and 2009, and that the imports' market share continuously increased between 2008 and 2012 except in 2009.⁶⁸ The complainants request that we reject Indonesia's proposed changes, arguing that the Final Disclosure Report does not support a finding by the Panel that the "trends" measuring the performances of several serious injury indicators and calculated on the basis of the LOGEST function do not result from a mere comparison of end points. As regards Indonesia's other requested changes, the complainants argue that the Panel required to neither discuss each and every factual element that is before it nor accept the same meaning and weighting of the evidence that is advanced by Indonesia.⁶⁹

4.35. We have modified the exposition of relevant facts in this paragraph to reflect Indonesia's third request. Our understanding of the relevance of the LOGEST function, as described by Indonesia during the course of the proceeding, is already described in footnote 158 and, therefore, does not need to be included in this paragraph. In addition, we do not find it necessary to specify in paragraph 7.80 that Indonesia disputes Exhibit TPKM/VNM-35 (BCI), as this is already apparent from paragraph 7.81.

4.19 Paragraph 7.81

4.36. Indonesia requests that the statement in the last sentence of paragraph 7.81 be deleted and replaced with a different formulation because it represents a conclusion in relation to the information presented in Exhibit TPKM/VNM-35 (BCI), which Indonesia disputes. Moreover, Indonesia notes that it was "never requested [by the Panel] to disclose all actual figures concerning injury indicators during the course of [the] proceeding".⁷⁰ The complainants request that Indonesia's request be denied, arguing that the figures listed in Exhibit TPKM/VNM-35 (BCI) accurately match the figures that must have supported the calculation of the indexed numbers relied upon by KPPI in its Final Disclosure Report, and that the Panel was empowered to treat the content of Exhibit TPKM/VNM-35 (BCI) as a relevant and objective fact.⁷¹

4.37. During the course of the proceeding, Indonesia was asked whether it accepted the calculations set out in Exhibit TPKM/VNM-35 (BCI), and if not, to explain why not.⁷² Indonesia was also given the opportunity to comment on the complainants' explanation of the methodology used to derive the information contained in Exhibit TPKM/VNM-35 (BCI).⁷³ However, Indonesia's

⁶⁶ Indonesia's request for interim review, paras. 33 and 34.

⁶⁷ Complainants' comments on Indonesia's request for interim review, para. 2.34.

⁶⁸ Indonesia's request for interim review, paras. 35-37.

⁶⁹ Complainants' comments on Indonesia's request for interim review, paras. 2.35 and 2.36.

⁷⁰ Indonesia's request for interim review, paras. 38-40.

⁷¹ Complainants' comments on Indonesia's request for interim review, paras. 2.37 and 2.38.

⁷² Panel question No. 64.

⁷³ Panel question No. 69.

submissions in reply merely asserted, *without referring to any evidence*, that the data underlying KPPI's analysis was different from the data used to make the calculations in Exhibit TPKM/VNM-35 (BCI). Thus, although Indonesia was not explicitly requested to disclose all actual figures used in KPPI's determination, Indonesia could clearly have substantiated its rejection of the complainants' calculations by disclosing such information. However, Indonesia did not do so, and did not otherwise substantiate its position. In this circumstance, we believe that the conclusion we have made in paragraph 7.81 is justified and appropriate for the purpose of this particular section of our report. Accordingly, we deny Indonesia's request.

4.20 Paragraph 7.84

4.38. Indonesia requests that the last two sentences of paragraph 7.84 be deleted, as they amount to the expression of a "perception" held by the Panel in relation to a disputed fact.⁷⁴ The complainants submit that Indonesia's request should be denied, arguing that the Panel's observation that the Final Disclosure Report contains no finding on the imminence of serious injury qualifies as a relevant factual finding that the Panel was empowered to make.⁷⁵ Separately, the complainants request that we make a finding on whether KPPI's determination was consistent with Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), and 4.2(c) of the Agreement on Safeguards or, at the very least, on whether KPPI provided a reasoned and adequate explanation of the threat of serious injury to the domestic industry.⁷⁶

4.39. The statements in paragraph 7.84 concerning the extent to which KPPI addressed the imminence of serious injury reflect our objective assessment of KPPI's analysis, as set out in the Final Disclosure Report. We consider these statements shed light on facts that are relevant to the evaluation of the consistency of KPPI's investigation with Indonesia's obligations under the Agreement on Safeguards. Accordingly, we deny Indonesia's request.

4.40. Turning to the complainants' separate request for review, we recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Accordingly, we deny the complainants' request in this respect.

4.21 Paragraph 7.93

4.41. The complainants request that the reference to "2010 and 2011" in this paragraph be replaced by "2008 and 2009" to correctly reflect the underlying facts.⁷⁷ Indonesia has not specifically commented on the complainants' request. We have made the requested change.

4.22 Paragraph 7.98

4.42. The complainants request that we amend the characterization of their argument concerning KPPI's assessment of installed capacity to more accurately reflect its submission.⁷⁸ Indonesia has not specifically commented on the complainants' request. We have made the requested change.

4.23 Paragraph 7.101

4.43. Indonesia requests that the words "in five sentences" contained in the first sentence of paragraph 7.101 be replaced with "in paragraph 60 – 63".⁷⁹ The complainants request that Indonesia's request be denied or, alternatively, that the following formulation be used instead: "in five sentences contained in paragraphs 60 to 63".⁸⁰

4.44. We have substituted "in five sentences contained in paragraphs 60 to 63" for "in five sentences" in response to this request.

⁷⁴ Indonesia's request for interim review, paras. 41-43.

⁷⁵ Complainants' comments on Indonesia's request for interim review, paras. 2.39 and 2.40.

⁷⁶ Complainants' request for interim review, para. 2.48.

⁷⁷ Complainants' request for interim review, para. 2.50.

⁷⁸ Complainants' request for interim review, para. 2.51.

⁷⁹ Indonesia's request for interim review, paras. 44-46.

⁸⁰ Complainants' comments on Indonesia's request for interim review, para. 2.41.

4.24 Paragraph 7.102

4.45. Indonesia requests that the description of the relevant facts presented in paragraph 7.102 be modified to: (a) explain that the LOGEST function used to derive the data analysed by KPPI ensured that KPPI was not making end-point to end-point comparisons; and (b) indicate that the petitioners' highest market share between 2010 and 2012 remained lower than their market shares at the beginning of the POI in 2008 and 2009, and that the market share held by imports continuously increased between 2008 and 2012 except in 2009.⁸¹ The complainants submit that Indonesia's requests should be denied, arguing that the Final Disclosure Report does not support a finding that the "trends" based on the LOGEST function necessarily lead to the conclusion that KPPI's analysis did not involve a mere comparison of end points. As regards Indonesia's second requested change, the complainants consider that this constitutes a request to introduce factual findings that were not considered relevant by the Panel and that it should, accordingly, be rejected.⁸² Separately, the complainants request that the Panel make a finding on whether "the data and facts assessed in these proceedings support KPPI's conclusion that the petitioners' market share decreased because it was absorbed by the market share of imports".⁸³

4.46. We have modified the exposition of relevant facts in this paragraph to account for Indonesia's second request. Our understanding of the relevance of the LOGEST function, as explained by Indonesia during the course of the proceeding, is already described in footnote 158 and, therefore, does not need to be included in this paragraph. As regards the complainants' specific request to make findings with respect to the extent to which the data and facts substantiate KPPI's determination, we recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Moreover, in our view, the facts described in paragraphs 7.101 to 7.103 are a sufficient basis to determine the merits of the complainants' "causation" claims. Accordingly, we deny the complainants' request.

4.25 Paragraph 7.103

4.47. The complainants request that we make findings on whether KPPI's determination is consistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards or, at the very least, on whether KPPI provided a reasoned and adequate explanation of the causal relationship between the alleged increase in imports and the threat of serious injury to the domestic industry.⁸⁴

4.48. We recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the final report and elsewhere in our disposition of the parties' interim review requests. Accordingly, we deny the complainants' request.

4.26 Paragraph 7.105

4.49. The complainants maintain that the description of their arguments contained in this paragraph misrepresents the submissions made during the course of this proceeding, with respect to the different legal bases the complainants' rely upon to make out their claims. The complainants request that this paragraph be amended to more accurately reflect their arguments.⁸⁵ Indonesia has not specifically commented on the complainants' request. We have revised the summary of the complainants' arguments in paragraphs 7.104 and 7.105 in the light of the complainants' own summary of their arguments as set out in their request for interim review.

4.27 Paragraph 7.110

4.50. The complainants argue that, as currently drafted, paragraph 7.110 could be interpreted to suggest that the lack of availability of import data relating to the narrower product type precluded KPPI from undertaking a segregated analysis of the types of the subject product whose thickness does not exceed 1.2mm and those types whose thickness does not exceed 0.7mm. According to

⁸¹ Indonesia's request for interim review, paras. 47-49.

⁸² Complainants' comments on Indonesia's request for interim review, paras. 2.42 and 2.43.

⁸³ Complainants' request for interim review, para. 2.52.

⁸⁴ Complainants' request for interim review, para. 2.53.

⁸⁵ Complainants' request for interim review, paras. 2.54-2.58.

the complainants, Indonesia confirmed that it possessed relevant injury data with respect to the narrower product types with a thickness not exceeding 0.7 mm. The complainants request that this fact be reflected in paragraph 7.110.⁸⁶

4.51. The complainants furthermore request that paragraph 7.110 refer to the fact that KPPI did not undertake a segregated analysis of the models of the subject product with thickness not exceeding 1.2 mm and thickness not exceeding 0.7 mm.⁸⁷ Finally, the complainants also request that we make findings on the merits of their claims under the Agreement on Safeguards or, at a minimum, that we find whether, in the light of the record, a segregated analysis of injury caused by the narrower product types was practically feasible.⁸⁸ Indonesia did not specifically respond to the complainants' requests.

4.52. We do not believe that the current formulation of paragraph 7.110 conveys the conclusion that the complainants are deriving from the observation regarding the lack of availability of import data relating to the narrower product types. Accordingly, we deny the complainants' request to modify paragraph 7.110 so as to reflect the fact that Indonesia possessed relevant injury data with respect to the narrower product types. However, we have decided to reflect in paragraph 7.109 the fact that KPPI's determination did not contain a segregated analysis of the narrower and broader product types. Finally, as regards the complainants' specific request to make findings on the merits of their claims, we recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Moreover, in our view, the facts now described in paragraphs 7.109 and 7.110 are a sufficient basis to determine the merits of the complainants' "parallelism" claims. Accordingly, we deny the complainants' request.

4.28 Paragraph 7.111

4.53. The complainants request that this paragraph be amended so as to more accurately reflect their relevant arguments.⁸⁹ Indonesia has not specifically commented on the complainants' request. We have replaced the text of paragraph 7.111 with all but the last sentence of the text proposed by the complainants in their interim review request. In our view, the argument set out in the last sentence of the text proposed by the complainants is already reflected in paragraph 7.113.

4.29 Paragraph 7.112

4.54. Indonesia requests that this paragraph be amended to more fully reflect its arguments.⁹⁰ The complainants have not specifically commented on Indonesia's request. We have made the requested modification.

4.55. The complainants separately request that we identify references for the statements made in the first and the second sentences of paragraph 7.112.⁹¹ Indonesia has not specifically commented on the complainants' request. We have inserted two new footnotes identifying the supporting references.

4.30 Paragraph 7.113

4.56. The complainants request that this paragraph be amended in two places to more fully reflect their arguments.⁹² Indonesia has not specifically commented on the complainants' request. We have modified paragraph 7.113 in the light of the textual additions proposed by the complainants in their request for interim review.

⁸⁶ Complainants' request for interim review, paras. 2.59-2.61.

⁸⁷ Complainants' request for interim review, para. 2.62.

⁸⁸ Complainants' request for interim review, para. 2.63.

⁸⁹ Complainants' request for interim review, para. 2.64.

⁹⁰ Indonesia's request for interim review, paras. 50-52.

⁹¹ Complainants' request for interim review, para. 2.65.

⁹² Complainants' request for interim review, paras. 2.66 and 2.67.

4.31 Paragraph 7.118

4.57. The complainants request that we delete the adverb "however", which contrasts the first sentence with the second sentence of paragraph 7.118.⁹³ Indonesia did not specifically comment on the complainants' request. We do not find it appropriate to make the requested change. In our view, it is clear from a comparison between the WTO panel reports in *Ukraine – Passenger Cars*, *Korea – Dairy*, and *US – Wheat Gluten* on the one hand and the Appellate Body report in *US – Wheat Gluten* on the other hand, that the three panels, unlike the Appellate Body, appear to have viewed Article 12.2 of the Agreement on Safeguards as placing a timeliness requirement on Members with respect to the obligation to provide the requisite pertinent information. Accordingly, we deny the complainants' request.

4.32 Paragraph 7.123

4.58. The complainants request that we make findings on whether Indonesia's notifications of 26 May 2014 and of 23 July 2014, separately and taken together, satisfy the requirements of Article 12.2 of the Agreement on Safeguards or, at a minimum, that we find whether the facts demonstrate that Indonesia's relevant notifications contain all pertinent information.⁹⁴

4.59. We recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Moreover, in our view, the facts described in paragraphs 7.119 to 7.123 are a sufficient basis to determine the merits of the complainants' "notification" claims. Accordingly, we deny the complainants' request.

4.33 Paragraphs 7.124-7.126

4.60. The complainants request that we elaborate further upon their arguments with respect to their claim under Article 12.3 of the Agreement on Safeguards.⁹⁵ Indonesia did not specifically comment on the complainants' request. We have added one sentence to the end of paragraph 7.124, reflecting the first sentence of the text the complainants proposed could be inserted into this part of the report.

4.34 Paragraph 7.125

4.61. The complainants request that the correct legal basis for their claims be inserted into this paragraph and that footnote 254 be amended so that it better supports the fifth sentence of paragraph 7.125.⁹⁶ Indonesia did not specifically comment on the complainants' request. We have made the requested changes.

4.35 Paragraph 7.133

4.62. The complainants request that we add two sentences to this paragraph in order to fully reflect the alleged facts pertaining to the conduct of the investigation.⁹⁷ Indonesia did not specifically comment on the complainants' request. We have made the first of the two proposed changes, but not the second, which is not supported by Exhibit TPKM/VNM-16, upon which the complainants' rely.

4.36 Paragraph 7.136

4.63. The complainants request that this paragraph be amended to reflect the fact that one of the reasons Viet Nam identified for not being able to attend the consultations meeting in Indonesia was because they had been given "such short notice".⁹⁸ Indonesia did not specifically comment on the complainants' request. We have made the requested modification.

⁹³ Complainants' request for interim review, para. 2.69.

⁹⁴ Complainants' request for interim review, para. 2.70.

⁹⁵ Complainants' request for interim review, paras. 2.71 and 2.72.

⁹⁶ Complainants' request for interim review, paras. 2.73-2.76.

⁹⁷ Complainants' request for interim review, para. 2.77.

⁹⁸ Complainants' request for interim review, paras. 2.78 and 2.79.

4.37 Paragraph 7.140

4.64. The complainants request that this paragraph be amended to identify the date on which Chinese Taipei reminded KPPI of its "pre-consultations" obligations under Article 12.3.⁹⁹ Indonesia did not specifically comment on the complainants' request. We have made the requested modification.

4.38 Paragraph 7.141

4.65. The complainants request that this paragraph be amended to identify the entire legal bases of their claims. In addition, the complainants request that we make a finding on whether Indonesia provided an adequate opportunity for prior consultations within the meaning of Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards or, at a minimum, that we make a finding on whether the facts demonstrate that Indonesia provided an adequate opportunity for prior consultations.¹⁰⁰ Indonesia did not specifically comment on the complainants' request. We have made the requested modification.

4.66. We have made the first requested change. As regards the complainants' specific request to make findings on the merits of their claims, we recall that we have decided not to make alternative findings in this dispute, and have explained our reasons for not doing so in the Final Report and elsewhere in our disposition of the parties' interim review requests. Moreover, in our view, the facts described in paragraphs 7.133 to 7.141 are a sufficient basis to determine the merits of the complainants' "consultation" claims. Accordingly, we deny the complainants' request.

4.39 Paragraph 8.2

4.67. The complainants request that we state in our conclusions and recommendations that, in the light of our finding that the specific duty is not a safeguard measure, there is no legal basis under the Agreement on Safeguards to support the continued application of the specific duty as an extended safeguard measure.¹⁰¹ Indonesia did not specifically comment on the complainants' request. We consider that it is not necessary to make the requested finding, as it is already evident from our report that a measure that is not a safeguard measure does not fall within the scope of the rights and disciplines set out in the Agreement on Safeguards, which include, of course, the right to extend a safeguard measure.

4.40 Paragraph 8.4

4.68. The complainants request, on the assumption that we reconsider our findings and determine that the specific duty *is* a safeguard measure, that we reassess our decision not to make a suggestion about how Indonesia may bring its WTO-inconsistent safeguard measure into conformity with its obligations.¹⁰² Having decided not to reconsider our findings concerning the legal characterization of the specific duty, we deny the complainants' request.

⁹⁹ Complainants' request for interim review, para. 2.80.

¹⁰⁰ Complainants' request for interim review, paras. 2.81 and 2.82.

¹⁰¹ Complainants' request for interim review, para. 2.83.

¹⁰² Complainants' request for interim review, para. 2.84.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE COMPLAINANTS

1 INTRODUCTION

1.1. This integrated executive summary contains the arguments presented by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) and the Socialist Republic of Viet Nam (Viet Nam) (hereinafter the complainants) in their written submissions, oral statements, responses to questions and comments thereto.

1.2. The complainants challenge three measures by Indonesia that are inconsistent with Article XIX of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Safeguards.

1.3. First, the complainants consider that Indonesia's safeguard measure, which takes the form of a specific duty, is inconsistent with Article XIX:1(a) of the GATT 1994, and Articles 2.1, 3.1, last sentence, 4.1(a), 4.1(b), 4.2(a), 4.2(b) and 4.2(c) of the Agreement on Safeguards. There is no disagreement among the parties that this measure is a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, and that it must therefore be subject to the disciplines of Article XIX of the GATT 1994 and the Agreement on Safeguards. In any event, the specific duty is applied inconsistently with Article I:1 of the GATT 1994, and cannot be justified under Article 9.1 of the Agreement on Safeguards.

1.4. Second, Indonesia's notification to the WTO Committee on Safeguards of certain required information prior to the imposition of the safeguard measure is inconsistent with Article 12.2 of the Agreement on Safeguards.

1.5. Third, Indonesia failed to provide WTO Members with adequate opportunity for consultations prior to the imposition of the safeguard measure, contrary to Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards.

1.6. The complainants request that the Panel recommend Indonesia to bring its measures into conformity with WTO law. Given the nature and number of the violations at issue, and the fact that Indonesia's competent authority, Komite Pengamanan Perdagangan Indonesia (KPPI), initiated on 18 January 2017 an investigation regarding a possible extension of the safeguard measure at issue, the complainants request the Panel to suggest that Indonesia withdraws the safeguard measure at issue, pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2 LEGAL ARGUMENTS

2.1 Indonesia's safeguard measure is a "safeguard measure" within the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards

2.1. The complainants submit that the specific duty is a safeguard measure within the meaning of Article XIX of the GATT 1994 and Article 1 of the Agreement on Safeguards. Indonesia has indicated that it has "unbound" commitments with respect to the products at issue.¹ The complainants consider, however, that this fact does not change the characterization of the measure as a safeguard measure. Indonesia agrees with the complainants that the measure at issue is, indeed, a safeguard measure and the fact that it has "unbound" commitments with respect to the subject products should not affect the nature of the measure.²

2.2. With respect to the definitional elements of a safeguard measure, the complainants are of the view that a safeguard measure must consist of (i) a suspension, withdrawal, or modification of a

¹ Indonesia's rebuttal submission, paras. 40-41.

² Indonesia's rebuttal submission, para. 41.

GATT obligation ("the nature of the measure") that is (ii) taken under the scope of Article XIX and the Agreement on Safeguards, with a view to remedying (or preventing) a situation of serious injury caused or threatened by an increase in imports ("the objective of the measure").³

2.3. The complainants consider that what determines whether a measure is a safeguard measure must be distinguished from whether a safeguard measure meets the requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards to be a valid safeguard. If a measure does not fulfil the definitional elements of a safeguard measure, the measure is simply not a safeguard measure and, thus, Article XIX and the Agreement on Safeguards do not apply to that measure. However, the fact that a safeguard measure does not fulfil the requirements of Article XIX and the Agreement on Safeguards does not change the nature of the measure as a safeguard.⁴

2.4. Turning to the obligations that may be suspended when applying a safeguard measure, the complainants agree with the panel's interpretation in *Dominican Republic – Safeguard Measures* that there is a parallelism between the words "obligation" and "concession" in the first part of Article XIX:1(a) and "obligations" and "concessions" in the last part of that provision.⁵ This means that a Member that applies a safeguard measure must suspend the obligation or withdraw or modify the concession that has resulted in the increase in imports.⁶

2.5. Moreover, in the complainants' view, the suspension of *any GATT obligation* made under the scope of Article XIX of the GATT 1994 and following the procedures laid out in the Agreement on Safeguards would always amount to a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. The most commonly cited examples of those obligations are those set out in Articles II and XI of the GATT 1994. However, the panel in *Dominican Republic – Safeguard Measures* found that the safeguard measure at issue consisted of the suspension of the Dominican Republic's obligation under Article I:1 of the GATT 1994.⁷

2.6. To be clear, the complainants do not argue that *any suspension, withdrawal, or modification* of a GATT obligation or concession amounts to a "safeguard measure" within the meaning of Article 1.1 of the Agreement on Safeguards and Article XIX of the GATT 1994. However, *any measure* that consists of a suspension, withdrawal, or modification of a GATT obligation, taken with a purpose of remedying or preventing serious injury caused or threatened by an increase in imports, must be considered a safeguard measure. Additional evidence indicating that a measure is a safeguard measure is whether it has been implemented within the scope of Article XIX and the Agreement on Safeguards, including the conduct of a "safeguard" investigation and 'the relevant notifications to the Committee on Safeguards under Article 12 of the Agreement on Safeguards'.⁸

2.7. In the present dispute, the complainants note that Indonesia's measure falls squarely within the above definition of a safeguard measure. It is a specific safeguard duty on the subject products that is applied in addition to Indonesia's applied FTA tariff rates and the current 20% MFN tariff rate.⁹ The measure is applied on the imports of the subject product that originate in some countries and is not applied on "like" imports of other origins. Therefore, the complainants observe that Indonesia's measure constitutes a suspension of Article I:1 of the GATT 1994. This suspension was taken to remedy a situation of alleged threat of serious injury to its domestic industry. Furthermore, Indonesia applied the measure pursuant to an investigation initiated, conducted, and notified to the Committee of Safeguards under the auspices of Article XIX of the GATT 1994 and the Agreement on Safeguards.¹⁰

2.8. The complainants note that during the last stages of the panel proceedings, Indonesia seemed to suggest that it is its obligation under Article XXIV of the GATT 1994 that resulted in the increase in imports, instead of its MFN obligation.¹¹ However, Article XXIV does not *impose an obligation* on

³ Complainants' response to Panel's question 49.

⁴ Complainants' response to Panel's question 49.

⁵ Complainants' response to Panel's question 47.

⁶ Complainants' response to Panel's question 48.

⁷ Complainants' response to Panel's question 49.

⁸ Complainants' response to Panel's question 49.

⁹ The complainants have presented evidence indicating that as from 30 May 2015, Indonesia has increased its applied tariff rate from 12.5% to 20% with respect to the subject product. Complainants' comments on Indonesia's responses to the Panel's question 53.

¹⁰ Complainants' response to Panel's question 49.

¹¹ Indonesia's responses to the Panel's questions 47 and 48.

Indonesia either to enter into free-trade agreements or to provide a certain level of market access to its FTA partners. Instead, it *permits* Indonesia to do so. Therefore, the complainants submit that Article XXIV cannot be considered an "obligation" that led to an increase in imports.¹² Moreover, Indonesia cannot submit an *ex-post* explanation to attempt to make up for the deficiencies and lack of reasoned and adequate explanation in KPPI's Final Disclosure Report.¹³

2.9. In addition, Indonesia argues that should the Panel consider that this measure is not a safeguard measure, it should reject the complainants' arguments since Indonesia is free to increase its tariffs with respect to the subject products, without any obligation to comply with the safeguards disciplines under WTO law.¹⁴ The complainants have provided the above reasons, including the fact that Indonesia itself does not dispute the characterization of this measure, indicating that Indonesia's measure is a safeguard measure and should be assessed under Article XIX of the GATT 1994 and the Agreement on Safeguards. In any event, the complainants argue that if the Panel were to consider Indonesia's measure *not* to be a safeguard measure, Indonesia has applied its measure in a manner that is inconsistent with Article I:1 of the GATT 1994, as it excludes certain countries from the application of the measure.¹⁵

2.10. In the light of the foregoing, the complainants submit that the measure at issue is a safeguard measure that should be assessed under Article XIX of the GATT 1994 and the Agreement on Safeguards.

2.2 The effects of GATT obligations / unforeseen developments

2.2.1 Indonesia has failed to indicate which GATT obligations, including tariff concessions, resulted in an increase in imports

2.11. Notwithstanding the characterization of the measure at issue, the complainants consider that Indonesia applied a safeguard measure inconsistently with the requirements of Article XIX:1(a) of the GATT 1994. In particular, KPPI failed to identify the specific obligation in its Final Disclosure Report and also failed to explain how this obligation would have led to the alleged increase in imports that threatened to cause serious injury to its domestic industry.¹⁶ The complainants consider that the Panel should follow the precedent established by the panel in *Dominican Republic – Safeguard Measures*. In that case, the panel found that the investigating authority did not identify these obligations "in its report" and did not explain how they resulted in the increase in imports that led to serious injury in respect of its domestic industry. Thus, "it [was] not possible to conclude that the report of the competent authority contain[ed] a reasoned and adequate explanation" as to how the Dominican Republic incurred GATT obligations within the meaning of Article XIX:1(a) of the GATT 1994.¹⁷

2.2.2 Indonesia has failed to explain how KPPI provided a reasoned and adequate explanation of the unforeseen developments concerned and how they resulted in an increase in imports

2.12. The complainants consider that KPPI's determination of the unforeseen developments is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.¹⁸

2.13. The complainants have argued that KPPI has failed to provide a reasoned and adequate explanation of what the unforeseen developments were; why they were unforeseen; and how they resulted in the increase in imports of the specific products that threatened to cause serious injury to its domestic industry.

¹² Complainants' comments on Indonesia's responses to the Panel's questions 47 and 48.

¹³ Complainants' comments on Indonesia's responses to the Panel's questions 47 and 48.

¹⁴ Indonesia's rebuttal submission, para. 41.

¹⁵ Complainants' first written submission, paras. 5.142-5.150.

¹⁶ Complainants' response to Panel's question 47; Complainants' first written submission, para. 5.28.

¹⁷ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.148-7.149.

¹⁸ Complainants' first written submission, paras. 5.15-5.33.

2.14. Indonesia has agreed that KPPI was obliged "to provide an explanation as to how the unforeseen development[s] could lead to increased imports".¹⁹ However, Indonesia argued that KPPI was required to provide an explanation "as simple as bringing two sets of facts together", and that the length of KPPI's explanation is not a factor that should be considered by the Panel.²⁰ The complainants have demonstrated that the factual assertions made by KPPI in its discussion on unforeseen developments in the Final Disclosure Report were multiple, implied complex economic reasoning, and required much more explanation than just "bringing two sets of facts together".²¹

2.15. The complainants explained that Indonesia relies on a statement made by the panel in *US – Steel Safeguards*²² that does not reflect the well-established standard followed by the Appellate Body and other panels. In fact, even in *US – Steel Safeguards*, the panel characterised the discussion on unforeseen developments, which in that case (like the present one) involved macroeconomic events of a high complexity, as one that would "require *much more* detailed analysis in order to make clear the relationship that exists between the unforeseen developments and the increased imports that are causing or threatening to cause serious injury".²³

2.16. Furthermore, the complainants have argued that KPPI failed to explain the "logical connection" between the alleged unforeseen developments and the effects of Indonesia's GATT obligations and the increase in imports.²⁴ In fact, in its Final Disclosure Report, KPPI concluded that the *surge of imports* during [the] period of investigation as mentioned in Chapter C.2 is considered as [an] *unforeseen development*.

2.17. Indonesia acknowledged KPPI's erroneous conclusion in its Final Disclosure Report²⁵ but requested the Panel not to be "fixated only on the conclusion itself". Rather, the Panel should "look to the context of the case".²⁶ On this basis alone, the complainants have argued that the Panel could conclude that KPPI did not adequately demonstrate a logical connection between the unforeseen developments and the increase in imports and, consequently, find that Indonesia's safeguard measure is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards. Even if the Panel could grant Indonesia its request, given the brevity of KPPI's explanation on "unforeseen developments", it is unclear to which further "context" the Panel could look.

2.18. The complainants also note that the Appellate Body has unambiguously explained that, when an investigating authority relies on a macroeconomic event, it is obliged to provide a "logical connection" between the unforeseen developments and the alleged increase in imports. Indeed, it is not for the panel to read into the report linkages that the investigating authority failed to make.²⁷

2.19. Indonesia has alleged that KPPI provided the necessary explanation and data in its Final Disclosure Report indicating the effects of the 2008 global financial crisis in the Indonesian economy, including the alleged increase in imports. The complainants note that the data relied upon by Indonesia are in other parts of the Final Disclosure Report; are not referred to in its explanation relating to unforeseen developments; and in fact, contradict the claim made by Indonesia that the 2008 global financial crisis did not have an adverse effect on Indonesian imports and demand of the products at issue. The complainants have demonstrated that the data in tables 7 and 8 of the Final Disclosure Report indicate that domestic consumption and imports of the subject product in Indonesia declined in 2008-2009. It therefore appears that the unforeseen developments and increase in imports are merely coincidental.

2.20. In an attempt to compensate for the shortcomings of KPPI's explanation in the Final Disclosure Report, Indonesia has provided further data in the Panel proceedings to demonstrate its

¹⁹ Indonesia's first written submission, paras. 53.

²⁰ Indonesia's first written submission, para. 53; Indonesia's response to Panel's question 8, paras. 11-12.

²¹ Complainants' rebuttal submission, para. 2.9.

²² Panel Report, *US – Steel Safeguards*, para. 10.115.

²³ Panel Report, *US – Steel Safeguards* para. 10.115. (emphasis added)

²⁴ Complainants' first written submission, para. 5.27; complainants' rebuttal submission, para. 2.9; Complainants' response to Panel's question 55.

²⁵ Indonesia's first written submission, para. 64.

²⁶ Indonesia's first written submission, para. 64.

²⁷ Appellate Body Report, *US – Steel Safeguards*, para. 322.

economic growth during the period of investigation (POI).²⁸ The complainants consider that these data cannot be taken into account by the Panel as they constitute an *ex-post* explanation.

2.21. Indonesia has alleged that KPPI was not obliged to explain why Indonesia's purchasing power remained high during the 2008 global financial crisis, nor the occurrence of the 2008 global financial crisis.²⁹ The complainants note that, pursuant to the last sentence of Article 3.1 of the Agreement on Safeguards, KPPI was obliged to show that every pertinent fact upon which it relied for its determination was properly addressed and explained in the Final Disclosure Report. Further, the panel in *Argentina – Preserved Peaches* concluded that "as a minimum, some discussion should be done by the competent authorities as to *why* they were unforeseen at the appropriate time, and *why* conditions in the second clause of Article XIX:1(a) occurred 'as a result' of circumstances in the first clause".³⁰

2.2.3 Conclusion

2.22. In the light of the foregoing, KPPI's determination of unforeseen developments and the effect of GATT obligations is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

2.3 Increased imports

2.23. KPPI's determination of increased imports is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1 (and for Viet Nam also Articles 4.2(a) and 4.2(c)) of the Agreement on Safeguards because KPPI failed to provide a reasoned and adequate explanation of why the increase in imports was "recent enough".³¹

2.24. The Agreement on Safeguards does not specify explicitly the maximum permissible time gap between the end of the POI and the date of the determination of injury or threat thereof and the imposition of the final measure. Nevertheless, the discretion of the competent authority as to the length of these gaps is not unfettered. First, the analysis of increased imports must be based on the increase that is "*recent enough*", as has been confirmed in a consistent line of the decisions of the Appellate Body and previous panels. Second, more generally, the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 require Members to apply a safeguard measure exclusively as a response to an *emergency*, and subject to conditions set out in Article XIX and the Agreement on Safeguards. An excessively long gap between a POI and the determination of injury or threat thereof and the imposition of the final measure casts doubt on the urgency of the situation. The Appellate Body and previous panels have attached particular importance to developments in the most recent portions of a POI, in particular in determinations of threat of serious injury.³²

2.25. The Agreement on Safeguards does not establish an absolute standard of how recent the increase must be. Thus, the reasonableness of a time gap between the end of a POI and the serious injury determination or the imposition of the safeguard measure must necessarily depend on the specific circumstances of each investigation. These circumstances may include, among others: the availability of data, the manner in which imports behave and fluctuate during the POI, market conditions within the importing Member, and external macroeconomic factors that might be relevant to the case. In light of these circumstances, one may evaluate whether the data on increased imports serve as a reasonable proxy for current imports. As in any trade remedy dispute, this evaluation must be based on the investigating authority's explanation of its relevant determination. Furthermore, it must take into account the exceptional nature of a safeguard remedy.³³

2.26. To be clear, the complainants do not suggest that there may not be any time gap between the end of the POI and the determination of injury or the imposition of the safeguard. On the

²⁸ Indonesia's response to Panel's question 9, para. 17.

²⁹ Indonesia's first written submission, para. 56.

³⁰ Panel Report, *Argentina – Preserved Peaches*, para. 7.23. (emphasis added)

³¹ Complainants' first written submission, paras. 5.35, 5.36; complainants' rebuttal submission, para. 2.30.

³² Complainants' first written submission, paras. 5.40-5.44.

³³ Complainants' rebuttal submission, paras. 2.35, 2.36; complainants' opening statement at the first meeting of the Panel with the parties, para. 3.2.

contrary, there will ordinarily be some reasonable time gap to allow the investigating authority to analyse the data that it already collected and to complete its investigation. However, where additional data become available in sufficient time to be taken fully into account, they must be considered in the investigation.³⁴

2.27. In light of the specific circumstances of the investigation at issue, the complainants submit that a time gap of 9 months (instead of 15 months) between the end of the POI and the issuance of KPPI's Final Disclosure Report (i.e. final determination) would have been reasonable because of the following facts:

- a. During the investigation, the data on imports were available with a time lag of a maximum of six months;
- b. Indonesia's first written submission makes clear that as of 12 December 2013, KPPI had an active exchange of information with the petitioners on their "production process, labour and production target"; and, on 8 January 2014, KPPI "assessed the petitioners' structural adjustment". As the investigation was still underway at that time, and KPPI was effectively engaged in collecting industry data, it was in a position to extend the POI ending in December 2012, and to collect further data on the increase in imports for, at least, the first half of 2013. This means that the gap between the end of the POI in mid-2013 and the issuance of the Final Disclosure Report in March 2014 would have been 9 months;
- c. In its question 57, the Panel asked Indonesia whether the official data on the volume of imports of the subject product for the first six months of 2013 were available for KPPI by the end of 2013 or, at the very least, before the issuance of KPPI's Final Disclosure Report. Given that Indonesia did not answer this specific question, it would be appropriate for the Panel to infer that the official data on the volume of imports of the subject product for the first six months of 2013 were indeed available to KPPI by the end of 2013 at least; and
- d. The complainants had neither an obligation under Article XIX of the GATT 1994 or the Agreement on Safeguards, nor an actual procedural opportunity to request KPPI to update the data. Until the period almost immediately preceding Indonesia's notification of KPPI's threat of serious injury determination in May 2014, the complainants and their exporters were kept in the dark regarding any further developments in this investigation.³⁵

2.28. Despite these facts, the relevant time gaps in the investigation at issue are as follows:

- a. The gap between the end of the POI and the issuance of KPPI's Final Disclosure Report is 15 months;
- b. The gap between the end of the POI and Indonesia's notification under Article 12.1(b) is 17 months; and
- c. The gap between the end of the POI and the imposition of the safeguard measure is 19 months.

2.29. Given the length of these time gaps, the Final Disclosure Report should have, but did not, include a reasoned and adequate explanation as to why more recent data (i.e. the data for the first half of 2013) could not be used, and why the data used provided "a reasonable indication of current trends".³⁶

2.30. KPPI failed, however, to provide such an explanation. Indeed, Indonesia itself acknowledged that the time gaps were abnormal when it referred to several bureaucratic reasons that allegedly

³⁴ Complainants' response to Panel's question 61.

³⁵ Complainants' rebuttal submission, paras. 2.37-3.38; complainants' response to Panel's question 11; complainants' comments on Indonesia's response to Panel's question 57.

³⁶ Complainants' rebuttal submission, paras. 2.39-2.40 (citing Appellate Body Report, *US – Tyres (China)*, para. 147).

delayed the issuance of the Final Disclosure Report, such as a change of KPPI's Chairperson and the Minister of Trade.³⁷

2.31. In order to remedy the shortcomings in the First Disclosure Report, during the first substantive meeting of the Panel, Indonesia submitted a table showing that imports of the subject product continued to increase in 2013 (by approximately 30 per cent) from the levels of 2011 and 2012. However, the standard governing the Panel's review of KPPI's analysis limits it to examine only KPPI's explanation of the facts in the Final Disclosure Report and not information that was not assessed by KPPI. Moreover, as explained in the complainants' response to Panel's question 13, the complainants' claim has a systemic feature that goes beyond specific facts.³⁸

2.32. Indonesia further alleges that the analysis of the additional data was not feasible as the assessment of injury is dependent on the availability of audited financial statements of the domestic industry – these statements are only available on an annual basis. Therefore, because it was not possible to conduct the injury analysis on a semi-annual basis, it was also not possible to assess the increase in imports on that basis. The complainants demonstrated that this is an unsubstantiated *ex-post* explanation, which moreover contradicts the evidence before the Panel.³⁹

2.33. Indonesia relies erroneously on the alleged similarity between the relevant time gaps in the present dispute and in *Ukraine – Passenger Cars* (i.e. 15 and 16 months respectively) to support its view that a 16-month time gap is WTO-consistent. However, the facts in *Ukraine – Passenger Cars* and the present dispute can be distinguished. In that case, the panel found that Japan had not put forward specific arguments to suggest that the investigation took longer than needed. It also highlighted the fact that "the competent authorities were actively engaged [with Japan] right up to the end of the investigation", and "published a notice specifically on the extension of the investigation".⁴⁰ In light of these facts taken together, the panel concluded that the 16-month time gap in that dispute was WTO-consistent, while emphasizing that it took this decision "in the particular circumstances of [that] case".⁴¹

2.34. In the present dispute, the circumstances are very different. The complainants have argued, and Indonesia has acknowledged, that the time gaps at issue were "abnormal" due to several bureaucratic factors that delayed the issuance of the Final Disclosure Report. KPPI had access to data on volume of imports for, at least, the first half of 2013, but were ignored. Indonesia did not issue any notice as to the possible delay and extension of the investigation. Nor did Indonesia engage actively with exporting countries in the course of the investigation. Thus, the Panel should reject Indonesia's approach to justify the abnormal time gaps at issue based on a similar absolute number of months, which is 16 months.⁴²

2.35. In addition, Indonesia quoted out of context a statement in the *Argentina – Footwear (EC)* panel report allegedly suggesting that an investigating authority does not have to continuously update the data in its investigation. The complainants, however, demonstrated that, in *Argentina – Footwear (EC)*, the panel faulted the Argentine authority for not expanding the POI to include more recent data. The panel's decision in that dispute is, therefore, in line with the complainants' arguments in this case. Contrary to Indonesia's argument, that decision does not suggest that the investigating authority is not required to update the data on the volume of imports and injury when more relevant or recent data exist, such as in the present dispute.⁴³

2.36. Finally, Indonesia alleged that the only provisions relevant to the complainants' claims on "increased imports" are Articles 2.1 and 4.2(a) of the Agreement on Safeguards, and Article XIX:1 of the GATT 1994, and the complainants failed to make their *prima facie* case with respect to their claims under Article 3.1 (last sentence) and Article 4.2(c) of the Agreement on Safeguards. In the complainants' view, however, there is a substantial overlap between the claims under the

³⁷ Complainants' opening statement at the first meeting of the Panel with the parties, para. 3.3.

³⁸ Complainants' rebuttal submission, para. 2.44.

³⁹ Complainants' comments on Indonesia's response to Panel's question 57, para. 1.30; complainants' response to Panel's question 60.

⁴⁰ Panel Report, *Ukraine – Passenger Cars*, paras. 7.175-7.176.

⁴¹ Panel Report, *Ukraine – Passenger Cars*, para. 7.177.

⁴² Complainants' opening statement at the second meeting of the Panel with the parties, paras. 3.6-3.8; Complainants' response to Panel's question 12.

⁴³ Complainants' response to Panel's question 60 (quoting Panel Report, *Argentina – Footwear (EC)*, paras. 8.213-8.215).

substantive provisions, such as Articles 2.1, 4.2(a) and Article XIX:1, and the claims under Articles 3.1 and 4.2(c). If an investigating authority fails to provide a proper explanation of its finding on increased imports, it will violate the afore-mentioned substantive obligations and also act inconsistently with the requirements of Article 3.1 (last sentence) and Article 4.2(c) of the Agreement on Safeguards. Pursuant to the latter provisions, investigating authorities must explain "all pertinent issues of fact and law" in a reasoned manner.⁴⁴

2.37. In the light of the foregoing, KPPI's determination of increased imports is inconsistent with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

2.4 Threat of serious injury

2.4.1 KPPI failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards

2.38. The complainants submit that Indonesia acted inconsistently with its obligations under 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 (i) failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards, i.e. the rate and amount of the increase in imports in relative terms and utilized capacity; and (ii) failed to provide a reasoned and adequate explanation of how the facts supported its serious injury determination. In addition, Viet Nam submits that KPPI's finding of threat of serious injury is inconsistent with the definition of "threat of serious injury" under Articles 4.1(a), 4.1(b) and 4.1(c) of the Agreement on Safeguards.⁴⁵

2.39. The complainants note that Table 4 of the Final Disclosure Report provides a summary of the rate and amount of the increase in imports of the subject product in absolute terms only. Article 4.2(a) of the Agreement on Safeguards contains express language requiring investigating authorities to evaluate "the rate and amount of the increase in imports of the product concerned in absolute and relative terms".⁴⁶

2.40. The complainants have explained that the term "relative" is defined as "[c]onsidered in relation or in proportion to something else", or more appropriately in the context of Article 4.2(a) as "[e]xisting or possessing a specified characteristic only in comparison to something else; not absolute." Therefore, the express language of Article 4.2(a) requires a comparison of imports with "something else".⁴⁷

2.41. The complainants submit that "something else" is domestic production. Indeed, a reading of Article 4.2(a) and Article 2.1 of the Agreement on Safeguards, indicates that the increase in imports "in relative terms" must relate to "*domestic production*", and not to "domestic consumption"⁴⁸, as Indonesia proposes. The European Union shares the complainants' view.⁴⁹ A comparison of imports with domestic consumption is already contemplated in Article 4.2(a) under the terms "the share of the domestic market taken by increased imports". Thus, Indonesia's approach would render redundant either the requirement to analyse the increased imports in relative terms or the requirement to assess the share of the domestic market taken by increased imports.⁵⁰

2.42. The complainants consider that there is no contradiction between the Article 2.1 and Article 4.2(a). Both refer to two different moments in the investigation process. On the one hand, Article 2.1 requires a demonstration of an increase in imports for the imposition of a safeguard measure, either absolute or relative to domestic production. On the other hand, to arrive at this demonstration, Article 4.2(a) requires an assessment of whether imports have increased in absolute and relative terms. In this case, the assessment of the increase in imports from the

⁴⁴ Complainants' response to Panel's question 14; complainants' rebuttal submission, paras. 2.33-2.34.

⁴⁵ Complainants' first written submission para, 5.57.

⁴⁶ Appellate Body Report, *Argentina – Footwear*, para. 129. See also, complainants' rebuttal submission para. 2.53.

⁴⁷ Complainants' response to Panel's question 18.

⁴⁸ Complainants' opening statement in the first meeting of the Panel with the parties, para. 4.2.

⁴⁹ EU's response to Panel's question 1, para. 4.

⁵⁰ Complainants' rebuttal submission, para. 2.54.

two perspectives is required.⁵¹ Australia⁵² and the United States⁵³ also agree that there is no contradiction between the requirements of Articles 2.1 and 4.2(a).

2.43. Moreover, the complainants consider Indonesia's argument that the increase in imports in relative terms to domestic consumption is not the same as the share of the market taken by imports unfounded. The distinction suggested by Indonesia is artificial and not supported by the text of Article 4.2(a) of the Agreement on Safeguards. This provision refers to the "share" of the market taken by imports, which must be understood as referring to the analysis of the absolute market share taken by imports. Article 4.2(a) does not refer to the relative increase in the market share of imports. This is, again, another new interpretation put forward by Indonesia in its attempt to justify KPPI's failure to conduct the required analysis under Article 4.2(a).⁵⁴

2.44. The fact remains, however, that what Indonesia considers as different factors are, in fact, the same. There is no meaningful difference between the analysis of the relative increase in imports against domestic consumption and the analysis of the market taken by imports. In any event, even if Indonesia's interpretation were to be considered, KPPI nevertheless did not provide an adequate explanation of "the share of the domestic market taken by increased imports" in the Final Disclosure Report.⁵⁵

2.45. Furthermore, the complainants note that, together with Article XIX of the GATT 1994, Article 2.1 of the Agreement on Safeguards accords Members the right to apply a safeguard measure subsequent to a determination that imports have increased absolutely or relative to domestic production.⁵⁶ The Appellate Body has emphasized the need for coherence between Articles 2.1 and 4.2 of the Agreement on Safeguards. In fact, it has stated that the conditions set out in Article 2.1 are further elaborated in Article 4.2.⁵⁷ Therefore, the phrase "increase in imports" in Articles 4.2(a) and 4.2(b) must be "read as referring to the same set of imports envisaged in Article 2.1".⁵⁸

2.46. KPPI did not include Bluescope's "captive capacity" reserved for pre-painted galvalume production as part of the analysis of the situation of the domestic industry.⁵⁹ The complainants note that bare galvalume was the product subject to KPPI's investigation and eventual safeguard measure. Contrary to Indonesia's assertions during the course of the current dispute,⁶⁰ the complainants have presented evidence indicating that bare galvalume is used in the production of painted galvalume.⁶¹ Accordingly, Bluescope requires bare galvalume (which Bluescope also produces) as an input in its production of painted galvalume. Hence, the two segments of production of bare galvalume are relevant for: (i) production for the merchant market and, (ii) production for the captive market. Hence, KPPI's statement that Bluescope does not consume its own bare galvalume for its own captive consumption⁶² is not supported by the facts.

2.47. In this case, however, the Final Disclosure Report contains no indication that KPPI conducted the serious injury analysis with respect to both segments of the domestic industry. Nor does it contain an explanation of why the analysis of the merchant market alone was representative of the overall industry, or how, despite the absence of an analysis of production for the captive market, the findings of KPPI still provided a reasoned and adequate explanation of the alleged serious injury that affected the domestic industry.⁶³

2.48. The complainants also note that the price of pre-painted galvalume is higher than that of bare galvalume. Therefore, producers, like Bluescope, that have the facilities to produce both products would opt to produce the higher value pre-painted galvalume. Since Bluescope sells both

⁵¹ Complainants' rebuttal submission para. 2.57.

⁵² Australia's response to Panel's question 1, para. 2.

⁵³ U.S. response to Panel's question 1, para. 4.

⁵⁴ Complainants' opening statement in the second meeting of the Panel with the parties, para. 4.4.

⁵⁵ Complainants' opening statement in the second meeting of the Panel with the parties, para. 4.5.

⁵⁶ Complainants' response to Panel question 26.

⁵⁷ Appellate Body Report, *US – Steel Safeguards*, paras. 449.

⁵⁸ Appellate Body Report, *US – Steel Safeguards*, paras. 450.

⁵⁹ Complainants' first oral statement para. 4.5.

⁶⁰ Indonesia's opening statement in the second meeting of the Panel with the parties, para. 45.

⁶¹ Complainants' response to Panel's question 70.

⁶² Indonesia's response to Panel question 24(ii), para. 46.

⁶³ Complainants' rebuttal submission, para. 2.63.

products, it is reasonable to conclude that decreased sales of bare galvalume are a result of its increase in sales of the downstream pre-painted galvalume.

2.4.2 KPPI failed to explain its finding of threat of serious injury in spite of indications of positive performance of the domestic industry

2.49. KPPI concluded that the domestic industry "suffered a threat of serious injury" based mainly on two factors: (i) a decrease in market share and (ii) a decrease in profits.⁶⁴ However, KPPI failed to explain its finding of threat of serious injury in spite of indications of positive performance of the domestic industry.

2.50. While it is true that "[a]n evaluation of each listed factor will not necessarily have to show that each such factor is declining",⁶⁵ the competent authority must provide a reasoned and adequate explanation of how those factors showing positive performance do not negate the finding of serious injury or threat thereof.⁶⁶ A comprehensive and holistic analysis of all relevant factors is therefore required.⁶⁷

2.51. With respect to the decrease in market share, KPPI made findings based on tables 5, 6, and 7.⁶⁸ Its conclusion that during the POI, the market share of imports increased by 6 per cent, while the petitioner's market share decreased by 4 per cent⁶⁹ is not enough to explain adequately "the share of the domestic market taken by increased imports" as contemplated by Article 4.2(a). KPPI analysed this injury indicator based solely on a comparison of ending points of the POI.⁷⁰ The Appellate Body stated that "the competent authorities are required to consider the trends in imports over the POI (rather than just comparing the end points) under Article 4.2(a)."⁷¹

2.52. If KPPI had analysed the trends it would have noticed that, in fact, from 2010 onwards, the market share trend of the petitioners shows a significant increase. Based on the information provided in the Final Disclosure Report in paragraph 26(a) and tables 7 and 8, and evidence provided by Indonesia, the complainants have attempted to establish the specific market shares of imports and of the petitioners. These data show that between 2010 and 2012 the petitioners (as compared to imports and other domestic producers) experienced the highest market share increase in the Indonesian market for the products at issue. There was therefore no indication of threat of serious injury based on an alleged decline in market share.⁷²

2.53. The complainants also noted that KPPI uses indices that are contradictory and that do not support its conclusions. For example, the indices referred to in line 3 of Table 7 do not allow a reasonable understanding of how KPPI arrived at the increase in market share of imports of 6 per cent over the POI.⁷³

2.54. Moreover, the complainants observed that KPPI did not determine the total domestic market in the light of the participation of domestic producers other than the petitioners. Moreover, as noted by the importers, part of the domestic industry's production was used for Bluescope's own captive consumption. KPPI also noted that this petitioner produced both "Bare and Painted Galvalum". This fact should have been taken into account to establish the total domestic market. However, KPPI failed to do so.⁷⁴

2.55. With respect to decrease in profits, the majority of the factors examined also showed positive trends during the period of investigation. This is the case in particular with respect to changes in level of sales, production, productivity, employment. KPPI, however, failed to provide a

⁶⁴ Complainants' first written submission para. 5.77.

⁶⁵ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

⁶⁶ Complainants' first written submission, para. 5.78.

⁶⁷ Complainants' first written submission, para. 5.79.

⁶⁸ Complainants' first written submission, para. 5.81.

⁶⁹ Complainants' first written submission, para. 5.81.

⁷⁰ Complainants' first written submission, para. 5.82.

⁷¹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

⁷² Complainants' rebuttal submission, para. 2.68.

⁷³ Complainants' opening statement at the first meeting of the Panel, para. 4.4.

⁷⁴ Complainants' first written submission, para. 5.83.

reasoned and adequate explanation of the positive performance of these factors during the POI and whether these factors affected the domestic industry.⁷⁵

2.56. Finally, the data on which KPPI based its injury assessment have been selectively used in a different manner for different serious injury indicators. For instance, Table 8 of the Final Disclosure Report indicates that domestic sales were calculated based on data from only the domestic producers that requested the investigation, while Table 17 and paragraph 55 show that the increase in installed capacity was calculated on the basis of data pertaining to *all* domestic producers. It is clear that KPPI conducted an examination of serious injury to the domestic industry based on inconsistent databases. Without a proper explanation of why that non-uniform set of data did not affect the objectivity of its injury determination, KPPI could not, therefore, have arrived at an accurate and unbiased picture of the determination of serious injury to the domestic industry.⁷⁶

2.4.3 KPPI failed to explain how it found a "threat of serious injury" based solely on the evaluation of "actual" injury

2.57. While KPPI arrived at the conclusion that the domestic industry "suffered a threat of serious injury", this determination was based only on the analysis of actual injury of the domestic industry. KPPI failed to analyse whether the alleged serious injury was "clearly imminent" within the meaning of Article 4.1(b) of the Agreement on Safeguards.⁷⁷

2.58. While Indonesia subsequently attempted to explain how KPPI arrived at the determination of threat of serious injury,⁷⁸ the complainants consider this an *ex-post* explanation that cannot be considered by the Panel. Nevertheless, the explanations provided by Indonesia, which are either not reflected or clearly explained in the Final Disclosure Report, do not fulfil the criteria established by various panels and the Appellate Body: it is not for panels to cobble together disjointed reference in the investigating authority's report in order to find support for its conclusions.⁷⁹

2.4.4 KPPI's failure to conduct the serious injury determination in accordance with Articles 3.1, 4.1(b), 4.2(a) and 4.2(c) implies also the inconsistency of that determination with Article XIX:1(a) of the GATT and Article 2.1

2.59. Indonesia has argued that the complainants failed to explain how their claim based on Articles 3.1, 4.1(b), 4.2(a) and 4.2(c) results in inconsistencies with Article XIX of GATT and Article 2.1 of the Agreement on Safeguards.

2.60. The complainants submitted that Indonesia's argument has no legal merit. According to Article 1 of the Agreement on Safeguards, the agreement establishes "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Thus, by virtue of Article 1, any violation of the rules for the application of safeguard measures, including Articles 3.1, 4.1(b), 4.2(a) and 4.2(v), necessarily entails a violation of Article XIX of the GATT 1994.⁸⁰

2.61. Similarly, with respect to Article 2.1 of the Agreement on Safeguards, the Appellate Body has stated that "Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure'". The Appellate Body has further noted that "the conditions set forth in Article 2.1 are further elaborated in Article 4.2".⁸¹ The Appellate Body's statement necessarily implies that any violation of the conditions set forth in Article 4.2 also results in a violation of Article 2.1, and, ultimately, of Article XIX of the GATT 1994.

⁷⁵ Complainants' first written submission, paras. 5.85-5.87.

⁷⁶ Complainants' opening statement at the first meeting of the Panel, para. 4.3; complainants' responses to Panel Question 16 and 17.

⁷⁷ Complainants' first written submission, para. 5.90.

⁷⁸ Indonesia's first written submission, paras. 134-136.

⁷⁹ Appellate Body Report, *US – Steel Safeguards*, para. 326.

⁸⁰ Complainants' response to the Panel's question 21.

⁸¹ Appellate Body Report, *US – Line Pipe*, para. 188.

2.4.5 Conclusion

2.62. Based on the foregoing, the complainants submit that KPPI's serious injury determination is inconsistent with 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. In addition, Viet Nam also submits that this determination is inconsistent with Articles 4.1(a), 4.1(b) and 4.1(c) of the Agreement on Safeguards.

2.5 Causal link

2.5.1 KPPI failed to establish the causal link between increased imports of the subject product and serious injury

2.63. The complainants submitted that KPPI's determination is inconsistent with 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 provide a reasoned and adequate explanation of how the investigated imports *caused* serious injury to the domestic industry. KPPI also failed to provide an explanation of how factors other than the investigated imports may have also caused serious injury to the domestic industry.⁸²

2.64. The complainants noted that the causal link analysis conducted by KPPI is based on very limited data and cannot be considered as a proper basis for a positive determination of the existence of causation.⁸³ KPPI relied largely on the coincidence of the alleged increased imports and the alleged injurious indicators. However, this coincidence in time is not dispositive of the existence of a causal link. There may be situations where a coincidence in time "may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link".⁸⁴

2.65. Moreover, the complainants argued that KPPI's reliance on an analysis of coincidence in time is flawed. KPPI drew the conclusion that this alleged "coincidence" showed a causal link from the fact that imports increased while the petitioners' market share decreased. Furthermore, Indonesia has recognised the presence of other domestic producers in the market that accounted for part of domestic consumption – the complainants consider that these other domestic producers, and *not* imports, have usurped part of the petitioners' market share.

2.66. In the light of the known circumstances, an objective investigating authority could not have reached the same conclusion as KPPI did. Despite the finding of a "coincidence" of an upward trend (imports) and an alleged downward trend (petitioners' market share), KPPI could not have treated this coincidence as "objective evidence" that the decrease in market share was caused by the increase in imports. The facts show that the decrease in the petitioners' market share was caused by the presence of the other domestic producers in the market. Hence, KPPI's analysis of causation based on the coincidence in time was erroneous. KPPI's finding of an alleged coincidence based on a simple assertion made in paragraph 61 of the Final Disclosure Report cannot qualify as "objective evidence" of causation, within the meaning of Article 4.2(b), first sentence, and cannot meet the standards of a "reasoned and adequate explanation" or a "detailed analysis" of causation under Articles 3.1, last sentence, and 4.2(c), respectively.⁸⁵

2.67. Furthermore, as noted by the complainants in their response to Panel's question 28,⁸⁶ there was actually no coincidence between the alleged decline in the petitioners' market share and the increase in imports. In fact, table 7 of the Final Disclosure Report indicates that from 2010-2012, being the most recent part of the POI, the petitioners' market share experienced steady growth. On the other hand, imports also increased at the same time.⁸⁷

2.68. In addition, the complainants have provided evidence indicating that from 2010 onwards, while national consumption continued to grow, the petitioners' market share grew significantly larger than the market share of imported products. This fact further indicates that KPPI's causal

⁸² Complainants' first written submission, para. 5.94.

⁸³ Complainants' first written submission, para. 5.95.

⁸⁴ Panel Report, *US – Steel Safeguards*, para. 10.305.

⁸⁵ Complainants' rebuttal submission, para. 2.85.

⁸⁶ Complainants' response to Panel's question 28.

⁸⁷ Complainants' rebuttal submission para. 2.86.

link conclusion, that "the trend of Petitioners' market shares decreased because it was absorbed by import market share as elaborated in table 7"⁸⁸ is incorrect. In fact, it was the petitioners (and not imports) that benefitted the most during the most recent period of the POI of the growth in national consumption.⁸⁹

2.69. Furthermore, KPPI failed to discuss any other factors that might have affected the conditions of competition in the market; how these factors may have affected competition between domestic and imported products; and failed to provide any reasoned and adequate explanation in this respect. KPPI addressed only the relative position of national consumption, imports (including their market share), and the petitioners' market share as provided in Table 7 and paragraph 41 of the Final Disclosure Report.⁹⁰ In fact, the only manner in which KPPI addressed the competitive relationship between domestic products and imports in the context of causation was through a comparison between the trends in the petitioners' market share and import trends.⁹¹

2.70. The complainants argued that KPPI failed to provide any data relating to the conditions of competition between the different imported and domestic products.⁹² KPPI failed to focus on the "nature of the interaction between imported and domestic products in the domestic market".⁹³ A proper analysis of prices in the context of the conditions of competition would have cast doubt on the causal link between increased imports and serious injury.⁹⁴ Since 2009, the average price of imports increased while the petitioners' selling price declined. Thus, while the petitioners' products became cheaper, imported products became more expensive. Nonetheless, the market share of imports (with a higher price) increased, while the market share of the petitioners' products (with a lower price) decreased. This fact indicates that there might have been factors other than prices (e.g. quality) that influenced the choice of consumers and the degree of actual competition in the market.⁹⁵

2.71. Similarly, KPPI should have examined the extent to which there was a causal link between increased imports and serious injury, given the restrictions in competition imposed by the introduction of a technical standard on the products at issue. As Taiwan Steel & Iron Industry Association (TSIIA) noted in its "Comments on the Petition and Information", the introduction of this measure in 2009 by Indonesia's National Standardization Agency restricted the access of imports to the Indonesian market, and created a "monopolistic" position for domestic products. As a result, domestic producers improved their ability to raise prices.⁹⁶

2.72. Instead, Indonesia stated that KPPI's assessment of conditions of competition was reflected in Section D of the Final Disclosure Report.⁹⁷ However, the complainants note that Section D addresses the evaluation of other factors that allegedly caused serious injury to the domestic industry.⁹⁸ Thus, Indonesia's response indicates that KPPI conflated the conditions of competition analysis, which is relevant under Article 4.2(b), first sentence, with the question of the non-attribution of injurious effects to the investigated imports, which is relevant under Article 4.2(b), second sentence.⁹⁹

2.73. In relation to whether domestic and imported products were able to compete in terms of technical quality, KPPI's "analysis" was limited to the assertion that domestic products were manufactured on the basis of standards of the International Standardization Organization (ISO), and, therefore, were therefore able to compete with imports.¹⁰⁰ This bald assertion cannot constitute a proper analysis of conditions of competition, and "objective evidence" of causation within the meaning of Article 4.2(b), first sentence, of the Agreement on Safeguards. Indonesia did not explain whether imports were subject to the same standards; whether the use of the same

⁸⁸ Complainants' rebuttal submission para. 2.87.

⁸⁹ Complainants' rebuttal submission para. 2.89.

⁹⁰ First Written Submission para. 5.108.

⁹¹ Complainants' response to Panel's question 30.

⁹² Complainants' first written submission, para. 5.108.

⁹³ Panel Report, *Argentina – Footwear (EC)*, para. 8.250.

⁹⁴ Complainants' opening statement at the first meeting of the Panel with the parties, para. 5.1.

⁹⁵ Complainants' rebuttal submission para. 2.92; complainants' response to Panel's question 30.

⁹⁶ Complainants' rebuttal submission para. 2.93; complainants' response to Panel's question 30.

⁹⁷ Indonesia's response to Panel's question 34, para. 55.

⁹⁸ Complainants' rebuttal submission para. 2.90.

⁹⁹ Complainants' rebuttal submission para. 2.90.

¹⁰⁰ Complainants' rebuttal submission para. 2.90.

standards established competition in the market; or whether other considerations, such as price, quality, or the relatively dominant position of one of the suppliers, may have had a bearing in the conditions of competition in the market.¹⁰¹

2.5.2 Non-attribution: KPPI failed to explain how factors other than the investigated imports caused serious injury to the domestic industry

2.74. KPPI's analysis of non-attribution was made dependent on whether any interested parties raised arguments concerning the existence of factors other than imports affecting the domestic industry. While the Final Disclosure Report contained a discussion of such other factors as increased national consumption, domestic competition, and the domestic product's ability to compete with imports, it did not contain an analysis of other factors that would have had a direct impact on the indicators that determined the alleged serious injury to the domestic industry. These other factors are the presence of other domestic producers (having a potential impact on market share) and the existence of significant investments by domestic producers (having a potential impact on the situation of profits and losses).¹⁰²

2.75. Concerning the domestic industry's decline in market share, KPPI did not take into account the other domestic producers, which accounted for 23 per cent of domestic production.¹⁰³ In the complainants' view, none of the findings referred to by Indonesia reflects a proper non-attribution analysis concerning the presence of other domestic producers threatening to cause serious injury to the petitioners. These findings were made as part of the evaluation of serious injury and not in the context of the determination of the causal link. Furthermore, KPPI's finding that imports increased, while the petitioners' market access allegedly decreased, does not provide any information with respect to the presence of other domestic producers in the market. There is no finding in the Final Disclosure Report in which KPPI clearly identified this other factor, examined whether it caused injurious effects to the petitioners, or separated those effects from those attributable to the investigated imports.¹⁰⁴

2.76. For example, tables 7 and 8 of the Final Disclosure Report indicate that from 2010 onwards the petitioners experienced a significant growth in their market share. The complainants have presented evidence to show that the increase in the petitioners' market share outstripped the increase in the market share of imports. This indicates that from 2010 onwards, there was no impairment of the petitioners' market share that could have been attributable to imports. The only period in the POI when the petitioners' experienced a decline in their market share was between 2008 and 2010. However, imports also experienced a simultaneous decline in market share, while the market share of other domestic producers doubled in size. Therefore, there is no clear indication that the petitioners' loss of market share at this time is attributable to imports, but there is enough evidence on the record to show that the market share losses experienced by the petitioners could have been (at least partly) attributed to the contemporaneous increase in market share of the other domestic producers.¹⁰⁵

2.77. With respect to the alleged decline in profits, KPPI noted that during the POI, the domestic industry increased its installed capacity significantly.¹⁰⁶ This means that the domestic industry expanded, indicating that there was increased investment in these facilities. KPPI however did not examine the question of whether the increase in losses may be explained by increased costs, including increased labour costs, caused by this additional capacity.¹⁰⁷ The complainants note that KPPI's analysis and findings with respect to the expansion of the installed capacity was meant to address a different situation: the importers' allegation that the petitioners' capacity could not meet the demand of bare galvalume from the downstream industry, and that this was the real development that led to the increase in imports. As a result, KPPI concluded that the increase in imports was not caused by the domestic industry's inability to meet the national consumption.¹⁰⁸

¹⁰¹ Complainants' rebuttal submission para. 2.91.

¹⁰² Complainants' first written submission para, 5.110.

¹⁰³ Complainants' first written submission para, 5.111.

¹⁰⁴ Complainants' rebuttal submission, para. 2.98.

¹⁰⁵ Complainants' rebuttal submission, paras. 2.99-2.100.

¹⁰⁶ Complainants' first written submission, para. 5.112.

¹⁰⁷ Complainants' first written submission, para. 5.112.

¹⁰⁸ Complainants' rebuttal submission, para. 2.101.

2.78. Thus, KPPI's analysis was not a non-attribution analysis within the meaning of Article 4.2(b), second sentence, of the Agreement on Safeguards.¹⁰⁹ Moreover, the fact that the increase in national consumption may have encouraged the expansion of installed capacity does not negate the fact that the petitioners' losses could have been the result (at least partially) of the cost of expansion. There was no separation of these injurious effects from the serious injury that was determined; there was also no non-attribution of those effects on the investigated imports.¹¹⁰

2.5.3 KPPI's failure to establish a causal link in accordance with Article 4.2(b) implies also the inconsistency with Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards

2.79. Indonesia has argued that the complainants failed to explain how their claim based on Article 4.2(b) results in inconsistencies with Article XIX of GATT and Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards.¹¹¹

2.80. Indonesia's argument ignores the legal relationship between, on the one hand, Article 4.2(b), and, on the other, Article XIX of the GATT 1994 and Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards. According to Article 1 of the Agreement on Safeguards, the agreement establishes "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Thus, by virtue of Article 1, any violation of the rules for the application of safeguard measures, including Article 4.2(b) of the Agreement on Safeguards, entails a violation of Article XIX of the GATT 1994.

2.81. Similarly, as the Appellate Body has stated that "Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure'". The Appellate Body has further noted that "the conditions set forth in Article 2.1 are further elaborated in Article 4.2". The Appellate Body's statement necessarily implies that any violation of the conditions set forth in Article 4.2 also results in a violation of Article 2.1, and, ultimately, of Article XIX of the GATT 1994.

2.82. Furthermore, Indonesia's argument also ignores that a violation of Article 4.2(b) is established through the absence of a "reasoned and adequate explanation" and a "detailed analysis" of causation, as required by Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. Accordingly, any violation of Article 4.2(b) has to be found through a violation of Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

2.5.4 Conclusion

2.83. In light of the above, the complainants reiterate that KPPI's causal link determination is inconsistent with 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.

2.6 Parallelism

2.84. The complainants submit that Indonesia failed to ensure the required "parallelism" between the product scope of the investigation and the product scope of the safeguard measure at issue. Indonesia, therefore, acted inconsistently with Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards. In particular, following the completion of the investigation at issue, Indonesia narrowed down the product scope of the safeguard measure from the subject product with "thickness not exceeding 1.2 mm" to that with "thickness not exceeding 0.7 mm". Indonesia has not disputed the existence of this gap. It is thus clear that Indonesia failed to comply with the requirement of parallelism. Moreover, given Indonesia's failure to observe this requirement, Indonesia also failed to provide a reasoned and adequate explanation of how its determinations based on a broader product scope satisfied the requirements of the afore-mentioned provisions within the meaning of Article 3.1 (last sentence) of the Agreement on Safeguards.¹¹²

¹⁰⁹ Complainants' rebuttal submission, para. 2.102.

¹¹⁰ Complainants' rebuttal submission, para. 2.103.

¹¹¹ Indonesia's first written submission, paras. 152-155.

¹¹² Complainants' rebuttal submission, paras. 2.110-2.116; complainants' first written submission, para. 5.115.

2.85. The requirement of parallelism has been inferred from the parallel language in Articles 2.1 and 2.2 of the Agreement on Safeguards. These provisions both refer to "product ... being imported". The Appellate Body has clarified that the term "product" in Articles 2.1 and 2.2 has the same meaning in both provisions. However, the requirement of parallelism permeates the text of the whole Agreement on Safeguards, and can be derived from the use of similar notions in different parts of Article 2.1, Article 4.2, as well as Article XIX:1(a) of the GATT 1994.¹¹³

2.86. If the product scope of the safeguard investigation does not correspond to that of the final measure, it calls into question whether the imports covered by the measure, alone, would have given rise to the same positive findings on increased imports, serious injury (or threat thereof) and causal link in accordance with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994. For example, in *US – Steel Safeguards*, the Appellate Body clarified that "imports *excluded* from the application of the safeguard measure must be considered a factor 'other than increased imports' within the meaning of Article 4.2(b)", and that "[t]he possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b)".¹¹⁴ In other words, in the absence of the correspondence ("parallelism") between the product scope of the investigation and that of the safeguard measure, the results of the investigation become unreliable.¹¹⁵

2.87. The Appellate Body has clarified that to make a *prima facie* case of the inconsistency of a safeguard with the requirement of parallelism, the complainant must merely demonstrate the existence of a *gap* between the imports covered by the investigation and those falling within the scope of the measure. If the gap is established, it is incumbent upon the respondent to refer the panel to a reasoned and adequate explanation on the record that establishes explicitly that the latter set of imports, by itself, satisfies the conditions for the application of the measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.¹¹⁶

2.88. As noted, Indonesia did not dispute the fact that KPPI failed to observe the requirement of parallelism. Indonesia, however, argued that the requirement of parallelism does not apply to the facts in the present dispute, as this requirement prohibits only discrimination based on origin. The complainants disagree. The requirement of parallelism addresses concerns that arise equally with respect to narrowing the product scope of the safeguard measure, as well as with respect to limiting the product sources to which the measure applies. In both of these situations, it seeks to eliminate any room for arbitrariness or manipulation by investigating authorities that may turn the application of a safeguard into a means of disguised discrimination or a disguised restriction on international trade. If, in any of these situations, the requirement of parallelism is not observed, one would not be able to state with certainty that the imports subject to the measure, by themselves, satisfy the conditions for the application of the measure set out in the Agreement on Safeguards. This view was also supported by many third parties in this dispute.¹¹⁷

2.89. In addition, Indonesia contended that the narrowing of the product scope of the measures is justified under Article 5.1 (the first and last sentences) of the Agreement on Safeguards. According to Indonesia, a measure with a narrower scope is less trade restrictive and more suitable for the achievement of Indonesia's objective to remedy serious injury and facilitate adjustment. The complainants, however, explained that Article 5.1 (the first and last sentences) does not serve as a justification for violations of other obligations under the Agreement on Safeguards, including the requirement of parallelism. On the contrary, the first sentence of Article 5.1 imposes an obligation with respect to the manner in which a safeguard measure is applied, by restricting the extent of the latter to what is necessary to address the injury (or threat thereof) and to facilitate adjustment. Likewise, the last sentence of Article 5.1 restricts a Member's ability to use means

¹¹³ Complainants' rebuttal submission, para. 2.113 (citing Appellate Body Report, *US – Wheat Gluten*, para. 96; Appellate Body Report, *US – Steel Safeguards*, para. 450); complainants' response to Panel's question 36.

¹¹⁴ Appellate Body Report, *US – Steel Safeguards*, para. 450.

¹¹⁵ Complainants' rebuttal submission, para. 2.114.

¹¹⁶ Complainants' rebuttal submission, para. 2.115 (citing Appellate Body Report, *US – Line Pipe*, paras. 186-188).

¹¹⁷ Complainants' rebuttal submission, paras. 2.117-2.118 (citing Australia's third party oral statement at the first meeting of the Panel with the parties, para. 9; EU's third party oral statement at the first meeting of the Panel with the parties, paras. 3, 6; and EU's response to Panel's question 4, para. 9). See also complainants' response to Panel's question 36 (citing Japan's third party submission, para. 53).

that are not conducive to achieving the objectives of remedying or preventing serious injury (or threat thereof) and facilitating the adjustment.¹¹⁸

2.90. In fact, Article 5.1 can be interpreted in a coherent and harmonious manner with the requirement of parallelism and other requirements of the Agreement on Safeguards. In particular, a Member may exclude imports of certain models of the subject product from the scope of both the investigation and the application of the measure if, during the investigation, its investigating authority determines that the non-excluded models satisfy, by themselves, the requirements of Articles 2.1 and 4.2, and the excluded models were considered in the authority's non-attribution analysis. In this case, the requirement of parallelism is not violated, as the product scopes of the investigation and of the safeguard measure are the same. Furthermore, based on Article 5.1 (first sentence), a Member may reduce the level or quantum of the safeguard it imposes on *all models* of the investigated product. This measure would also be consistent with the requirement of parallelism.¹¹⁹

2.91. On the other hand, as the EU pointed out, if, during the investigation, the authority did not differentiate between various models (e.g. A and B) of the subject product, but, following the completion of the investigation, proposes to narrow down the scope of the measure to only Model A, it will be obligated to "re-do the investigation in such a way so as to collect relevant data with respect to that particular model". The failure of the investigating authority to re-do its investigation would lead to a breach of the requirements of Articles 2.1 and 4.2 (including the non-attribution obligation under Article 4.2(b), second sentence), as well as Article 5.1, first sentence of the Agreement on Safeguards.¹²⁰

2.92. In the present case, neither the Final Disclosure Report, nor any other document on the record suggests that, in its findings, KPPI had differentiated between different sub-categories of the subject product, in particular, the sub-category of the product with thickness not exceeding 0.7 mm and that with thickness not exceeding 1.2mm. Indonesia alleged that "[t]he national interest consideration stage revealed that the threat to serious injury during the period of investigation was mostly caused by imports of bare galvalum with thickness not exceeding 0.7 mm". This is, however, an *ex-post* explanation, which is not reflected in the determinations under review. The Panel should, therefore, disregard this argument.¹²¹

2.93. In addition, Indonesia cited the panel reports in *Ukraine – Passenger Cars* and *US – Steel Safeguards* in support of its position that amendments of proposed safeguard measures based on political decisions are common. The complainants, however, demonstrated that Indonesia's references to these cases are inapposite. In *Ukraine – Passenger Cars*, the investigating authority did not exclude any product in respect of which the investigation was conducted from the application of the measure. In *US – Steel Safeguards*, even though the final measure was imposed on the group of the products that was narrower than the group of the products investigated initially, the investigating authority had conducted a segregated analysis of injury with respect to each of these product groups and reached separate determinations on each of them.¹²²

2.94. Indonesia also alleged that it would be virtually impossible to obtain import data only for subject products with thicknesses not exceeding 0.7mm. This statement is inconsistent with Indonesia's own actions. If Indonesia did not possess the relevant data on the increased imports, there was no basis for KPPI's decision to exclude products from the scope of the safeguard measure. Furthermore, as Indonesia confirmed in its responses to Panel's questions 37 (paragraph 60) and 39, KPPI did apparently possess the data on injury with respect to the models with thicknesses not exceeding 0.7mm. To be clear, however, the Final Disclosure Report does not analyse the injurious effects of those specific models.¹²³

¹¹⁸ Complainants' rebuttal submission, paras. 2.117-2.119; complainants' response to Panel's question 40.

¹¹⁹ Complainants' rebuttal submission, para. 2.120.

¹²⁰ Complainants' rebuttal submission, para. 2.121 (citing EU's response to Panel's question 5, para. 13).

¹²¹ Complainants' rebuttal submission, para. 2.122 (citing Indonesia's responses to Panel's questions 37 and 39).

¹²² Complainants' rebuttal submission, paras. 2.123-2.125 (citing Panel Report, *Ukraine – Passenger Cars*, paras. 2.7, 7.3-7.4; and Panel Report, *US – Steel Safeguards*, paras. 1.7-1.17, 1.30-1.34).

¹²³ Complainants' rebuttal submission, para. 2.126.

2.95. Finally, Indonesia argued that if the Panel were to agree with the complainants' broad interpretation of the requirement of parallelism, this would add to or diminish the rights and obligations of Members under the Agreement on Safeguards, contrary to the requirements of Article 3.2 of the DSU. As explained, however, the complainants' interpretation of the requirement of parallelism is based on the text, context, object and purpose of the Agreement on Safeguards and Article XIX of the GATT 1994. This interpretation does not expand the scope of Members' rights or obligations beyond those that already exist in relevant provisions of WTO covered agreements.¹²⁴

2.96. In light of the foregoing, by imposing the safeguard measure at issue on a narrower product scope, without providing any reasoned and adequate explanation as to why such alteration of the product scope was warranted and supported by the underlying investigation, Indonesia acted inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards.

2.7 Violation of the Most-Favoured-Nation clause

2.97. The complainants have argued that pursuant to Regulation No 137.1/PMK.011/2014, Indonesia exempts the subject products originating in the listed 120 Members ("exempted Members") from the application of the specific duty. However, "like" products originating in the territory of Members that are not on the list, including the complainants, are subject to the specific duty. It is thus clear that Indonesia's safeguard measure grants an "advantage, favour, privilege or immunity" to the subject products from the exempted Members that is not accorded immediately and unconditionally to "like" products originating from all WTO Members. Indonesia's measure is, therefore, inconsistent with Article I:1 of the GATT 1994.

2.98. Indonesia has not rebutted the complainants' *prima facie* claim, nor has it presented a valid defence against this claim. Instead, Indonesia submits that Article 9.1 of the Agreement on Safeguards justifies the inconsistency of its measure with Article I:1 of the GATT 1994,¹²⁵ in that it "obliges Members applying a safeguard measure to exclude imports from developing country Members".¹²⁶ Indonesia argues that its safeguard measure is consistent with Article 9.1 of the Agreement on Safeguards as all exempted Members are developing countries.¹²⁷

2.99. It has been established in case law that Article 9.1 of the Agreement on Safeguards can be invoked to justify a derogation from Article I:1 of the GATT 1994.¹²⁸ The complainants submitted, however, that Indonesia's safeguard measure is not justified under Article 9.1 of the Agreement on Safeguards because it does not fulfil the requirements of this provision. Indeed, imports from six of the exempted Members, i.e. European Union members Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania cannot qualify as imports coming from *developing countries*.

2.100. Specifically, the complainants explained that within the WTO, the general rule to determine a Member's development status is through "self-selection" and not any other criteria, including the International Monetary Fund's development status list suggested by Indonesia.¹²⁹ The complainants have presented evidence indicating that, upon their accession to the WTO in 1996 and 2000 respectively, Bulgaria and *Croatia* both made statements to the effect that they were not *developing countries* for the purposes of their WTO activities.¹³⁰

2.101. In addition, Members who provide GSP schemes pursuant to paragraph 2(a) of the Enabling Clause¹³¹ consider themselves as developed country Members, because this provision contemplates preferential tariff treatment "accorded by *developed* [Members] to products originating in *developing countries*".(emphasis added) The European Union grants tariff preferences to WTO developing country Members pursuant to its GSP scheme. Prior to their accession to the European Union, Hungary and Poland maintained their own GSP schemes. These two countries are original WTO Members that acceded to the European Union on 1 May 2004. In

¹²⁴ Complainants' opening statement at the second meeting of the Panel with the parties, para. 6.3.

¹²⁵ Indonesia's opening statement at the first meeting of the Panel with the parties, para. 64.

¹²⁶ Indonesia's first written submission, para. 213.

¹²⁷ Indonesia's first written submission, paras. 213 and 214.

¹²⁸ Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.68 and 7.71.

¹²⁹ Indonesia's rebuttal submission, paras. 123.

¹³⁰ Complainant's response to Panel's question 42.

¹³¹ GATT Decision of 28 November 1979.

that regard, these two countries would thus be considered *developed country* Members within the WTO before and after their European Union accessions.

2.8 Notification

2.102. The complainants submitted that Indonesia's notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards did not satisfy the requirements under Article 12.2. Indonesia acted inconsistently with this provision, because it failed to provide in its notification dated 26 May 2014 "all pertinent information".¹³²

2.103. According to Article 12.2, when making notifications under Articles 12.1(b) and (c), Members must provide the Committee on Safeguards with "all pertinent information", including (i) evidence of serious injury or threat thereof caused by increased imports within the meaning of Article 4.2 of the Agreement on Safeguards, (ii) the precise description of the product involved and the proposed measure, (iii) the proposed date of introduction, and (iv) the expected duration and timetable for progressive liberalization.¹³³

2.104. In *Korea – Dairy*, the Appellate Body clarified that "the text of Article 12.2 makes it clear that a Member proposing to apply a safeguard measure is required to provide the Committee on Safeguards with all pertinent, not just *any* pertinent, information", and that "such information shall include certain items listed immediately after the phrase 'all pertinent information'" in Article 12.2.¹³⁴

2.105. In addition, the complainants are of the view that Article 12.2 of the Agreement on Safeguards, read in its context, and in the light of its object and purpose, requires that all pertinent information be notified *before* the measure is applied. Moreover, Article 8.1 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994 further supports this interpretation.¹³⁵

2.106. In the present dispute, KPPI issued its Final Disclosure Report on 31 March 2014; Indonesia notified its threat of serious injury determination under Article 12.1(b) on 26 May 2014; the Minister of Finance promulgated Regulation No 137.1/PMK.011/2014 imposing the measure on 15 July 2014; and Indonesia notified its decision to impose the measure at issue under Article 12.1(c) on 23 July 2014, after the measure had already entered into force. Indonesia's notification under Article 12.1(b), which is the only relevant notification circulated *before the entry into force of the measure at issue*, does not sufficiently describe the proposed measure, the amount of safeguard duty, the date of introduction of the measure and timetable for the progressive liberalization of the measure.¹³⁶ Further, KPPI has failed to evaluate a mandatory factor for its injury analysis, i.e. the rate and amount of the increase in imports of the subject product in relative terms within the meaning of Article 4.2(a).¹³⁷

2.107. Indonesia argued that the subsequent notification, dated 23 July 2014, could have rectified these deficiencies.¹³⁸ However, this notification was submitted *after* the measure took effect. Indonesia could not rectify the deficiencies of its notification under Article 12.1(b) by submitting a further notification too late to fulfil the purposes for which the notification of "all pertinent information" was required in the first place.¹³⁹ In any event, Indonesia also failed to provide all of the missing pertinent information in the subsequent notification dated 23 July 2014, in particular the rate and amount of the increase in imports in relative terms. Therefore, even if read together, both notifications are inconsistent with Article 12.2.¹⁴⁰

¹³² Complainants' rebuttal submission, para. 2.138.

¹³³ Complainants' first written submission, para. 5.153; complainants' opening statement at the first meeting of the Panel, para. 8.2; complainants' rebuttal submission, para. 2.138.

¹³⁴ Appellate Body Report, *Korea – Dairy*, para. 107 (original emphasis); complainants' rebuttal submission, para. 2.141.

¹³⁵ Complainants' rebuttal submission, para. 2.145; complainants' response to Panel's question 43.

¹³⁶ Complainants' rebuttal submission, para. 2.156; complainants' first written submission, para. 5.162.

¹³⁷ Complainants' first written submission, para. 5.164.

¹³⁸ Indonesia's rebuttal submission, para. 128.

¹³⁹ Complainants' rebuttal submission, para. 2.142; complainants' response to Panel's question 43.

¹⁴⁰ Complainants' rebuttal submission, para. 2.148.

2.108. Indonesia relied on the Appellate Body report in *US – Wheat Gluten* to argue that its notifications dated 26 May 2014 and 23 July 2014 complied with the requirements of Article 12.2.¹⁴¹ That case, however, does not stand for the proposition that a Member is entitled to notify "all pertinent information", or rectify deficiencies in its notification of a finding of serious injury under Article 12.1(b), after it had already applied the safeguard measures. In *US – Wheat Gluten*, the Appellate Body discussed the narrower question of whether a Member can notify its decision to apply or extend a safeguard measure within the meaning of Article 12.1(c) after the decision to apply or extend the measure was taken. It answered this question in the affirmative. However, even if a Member is entitled to submit its notification under Article 12.1(c) after the adoption of the safeguard measure, that Member must still comply with the requirements of Article 12.2. It can do so by notifying "all pertinent information" in preceding notifications, for example, a notification under Article 12.1(b).¹⁴²

2.109. Furthermore, the complainants agree with the European Union that the finding of the Appellate Body in *US – Wheat Gluten* must be read in the context of the specific facts of the case. In that dispute, the safeguard measure at issue was a quota, the effect of which does not materialize immediately after the measure is imposed. In contrast, in the present dispute, the safeguard measure is imposed in the form of a duty, which has immediate effects. In these circumstances, it is important that the Members other than the one imposing the measure are fully aware of the details of the measure before its entry into force and before its effects materialize in order to raise concerns in the Committee on Safeguards, or seek consultations under Article 12.3 on how to maintain a substantially equivalent level of concessions.¹⁴³

2.110. In addition, as Japan noted in its response to Panel's Question 6, the Appellate Body's findings in *US – Wheat Gluten* do not address the question of whether there is a violation of Article 12.2 in circumstances similar to the present dispute. Japan also pointed out that whether a notification complies with Article 12.2 requires an examination of whether the Member *proposing to apply* the measure notified all pertinent information, including the *proposed* measure and the *proposed* date of introduction.¹⁴⁴ This is impossible in a case where the measure has already entered into force, because the Member is no longer *proposing to apply* a measure.¹⁴⁵

2.111. Indonesia further argued that it could not provide all the information required in its notification of 26 May 2014, as the final decision on some of the elements of the "pertinent information" was taken through the promulgation of Regulation No. 137/2014 on 15 July 2014. While the complainants appreciate Indonesia's clarification that it is the Ministry of Finance that takes the decision to apply a safeguard measure, this fact did not preclude Indonesia from notifying "all pertinent information" in a manner consistent with Article 12.2, and, thereby respecting the rights of other Members under this provision. It is a well-established principle that a Member cannot invoke its internal procedures or legislation to justify a violation of its obligations under WTO law. Moreover, Indonesia did not explain why certain pertinent information could not have been included in Indonesia's 26 May notification, while other items could be included in that notification. In fact, the proposed measure and the timetable for the progressive liberalization were already set out in the Final Disclosure Report, published on 31 March 2014, and have not been changed since.¹⁴⁶

2.112. In light of the foregoing, Indonesia acted inconsistently with Article 12.2 of the Agreement on Safeguards by failing to notify all pertinent information in its 26 May notification, even if read together with its 23 July notification.

¹⁴¹ Indonesia's first written submission, para. 240; Indonesia's opening statement at the first meeting of the Panel with the parties, paras. 66-68; Indonesia's rebuttal submission, para. 128.

¹⁴² Complainants' responses to Panel's question 44; complainants' rebuttal submission, para. 2.150.

¹⁴³ European Union's response to Panel's Question 6, para. 17; complainants' rebuttal submission, para. 2.151.

¹⁴⁴ Japan's response to Panel's Question 6, para. 11.

¹⁴⁵ Complainants' rebuttal submission, para. 2.152.

¹⁴⁶ Complainants' rebuttal submission, para. 2.156 (citing Article 27 of the 1969 Vienna Convention on the Law of Treaties; Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 46; and Panel Report, *Argentina – Textiles and Apparel*, footnote 198).

2.9 Consultations

2.113. Indonesia's failure to provide a meaningful opportunity for consultations prior to the application of the safeguard measure at issue is inconsistent with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards. Indonesia did not respond adequately to the complainant's requests for prior consultations, nor did it provide Members with all pertinent information enabling them to review the proposed measure in a meaningful manner and to engage in the consultations with Indonesia.¹⁴⁷

2.114. The Appellate Body in *US – Line Pipe*, affirming its findings in *US – Wheat Gluten*, noted that consultations must be held *prior* to the application of the measure in order to afford the Members an adequate opportunity to consider the likely consequences of the measure before it takes effect.¹⁴⁸ This position was followed by the panel in *Ukraine – Passenger Cars* when it observed that "Article 12.3 gives affected Members a right to an adequate opportunity for consultations *before, not after, a safeguard measure is applied*".¹⁴⁹

2.115. Indonesia alleged that it provided multiple opportunities for prior consultations but the complainants failed to seize these opportunities.¹⁵⁰ This allegation is unfounded. In fact, Chinese Taipei reminded KPPI of its obligation to hold prior consultations under Article 12.3 on three occasions, but KPPI simply ignored Chinese Taipei's repeated requests. Chinese Taipei was not required under Article 12.3 to continue repeating its requests for prior consultations.¹⁵¹ With respect to Viet Nam, its first letter dated 24 April 2014 requesting consultations did not receive an answer until 4 July 2014, i.e. more than two months later. This answer was provided just three days before the Minister of Finance signed Regulation No. 137.1/PMK.011/2014 imposing the measure,¹⁵² and less than two weeks before the regulation was promulgated. Moreover, KPPI sent its answer on Friday 4 July 2014, and proposed to schedule the consultations in Jakarta on Tuesday of the following week, 8 July 2014, i.e. only two working days later and after the decision to impose the safeguard had already been taken.¹⁵³ Thus, Indonesia did not provide the complainants with a meaningful opportunity to engage into consultations.

2.116. Indonesia argued that since Hoa Sen (Viet Nam's exporter) and Viet Nam received the Final Disclosure Report in May 2014, they had sufficient information to prepare for consultations.¹⁵⁴ However, Viet Nam never received the report from KPPI directly, despite its requests dated 24 April 2014 and 16 June 2014,¹⁵⁵ and Chinese Taipei received it only after the measure entered into force.¹⁵⁶ As the panel in *Ukraine – Passenger Cars* explained, Article 12.3 requires that all Members having substantial interests as exporters be given an opportunity for prior consultations.¹⁵⁷ Indonesia had to provide this opportunity by, *inter alia*, submitting a proper notification to the WTO Committee on Safeguards (as opposed to particular exporters) consistent with the requirements of Article 12.2. Indonesia failed to do so.¹⁵⁸

2.117. It can hardly be disputed that the complainants have a "substantial interest" as exporters of the product concerned within the meaning of Articles XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards. As acknowledged by KPPI in the Final Disclosure Report, Chinese Taipei's share of Indonesia's total imports of the subject product was 21 per cent in 2012, whereas Viet Nam's share for the same products in the same year was 60.04 per cent, making

¹⁴⁷ Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.1.

¹⁴⁸ Appellate Body Report, *US – Line Pipe*, para. 108 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 136). Complainants' first written submission, para. 5.175; Complainants' rebuttal submission, para. 2.160.

¹⁴⁹ Panel Report, *Ukraine – Passenger Cars*, para. 7.521 (emphasis added); complainants' rebuttal submission, para. 2.160.

¹⁵⁰ Indonesia's rebuttal submission, paras. 134, 137, 138 and 140.

¹⁵¹ Complainants' rebuttal submission, paras. 2.167-2.168; complainants' opening statement at the second meeting of the Panel, para. 9.2.

¹⁵² Indonesia's response to Panel's question 46, para. 71.

¹⁵³ Complainants' rebuttal submission, para. 2.165.

¹⁵⁴ Indonesia's rebuttal submission, para. 140.

¹⁵⁵ Complainants' responses to Panel's questions 11 and 45; complainants' rebuttal submission, para. 2.169.

¹⁵⁶ Complainants' responses to Panel's questions 11 and 45; complainants' rebuttal submission, para. 2.169.

¹⁵⁷ Panel Report, *Ukraine – Passenger Cars*, para. 7.522.

¹⁵⁸ Complainants' opening statement the second meeting of the Panel with the parties, para. 9.4.

them two of the three primary exporting countries to Indonesia. Thus, it is clear that the obligations under Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards apply in this dispute.¹⁵⁹

2.118. Indonesia relied on a statement in *Korea – Dairy* to argue that "consultations may be adequate even in circumstances where prior notifications of a finding of serious injury or of any proposed measure are incomplete".¹⁶⁰ In that dispute, however, the panel did not suggest that the opportunity for consultations may be considered adequate even when the Member proposing to apply a safeguard did not furnish some of the pertinent information listed in Article 12.2. Indeed, the panel, in a different passage, held that "Article 12.1, 12.2 and 12.3 taken together makes it clear that *before a definitive safeguard measure may be applied*, the Member proposing to apply it must notify all the pertinent information regarding the proposed measure and the factual basis (the injury finding) for applying it, and must provide an opportunity for consultations with Members whose trade will be affected by the proposed measure".¹⁶¹

2.119. Indonesia further attempted to justify its failure to provide adequate opportunities for prior consultations by arguing that the last sentence of Article XIX:2 of the GATT 1994 allows Members to apply provisional measures without holding these consultations. Indonesia appears to suggest that the safeguard at issue is a "provisional measure" within the meaning of that Article.¹⁶² However, the imposition of "provisional measures" is subject to certain strict conditions, the fulfilment of which Indonesia has not demonstrated. For example, Indonesia did not establish that the alleged "provisional measure" was taken in "critical circumstances", or that the delay in the imposition of the measure would have caused damage to Indonesia's industry that would be difficult to repair, as envisaged under Article XIX:2. Moreover, according to Article XIX:2, the consultations must take place immediately after the provisional measure takes effect, which was not the case here. Indonesia's allegation that the measure at issue is a "provisional measure" is not supported by any evidence. Indonesia cannot invoke this provision by merely stating that "such is the case in the present case",¹⁶³ without explaining why this provision would apply to the facts of this dispute.¹⁶⁴

2.120. Lastly, Indonesia argues that, during the consultations that took place after the imposition of the safeguard measure, the complainants did not raise the issue of the substantially equivalent level of concessions and other obligations that a Member proposing to impose a safeguard must endeavour to maintain under Article 8.1.¹⁶⁵ The complainants fail to see the relevance of this argument to their claim. As explained, there were no prior consultations between Indonesia and any of the complainants before the imposition of the safeguard, nor were adequate opportunities for these consultations provided.¹⁶⁶

2.121. Regardless of whether consultations were held or not, Indonesia failed to provide sufficient information within the meaning of Article 12.2 of the Agreement on Safeguards to allow for the possibility, through consultations, for a meaningful exchange on the proposed measure. As has been previously discussed, Indonesia's notification dated 26 May 2014 does not contain all pertinent information. Thus, in the absence of sufficient information, Indonesia could not have provided an "adequate opportunity" for prior consultations within the meaning of Article 12.3 of the Agreement on Safeguards.¹⁶⁷

2.122. In light of the foregoing, Indonesia acted inconsistently with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards by failing to provide adequate opportunities for prior consultations with Members having substantial interests as exporters.

¹⁵⁹ Complainants' first written submission, para. 5.188.

¹⁶⁰ Indonesia's opening statement at the first meeting of the Panel with the parties, para. 79; see also Indonesia's first written submission, paras. 262-263 (quoting Panel Report, *Korea – Dairy*, para. 7.150).

¹⁶¹ Panel Report, *Korea – Dairy*, para. 7.120 (emphasis added); complainants' rebuttal submission, paras. 2.170-2.171.

¹⁶² Indonesia's rebuttal submission, para. 139.

¹⁶³ Indonesia's rebuttal submission, para. 139.

¹⁶⁴ Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.3.

¹⁶⁵ Indonesia's rebuttal submission, para. 142.

¹⁶⁶ Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.5.

¹⁶⁷ Complainants' first written submission, para. 5.189.

3 CONCLUSION

3.1. In the light of the foregoing, the complainants request the Panel to find that Indonesia acted inconsistently with Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards. Thus, the complainants request the Panel to recommend Indonesia to bring the measures into compliance with its WTO obligations.

4 SUGGESTION FOR IMPLEMENTATION

4.1. The complainants have repeatedly shown that Indonesia's safeguard measure violates various WTO provisions relating to safeguard measures. The nature and extent of Indonesia's violations warrant only one solution: the complete withdrawal of Indonesia's safeguard measure. Therefore, the complainants request this Panel to make a suggestion under Article 19.1 of the DSU that the only manner in which Indonesia can bring the safeguard measure at issue into conformity with its WTO obligations is by withdrawing it.

4.2. It is clear that Article 19.1 of the DSU grants panels the discretion to make such a suggestion. In circumstances in which a DSB recommendation could be implemented in different ways, a panel's suggestion may be unwarranted. However, as noted, this is not the case in the present dispute. In situations analogous to the present dispute, when panels found violations "to be of a fundamental nature and pervasive",¹⁶⁸ and when, in their view, there was no other way for the respondent to properly implement the DSB recommendation without revoking the measure, other panels have exercised their discretion under Article 19.1 and made this suggestion.¹⁶⁹

4.3. In sum, the complainants submit that the gravity and extent of the inconsistencies of Indonesia's measure with WTO law warrant this Panel to suggest that the only way Indonesia can bring its measure into conformity with its WTO obligations is, simply, to withdraw it.¹⁷⁰

¹⁶⁸ See Panel Report, *Guatemala – Cement II*, para. 9.6.

¹⁶⁹ See Panel Report, *Guatemala – Cement II*, para. 9.6. See also Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 8.7; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.12; and *Ukraine – Passenger Cars*, paras. 8.7-8.8.

¹⁷⁰ Complainants' opening statement at the second meeting of the Panel with the parties, paras. 10.1-10.3.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA****I. INTRODUCTION**

1. This dispute raises the important issue as to how a WTO developing country Member could effectively utilize the Emergency Action on Imports of Particular Products or commonly known as "Safeguard Measure". All WTO Members recognize the needs to have an emergency instrument to temporarily limit imports in order to remedy serious injury or threat thereof of the domestic industry and to facilitate adjustment regardless whether the imports are traded fairly or not. The safeguard instrument should also be practicable especially for WTO developing country Members which would have their own limitations. There must be a balance between the strict and high standards to apply for a safeguard measure on one hand, and the ability of WTO Members especially the developing ones to comply with these high standards on the other. The safeguard measure is not a safety valve that is put inside a safety vault that no one could have the key or combination to open it without triggering the alarm.

2. Steel industry is a very strategic industry in every country including Indonesia. Therefore, when these industries are seriously injured or threatened to be seriously injured because of surge of imports as a WTO Member Indonesia has the right to impose a safeguard measure. Indonesia understands that the standards to impose a safeguard measure are very high and exacting. Thus, the Indonesia Safeguard Committee (hereinafter referred to as "KPPI") has conducted a very thorough long investigation prior to making any recommendation to impose the safeguard measure on Subject Good to ensure impartial and objective investigations taking into account the due process rights of all parties including the petitioners, exporters, government of exporting countries, importers and the users industries.

3. As one of the emerging market economies of the world with the fourth biggest population in the world, as well as its increasing purchasing power, Indonesia is facing the impact of globalization and is consequently becoming one of the most targeted export destinations in the Southeast Asia region. Indonesia's domestic market particularly for the Subject Good is not only attractive to local producers, but also foreign producers. Therefore, the quantity of imports has increased by more than three times in 2012 compared to 2008, in line with the increasing market share of the imported products. This situation justifies the initiation of investigation as well as the imposition of a temporary emergency safeguard measure.

II. LEGAL ISSUES AND CLAIMS**A. Burden of Proof**

4. Indonesia submits that the complainants have failed to make its *prima facie* case of some of their claims concerning: (1) increased imports; (2) threat of serious injury; and (3) causal link. The complainants cited multiple alleged inconsistencies of the Government of Indonesia with the provisions either from the GATT 1994 or the Agreement on Safeguards. Those articles contain multiple distinct obligations and each has their own burden of proof that the complainants have to establish. By only mentioning those multiple articles in the introduction part, in legal standard section and in the conclusion of the respective part of the complainants' first written submission, Indonesia submits that the complainants have failed to meet their burden of proof to establish a *prima facie* evidence as to why the challenged measures violate those multiple provisions and therefore such claims must be rejected by the Panel.

5. Indonesia would like to recall that complaining WTO Members engaging in the WTO dispute settlement proceeding must meet the certain applicable high standards. These high standards are reflected in the stringent requirements for a panel request, which *must connect the challenged measures with the provisions of the covered agreements claimed to be infringed, so that the respondent is aware of the basis for the claims.*¹ The Appellate Body has noted that the

¹ Appellate Body Report, *US – Gambling*, para. 141.

requirement to make a *prima facie* case – made in the course of submission to the panel – demands the same high standards.² The evidence and arguments underlying a *prima facie* case must therefore be sufficient to identify the challenged measure and identify the relevant WTO provision and obligations contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.³ The complainants clearly have not met this condition by merely citing multiple provisions either from the GATT 1994 or the Agreement on Safeguards.

6. Indonesia submits that an explanation about the legal standards of certain provisions in the GATT 1994 or Agreement on Safeguards without any explanation or connection to the challenged measure for sure does not fulfill a *prima facie* case. If the complainants' proposition is accepted by the Panel, this could have a significant impact for the future WTO dispute settlement proceeding, where the complainant could simply submit legal standards of the WTO provision without making any connection to the measure, and the respondent would still be obligated to counter and the Panel must also assess such claims.

7. Indonesia strongly disagrees with the complainants that the facts and legal arguments underlying claims under Article XIX:1 of the GATT 1994, Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards are the same.⁴ We note that those articles contain multiple distinct obligations and each has its own burden of proof for the complainants to meet.

8. Indonesia also disagrees with the complainants' proposition that any violation of the other relevant provisions of the Agreement on Safeguards will automatically result in an inconsistency with Article XIX:1 of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. This proposition would have tremendous impact on the future WTO dispute settlement concerning safeguard measures because all complaints will include inconsistency with Article XIX:1 of the GATT 1994 and Article 2.1 of the Agreement on Safeguards in any of their claims under the Agreement on Safeguards. We believe this would also undermine the existence of substantive requirements under those two articles that must be demonstrated by the complainants.

9. Indonesia notes that the Panel's decision in the *Ukraine – Passenger Cars* to exercise judicial economy clearly demonstrates that obligations under Article 2.1 on the one hand and Article 3.1 (last sentence) and 4.2(c) on the other hand are different. Otherwise, the panel in the *Ukraine – Passenger Cars* would make a decision similar to the complainants' proposition, whereby a violation of Article 2.1 of the Agreement on Safeguard would automatically entail a breach of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

B. Unforeseen Development

1. KPPI has provided the logical connection between the unforeseen development and increased imports

10. The complainants argued that KPPI failed to provide evidence or a reasoned or adequate explanation supporting the alleged "unforeseen developments", and how these developments led to the increase in imports.⁵ They referred to the Appellate Body's finding in *US – Steel Safeguards*, which stated that a Member imposing a safeguard measure should adduce an explanation or data supporting the existence of the unforeseen development.⁶ The complainants also argued that KPPI failed to provide a link between the 2008 global financial crisis, which was global and macroeconomic in nature, and the effects on the specific products at issue.⁷

11. In response to this, Indonesia emphasized on the panel's finding in *US – Steel Safeguards*, that the length and quantity of the explanation are not the factors that need to be considered, but rather, it is the nature of the facts, complexity, timing of the explanation, its extent, and its quality

² Ibid.

³ Ibid.

⁴ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 14.

⁵ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.19.

⁶ Ibid.

⁷ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.29.

are the relevant factors.⁸ Indonesia argued that KPPI has properly explained the logical connection, specifically in paragraph 52-53 of KPPI's final disclosure report.⁹ Further, contrary to the complainants' explanation, Indonesia argued that KPPI has provided an explanation as to why the unforeseen event could result in increased imports of the specific product at issue. They argued that aside from Indonesia's purchasing power that remained high, there was a shift in preference from the use of wood material to light steel, which ultimately resulted the increase in demand of galvalume.¹⁰ Therefore, Indonesia has explained the connection of why the unforeseen event could result in the increased imports of galvalume.

12. However, the complainants in their rebuttal submission argued that the factual assertions made by KPPI were multiple, implied complex economic reasoning, and required much more explanation.¹¹ For instance, they argued on what basis did KPPI assert that in a global economic crisis, Indonesia was the exception to the overall downturn.¹² The complainants also noted that the Final Disclosure Report does not contain any explanation of why the developments cited were unforeseen.¹³ They stated that the explanation was required as a matter of fact and had to be contained in KPPI's Final Disclosure Report.¹⁴

13. In response, Indonesia in its rebuttal submission argued that the complainants have understood that the unforeseen development is the 2008 financial crisis.¹⁵ Indonesia provided a series of evidence, which are reflected throughout the complainants' submission, demonstrating that the complainants have in fact understood which event is the unforeseen development.¹⁶ Indonesia also argued that the 2008 global financial crisis could not have been foreseen by Indonesia when it undertook its WTO commitments on 1 January 1995.¹⁷ They referred to the Panel's finding in *US – Steel Safeguards*, where the panel although found no explanation on how the Asian crisis constitutes unforeseen development in the USITC's Final Report, they stated that "we can assume that, as the crisis began in 1997, it could not have been foreseen by the United States negotiators in 1994, when the Uruguay Round ended".¹⁸ In this respect, Japan as third party argued that the Panel made this finding after it read the US' second supplementary report, which discussed about the unforeseen development.¹⁹ However, Indonesia was of the view that this is incorrect. It is clear that the panel made a finding based solely on the Final Report which does not discuss anything relating to unforeseen development, yet the panel made an assumption that the event in that case could not have been foreseen since it happened 3 years after the US' concession.²⁰ Therefore, Indonesia stated that the 2008 global financial crisis is an unforeseen event at the time Indonesia undertook its WTO commitments on 1 January 1995.²¹

14. With respect to the logical connection, Indonesia referred to the Panel's finding in *US – Steel Safeguards*, which stated that there are situations where the explanation "may be as simple as bringing two sets of facts together".²² Further, Indonesia reiterated the explanation provided by KPPI in its Final Report, demonstrating that it has shown the logical connection between the unforeseen development and increased imports.²³

⁸ Indonesia's first written submission, para. 53.

⁹ Ibid. para. 55.

¹⁰ Indonesia's first written submission, para. 55.

¹¹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.9.

¹² Ibid. para. 2.9.

¹³ Ibid. para. 2.18.

¹⁴ Ibid.

¹⁵ Indonesia's rebuttal submission, para. 25.

¹⁶ Indonesia's rebuttal submission, paras. 26-35.

¹⁷ Ibid. para. 36.

¹⁸ Ibid. para. 36.

¹⁹ Japan's first written submission, para. 16.

²⁰ Panel Report, *US – Steel Safeguards*, paras. 10.79-80.

²¹ Indonesia's rebuttal submission, para. 36.

²² Panel Report, *US – Steel Safeguards*, para. 10.115.

²³ Indonesia's rebuttal submission, para. 38.

2. Whether KPPI's conclusion is erroneous

15. The complainants argued that KPPI's conclusion, *i.e.* the surge in imports is the unforeseen development itself is erroneous.²⁴ They referred to the panel's finding in *Argentina – Preserved Peaches*²⁵ which stated that the existence of "unforeseen developments" and increased imports must be demonstrated individually and independently of each other.²⁶ Therefore, they concluded that KPPI's conclusion in paragraph 54 of its Final Disclosure Report that the increase in imports was the unforeseen development that caused the increase in imports itself is erroneous.²⁷

16. In response to this, Indonesia argued that the panel should not be fixated only on the conclusion, but to assess the whole context of the case.²⁸ Indonesia referred to several cases, such as *Argentina – Preserved Peaches* and *Chile – Price Band System* in arguing that it is the practice of the panel to look at the explanation and evidence provided by the competent authorities, rather than focusing on the conclusion itself.²⁹

3. KPPI has provided the relevant GATT obligation

17. With respect to the demonstration of GATT obligation, the complainants firstly argued that the importing Member is required to show, as a matter of fact, that it has undertaken relevant GATT obligations or that it made concessions.³⁰ In response to this, Indonesia stated that it has demonstrated the relevant GATT obligation, as shown in Table 3 of the KPPI's Final Disclosure Report.³¹

18. During the second substantive meeting, the Panel asked several questions to both parties, so as to clarify the parties' understanding of the relevant GATT obligation. For instance, the panel asked whether the term "obligation" on the first and last part of Article XIX:1(a) of the GATT 1994 have to be the same. In this respect, the complainants are of the view that these obligations refer to the same GATT obligation, in line with the panel's finding in *Dominican Republic – Safeguard Measure*.³² However, Indonesia is of the view that these obligations although might refer to the same GATT obligation, but it can also be different, particularly when the relevant obligation is MFN.³³

19. Indonesia responded to the complainants' answer with respect to their reference to the Panel in *Dominican Republic – Safeguard Measure*, by arguing that if the GATT obligation involved is other than tariff concessions, for instance, MFN, and the terms "obligation" in the first and last part of Article XIX:1(a) have to be the same, then no investigating authority could ever demonstrate how the exclusion of some negligible imports from developing country Members could ever result in the increased imports.³⁴

20. Further, Indonesia referred to the Appellate Body's finding in *Argentina – Footwear*, where it stated that to fulfill this requirement, a mere demonstration of the relevant GATT obligation would be sufficient.³⁵ At the present case Indonesia does not have any concession or commitment in its schedule for the Product Concerned because it is stated "unbound". In this circumstances Indonesia is of the view that the identification of the applied MFN rate as well as all other tariffs under regional or free trade agreement under Article XXIV of the GATT 1994 would fulfil the requirement "of the effect of the obligations incurred by a Member under this Agreement, including

²⁴ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.31.

²⁵ Panel Report, *Argentina – Preserved Peaches*, para. 7.24.

²⁶ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.33.

²⁷ *Ibid.* para. 5.33.

²⁸ Indonesia's first written submission, para. 64.

²⁹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 64.

³⁰ *Ibid.* para. 5.28.

³¹ Indonesia's response to Panel Question No. 6.

³² The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 47.

³³ Indonesia's response to Panel Question No. 47.

³⁴ *Ibid.* para. 4.

³⁵ *Ibid.* para. 11.

tariff concessions...". Otherwise it would be legally impossible to impose a safeguard measure on a product that has no tariff concession or commitment because the Member cannot fulfil the requirement "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions..." as provided in Article XIX:1 (a) of the GATT 1994. It would be impossible to substantiate the effect of having no tariff concession under the GATT which have led to the increased imports.³⁶

C. Increased Imports

21. The complainants argued that the abnormal time gap between the end of POI and the date of determination of threat of serious injury, which is 15 months, renders the increased imports not recent enough.³⁷ As reflected in their response to Panel question, the circumstances that might affect how recent a data should be, include the availability of data, the manner in which imports behave and fluctuate during the POI, market conditions within the importing Member, and external macroeconomic factors that might be relevant to the case.³⁸ Following their statement, they argued that based on the circumstances of the case³⁹ and the average time gap of past safeguards cases,⁴⁰ a time gap of 9 months would be more reasonable. Indonesia simply noted that instead of referring to an established case such as *Ukraine – Passenger Cars*, the basis they used for this argument, *i.e.* a mere average time gap of past cases, is unreasonable.

22. Further, Indonesia submitted that the complainants' argument has no basis. This is for two reasons. First, in light of the recent jurisprudence, *i.e.* *Ukraine – Passenger Cars*, the Panel established that a time gap of 16 months between the end of POI and the date of determination of injury is considered recent enough,⁴¹ insofar the complainants failed to prove that the investigation "should have taken less time than it did".⁴² In this case, Indonesia argues the time gap between the end of POI and the date of determination is 15 months, and the complainants have not submitted any evidence or arguments which would indicate that the investigation should have taken less time than it did. Further, Indonesia refers to the Panel's decision in *Argentina – Footwear*, where it clearly established that an investigating authority has no obligation to "continuously update the data in its investigation. Such a requirement would be unnecessarily burdensome and difficult to administer".⁴³ Indonesia is also of the view an investigating authority does not have any obligation to continuously update the import and/or injury data whenever such data is available.⁴⁴ This basis, in Indonesia's view, renders the complainants' argument completely invalid.

23. Indonesia also has submitted that that the 2013 annual import data was only published by Indonesia Statistic Bureau (BPS) on 4 August 2014 (5 months after the issuance of KPPI Final Disclosure Report)⁴⁵ and BPS does not officially publish half-yearly import statistic by country. It is the common practice of KPPI to refer to only to official annual import data published by BPS in order to correspond with the audited injury data to establish a causal link between them.⁴⁶

24. Additionally, Indonesia submits the complainants' suggestion to take into account the data of the first half of 2013 is also contradictory. This is because by taking into account new data, KPPI would have to update not only its increased imports analysis, but also other relevant requirements, such as causal link, serious injury, etc. KPPI would also need to verify the collected data, which in itself requires time. Therefore, the implementation of the complainants' suggestion would undoubtedly result in a longer, if not the same, time required to complete the investigation.

³⁶ Ibid. para. 12.

³⁷ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.30.

³⁸ Ibid. para. 2.36.

³⁹ Ibid. para. 2.37.

⁴⁰ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement during the first meeting, para. 3.3; *see also*, Exhibit TPKM-VNM-12.

⁴¹ Panel Report, *Ukraine – Passenger Cars*, para. 7.177.

⁴² Ibid. para. 7.176.

⁴³ Panel Report, *Argentina – Footwear*, para. 8.213.

⁴⁴ Indonesia's response to Panel Question, No. 57.

⁴⁵ Indonesia's opening statement at the first meeting, para. 38 and *see* Exhibit IDN-43.

⁴⁶ Indonesia's response to Panel Question, Nos. 57-58.

D. Serious Injury

1. Whether the complainants' interpretation of the terms "increase in imports ... in relative terms" under Article 4.2(a) is correct

25. In this respect, the complainants argue several issues, first, the complainants argue that KPPI failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards, in particular the rate and amount of increased imports in relative terms to domestic production.⁴⁷ Indonesia responded to this allegation by stating that the assessment of "relative terms" does not necessarily have to be compared with domestic production, but rather, the comparison with domestic consumption is also sufficient,⁴⁸ which KPPI has fulfilled. In response to this, the complainants put forward their interpretation of Article 4.2(a), which requires an investigating authority to make an assessment in relation to domestic production. They provided the definition of relative, which to be defined as "[c]onsidered in relation or in proportion to something else".⁴⁹ Second, they noted that the benchmark element is not defined in Article 4.2(a), but they argued that this benchmark could not be the domestic consumption, considering that such assessment would be redundant with the analysis on increased import.⁵⁰

26. In response to the complainants' argument, Indonesia put forward several reasons as to why the complainants' interpretation is incorrect. First, there is a deliberate distinction of the drafter to differentiate between the two. Article 2.1 explicitly refers the relative term to domestic production while Article 4.2(a) does not. Second, Article 2.1 uses the conjunction "or" while Article 4.2(a) uses the conjunction "and". Third, Article 2.1 focuses about the relative term that refers to the increased imports while Article 4.2(a) is more focused on the determination of serious injury. Lastly, the panel's analysis in *US – Lamb* also affirms that the assessment of rate and amount of imports relative to domestic consumption (market share) fulfills one of the factors set out in Article 4.2.⁵¹

27. Indonesia further noted the admission of the complainants that the "relative" benchmark is not defined in Article 4.2(a) of the Agreement on Safeguards.⁵² However, Indonesia disagrees with the complainants' assertion that a comparison with domestic consumption would be redundant as it would be the same as the assessment on the share of domestic market taken by increased imports.⁵³ Indonesia supported this contention by providing an example that the two assessments are different.⁵⁴

2. Whether or not KPPI has evaluated the situation of the domestic industry in respect of the production destined for the captive market of Bluescope

28. The complainants have argued that KPPI failed to conduct a serious injury determination with respect to all segments of the domestic industry. Alternatively, they also argued that KPPI failed to provide a reasoned and adequate explanation of how, despite the absence of an analysis of the captive market, there was still an overall impairment of the domestic industry.⁵⁵ Particularly, the complainants noted that Bluescope produced both bare and painted galvalume. Accordingly, Bluescope's production of painted galvalume must have required bare galvalume, and

⁴⁷ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.50.

⁴⁸ Indonesia's first written submission, paras. 125-131.

⁴⁹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.53.

⁵⁰ *Ibid.* para. 2.54.

⁵¹ Indonesia's response to Panel question No. 26; Indonesia's rebuttal submission, para. 67.

⁵² Indonesia's rebuttal submission, para. 68.

⁵³ *Ibid.* para. 68.

⁵⁴ *Ibid.* para. 69.

⁵⁵ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.60; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 17.

therefore two segments of production of bare galvalume were relevant, (i) production for the merchant market and (ii) production for the captive market.⁵⁶

29. In response to this, Indonesia argued that KPPI had investigated and evaluated all data and information related to the petitioners as well as actual condition of the domestic industry.⁵⁷ As a matter of fact, KPPI had addressed this concern in paragraph 26(b) of its Final Disclosure Report. Although the investigation also revealed that Bluescope produces both bare and painted galvalum, however, it also revealed that the products produced by Bluescope is not used for its own consumption. Indonesia also responded this in its responses to Panel question.⁵⁸ Indonesia would like to recall panel's decision in *Argentina – Footwear*, in which the Panel clearly established that their assessment does not involve questioning the facts as determined by the national authority.⁵⁹ The Panel's obligation is to make an objective assessment pursuant to Article 11 of DSU.⁶⁰

3. Whether or not KPPI has provided reasoned and adequate explanation concerning its threat of serious injury determination

30. The complainants argued that KPPI failed to explain its finding of threat of serious injury despite indications of positive performance of the domestic industry.⁶¹ They argued that KPPI's assessment regarding the decrease in market share was conducted on the basis of comparing the end points of the POI.⁶² They referred to the Appellate Body which stated that "the competent authorities are required to consider the trends in imports over the POI (rather than just comparing the end points) under Article 4.2(a)".⁶³

31. In response to this, Indonesia argued that it has considered trends in imports over the whole POI, instead of resorting to an end-to-end comparison. This has been provided in Indonesia's response to the panel's question, by also providing the method of calculation that KPPI used in order to determine the trends in imports using exponential regression function to make average of a trend throughout certain period of time rather than just a comparison on end-to-end point.⁶⁴

32. Further, Indonesia emphasized the finding of the Appellate Body in *Argentina – Footwear*, which stated that not all factors evaluated by the investigating authority is required to show a declining trend.⁶⁵ Further, Indonesia provided a summary of KPPI's assessment to determine threat of serious injury to the domestic industry:⁶⁶

- a. the petitioners cannot utilize the increase of domestic consumption because the share was taken by the increased imports;
- b. the domestic sales had only increased by 29 per cent, therefore it was not in line with the greater domestic consumption increase of 34 per cent during the POI;
- c. although the petitioners' production increased by 32 per cent during the POI, such increase still would not be sufficient to fulfil domestic consumption. Moreover, even with such increase, the petitioners' capacity utilization was still far below their installed capacity;
- d. in an effort to increase their capacity utilization and productivity, the petitioners tried to set production target and increased their labour. However, such effort still failed to reach the expected capacity utilization and productivity. Even in 2012, one of the petitioners was forced to lay off 10 per cent of its labour because of the declining company performance;

⁵⁶ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.61.

⁵⁷ Indonesia's rebuttal submission, para. 82.

⁵⁸ Indonesia's response to Panel Question, no. 24.

⁵⁹ Panel Report, *Argentina – Footwear*, para. 7.12.

⁶⁰ Panel Report, *US – Wheat Gluten*, para. 8.6.

⁶¹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.77.

⁶² Ibid. para. 5.82.

⁶³ Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

⁶⁴ Indonesia's response to Panel Question No. 23.

⁶⁵ Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

⁶⁶ Indonesia's first written submission, para. 136.

- e. the petitioners' inventory increased significantly by 75 per cent during the POI due to the increasing share of imports as reflected in Table 7 above;
- f. the petitioners suffered loss in 2008, 2009 and 2012 because they were forced to sell below their production cost in order to be able to compete with imports;
- g. KPPI also found that during 2009–2012 import prices were always below petitioners' prices. This condition caused both price undercutting and price depression to the petitioners;
- h. KPPI had also assessed other factors which might be causing threat serious injury to the domestic industry, i.e. increased capacity, competition with other domestic producers and quality of the products produced by petitioners. Based on KPPI's investigation, it found that such other factors did not contribute to the threat of serious injury to the domestic industry.

33. Indonesia also argued that with respect to the petitioners' positive performance, e.g. sales, production and capacity, it was merely the petitioners' effort to be able to compete with imports, which was clearly unsuccessful when during the same period, particularly during the most recent period in 2010–2011 when the petitioners' profit declined from 301 index point to 115 index point and ultimately suffered loss to -30 index point in 2012; while their inventory significantly increased from 118 index point in 2010 to 356 index point in 2011 and 460 index point in 2012.⁶⁷

E. Causal Link

1. Whether KPPI failed to establish the causal link between increased imports of the subject product and serious injury

34. The complainants argued in their first written submission that KPPI relied largely on the coincidence of the alleged increased imports and the alleged injurious indicators.⁶⁸ They further referred to the Panel's finding in *US – Steel Safeguards*, which stated that there may be situations where a coincidence in time "may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link".⁶⁹ However, the complainants did not elaborate on this specific issue and instead referred to the explanation in the context of non-attribution analysis.⁷⁰

35. In this respect, Indonesia emphasized that Article 4.2(b) contains two distinct obligations, each with burden of proof that has to be met.⁷¹ Indonesia provided the finding of the Appellate Body in *US – Line Pipe*, where it explained the difference between the two obligations.⁷² Indonesia argued that considering that the complainants did not elaborate on how Indonesia violates the first sentence of Article 4.2(b), and made an explicit reference to the analysis on non-attribution issue, the complainants have failed to meet their burden of proof.⁷³

36. In the complainants' rebuttal submission, they denied Indonesia's argument and argued that there was actually no coincidence between the alleged decline in the petitioners' market share and the increase in imports.⁷⁴ They stated that the petitioners' market share experienced a steady increase from 2010 to 2012, and imports also increased, showing an upward trend during the same period.⁷⁵ They further concluded that both the petitioners' market share and imports experienced an upward trend.⁷⁶

⁶⁷ Indonesia's rebuttal submission, para. 74.

⁶⁸ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.106.

⁶⁹ Panel Report, *US – Steel Safeguards*, para. 10.305.

⁷⁰ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.107.

⁷¹ Indonesia's first written submission, para. 159.

⁷² Appellate Body Report, *US – Line Pipe*, para. 208.

⁷³ Indonesia's first written submission, para. 161.

⁷⁴ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.86.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

37. In response to this, Indonesia noted the complainants' inconsistency in arguing that KPPI was inconsistent with the first sentence of Article 4.2(b) of the Agreement on Safeguards. Indonesia argued that in the complainants' first written submission, they acknowledged that there is a coincidence of the increased imports and the injurious indicators and argued only that the coincidence is flawed due to some other factors.⁷⁷ However, in their response to Panel question, the complainants stated that no coincidence occur.⁷⁸ Indonesia stated that the argument is misleading and the complainants failed to establish *prima facie* case. In any event, Indonesia also explained that it there was a causal link between the increased imports and the downward trend of the petitioner's market share.⁷⁹ Indonesia referred to its response to the panel's question in providing the method on how to prove that the coincidence did occur.⁸⁰

2. Whether KPPI has assessed other relevant factors with respect to Article 4.2(b) of the Agreement on Safeguards

38. In this instance, although the Final Disclosure Report contained a discussion of other factors such as increased national consumption, domestic competition, and the domestic product's ability to compete with imports,⁸¹ the complainants argued that KPPI did not examine the question of whether the increase in losses may be explained by increased costs, including increased labor costs, incurred in installing and using this additional capacity.⁸²

39. With respect to the decline in profits as a result of increase in installed capacity of the petitioners, Indonesia argued that KPPI in its Final Disclosure Report has evaluated such factor and found that the increase in the petitioners' installed capacity is in line with the increase of national consumption and therefore it was not a factor causing injury to the petitioner.⁸³ It further stated that the increase in consumption has indirectly encouraged the domestic industry to increase their production capacity in order to fulfill the demand. However, despite such effort, the domestic market share continued to decrease by 4 per cent while the market shares of imports increased by 6 per cent. Indonesia argued that this shows the increase in installed capacity is not the factor causing injury to the petitioners.⁸⁴

40. With regard to the complainants' question of the domestic product's ability to compete with imports, Indonesia argued that KPPI has also evaluated this factor. In fact, KPPI explained in its Final Disclosure Report that the domestic products conform to the applicable standardization, which includes Indonesia National Standard (SNI) and International Organization for Standardization (ISO).⁸⁵

41. Indonesia also noted that the assessment of other factors that might cause injury to the petitioners is not unlimited in nature.⁸⁶ They referred to the finding of the Appellate Body in *US – Wheat Gluten*, where the Appellate Body rejected the EC's argument that the competent authorities "have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant".⁸⁷

F. Parallelism

42. Indonesia submits that the current principle of parallelism does not include the scope of products and therefore Indonesia's safeguard measure is consistent with the current established principle of parallelism.⁸⁸ In addition, Indonesia also argues that Indonesia's decision to impose

⁷⁷ Indonesia's rebuttal submission, para. 90.

⁷⁸ *Ibid.* para. 91.

⁷⁹ Indonesia's opening statement during second meeting, para. 54.

⁸⁰ *Ibid.*

⁸¹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.110.

⁸² *Ibid.* para. 5.112.

⁸³ Indonesia's first written submission, para. 167.

⁸⁴ *Ibid.*

⁸⁵ KPPI's Final Disclosure Report, para. 57, see Exhibit IDN-8.

⁸⁶ Indonesia's first written submission, para. 168.

⁸⁷ Appellate Body Report, *US – Wheat Gluten*, para. 56.

⁸⁸ Indonesia's rebuttal submission, paras. 102-106.

the safeguard measure on narrower scope of products is in line with Article 5.1 of the Agreement on Safeguards.⁸⁹

1. Whether the doctrine of parallelism stipulated in Article 2.2 of the Agreement on Safeguards apply to the present case

43. Indonesia submits that Indonesia's practice in the present case is allowed under WTO provisions and under Indonesian regulation. Amendments of proposed measures, including the alteration of the form of measure from quota to duties, reduction of the safeguard rates or quota, or reduction of duration of the safeguard measure based on political decisions are common in the application of safeguard measures.⁹⁰ Previous case laws which were used as examples include *Ukraine – Passenger Cars* and *US – Steel Safeguards*.⁹¹

44. Moreover, pursuant to GR 34/2011 concerning Anti-Dumping Measure, Countervailing Measure and Safeguard Measure, the Minister will take into account the National Interest Consideration from the relevant Ministries before making any decision to impose the safeguard measure based on the recommendation from KPPI. Therefore, political decisions to determine the form, rate, duration of the safeguard measure as well as to narrow down the scope of products imposed by the safeguard measure shall not be deemed to violate Articles 2.1, 3.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards provided that it does not broaden the scope of product and that it does not discriminate based on origin.

2. Whether the application of the safeguard measure resulted in a discrimination based on origin

45. Assuming *arguendo* that the doctrine of parallelism as regulated in Article 2 of the Agreement on Safeguards does apply to the present case, Indonesia argues that it does not discriminate the application of the safeguard measure based on origin.⁹²

46. The principle of parallelism is neither in the text of the Agreement on Safeguards nor in Article XIX of the GATT 1994 and was first established by the panel in *Argentina – Footwear* case.⁹³ Subsequently, this unwritten principle was also raised in *US – Wheat Gluten*⁹⁴, *US – Line Pipe*⁹⁵, *US – Steel Safeguards*⁹⁶ and *Dominican Republic – Safeguard Measures*.⁹⁷ The principle was created based on the "parallel language used in the first and second paragraph of Article 2 of the Agreement on Safeguards."⁹⁸ The existing case law relating to the principle of parallelism exclusively relates to the exemption of FTA partners from the scope of the MFN application of the safeguard measure.

47. According to the Appellate Body in *US – Wheat Gluten*, the parallel language in Article 2.1 and 2.2 of the Agreement on Safeguards, which the complainants had referred to as the origin of the doctrine, would be given a different meaning if a Member, after including imports from all sources in the determination of serious injury, then excludes imports from one source from the application of the measure.⁹⁹

48. Indonesia would like to emphasize that there is no discrimination based on origin for imported products excluded from the application of the safeguard measure. The complainants also have never challenged or put forward any evidence that such exclusion resulted in *de facto* discrimination based on origin.¹⁰⁰ Therefore, even if the doctrine of parallelism as regulated in Article 2 of the Agreement on Safeguard does apply to the present case, Indonesia has complied

⁸⁹ Ibid. paras. 108-113.

⁹⁰ Indonesia's first written submission, para. 183.

⁹¹ Ibid. para. 183.

⁹² Indonesia's first written submission, para. 186.

⁹³ Panel Report, *Argentina – Footwear (EC)*, paras. 8.81-8.87.

⁹⁴ Panel Report, *US – Wheat Gluten*, para. 8.156.

⁹⁵ Panel Report, *US – Line Pipe*, para. 4.25.

⁹⁶ Panel Report, *US – Steel Safeguards*, para. 3.1.

⁹⁷ Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.64.

⁹⁸ Appellate Body Report, *US – Steel Safeguards*, para 439.

⁹⁹ Indonesia's first written submission, para. 189, referring to Appellate Body Report, *US – Wheat Gluten*, para. 96.

¹⁰⁰ Ibid. para. 190.

with its obligations as it has not discriminated the application of the safeguard measure based on origin, except those exempted under Article 9 of the Agreement on Safeguards.¹⁰¹

49. However, the complainants are now requesting the Panel to broaden this unwritten principle in two ways. First, from only covering the exclusion or discrimination based on origin now the complainants argued the principle of parallelism also covers the scope of products.¹⁰² Second, that the parallel language of Articles 2.1 and 2.2 of the Agreement on Safeguards should now be expanded to include the parallel language of Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards as well as Article XIX of the GATT 1994.¹⁰³ The complainants argued that the requirement of parallelism permeates the text of the whole Agreement on Safeguards, and can be derived from the use of similar notions in Articles 2.1 and 4.2, as well as Article XIX:1(a) of the GATT 1994.¹⁰⁴

50. Indonesia submitted that the complainants had requested the Panel to go beyond the text of the Agreement on Safeguards and even beyond the well-established case law by requesting the expansion of the principle of parallelism. The expansion does not include only that of the principle itself, but also the expansion of parallel provisions of Article 2.1 of the Agreement on Safeguards which is now to include Article XIX of the GATT that was not even mentioned in the complainants' request for the establishment of the panel.¹⁰⁵

51. Indonesia would like to recall that Article 3.2 of the DSU states that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Indonesia agrees with the United States that the application and enforcement of abstract principles not set out in the WTO Agreement would be fundamentally at odds with the customary rules of interpretation of public international law.¹⁰⁶

52. The Panel needs to be extremely cautious in addressing this claim as to not add or diminish the rights and obligations of Members provided in the Agreement on Safeguards. Indonesia is of the view, that if the Panel were to agree with the complainants' proposition, the Panel will open a "Pandora's Box" where the principle of parallelism could be further broadened in the future, especially in light of similar languages or terms used in Article 2.1 of the Agreement on Safeguards found throughout the Agreement on Safeguards, as was also acknowledged by the complainants.¹⁰⁷

3. The Mexico – Steel Pipes and Tubes anti-dumping case is not applicable to the present case

53. The complainants have referred to *Mexico – Steel Pipes and Tubes*, an anti-dumping dispute, in which the panel stressed the importance of the obligation to ensure identity between the scope of the investigated product and the scope of the product to which the measure applies.¹⁰⁸ Indonesia submits that the *Mexico – Steel Pipes and Tubes* case is irrelevant to the present case as it is an anti-dumping case and the doctrine of parallelism claimed by the complainants is based on Article 2 of the Agreement on Safeguards and not the Anti-Dumping Agreement.¹⁰⁹

54. Moreover, the facts considered in the referred case are vastly different from the set of facts being considered in the present case.¹¹⁰ In that case, the issue was the investigating authority

¹⁰¹ Ibid. para. 190.

¹⁰² The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.119.

¹⁰³ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 6.8; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question Nos. 36 and 41.

¹⁰⁴ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 36.

¹⁰⁵ Ibid.

¹⁰⁶ United States' third-party response to Panel Question No. 40, para. 13.

¹⁰⁷ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 36.

¹⁰⁸ Indonesia's first written submission, para. 193.

¹⁰⁹ Ibid.

¹¹⁰ Ibid. para. 194.

during the investigation added additional products in the scope of investigation which was to include tubing of 4"-6" and certain structural tubing.¹¹¹ However, in this case, the complainants have recognized that the difference in implementation is because Indonesia had narrowed down the scope of the product at issue from steel with a "thickness not exceed 1.2 mm" to that with a "thickness not exceeding 0.7 mm."¹¹²

4. Indonesia's actions are in compliance with Article 5.1 of the Agreement on Safeguards

55. In any event, Indonesia submits that its decision to impose the safeguard measure on narrower scope of product is in line with Article 5.1 of the Agreement on Safeguards.¹¹³ Indonesia submits that a requirement for an application to meet the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards would effectively render Article 5.1 of the Agreement on Safeguards inapplicable.¹¹⁴

56. Indonesia submits that Article 5 of the Agreement on Safeguards regulates the imposition of the safeguard measure.¹¹⁵ Indonesia also referred to the Panel question which implied that by requiring that the conditions in Article 2.1 of the Agreement on Safeguards must be satisfied in relation to any product subject to a safeguard measure would preclude any Member to comply with Article 5.1 of the Agreement on Safeguards in applying a safeguard measure that is less trade-restrictive.¹¹⁶ The narrowing down of the product scope has resulted in a less trade-restrictive measure. This decision was also not done in an arbitrary manner. Rather, it was based on the National Interest Consideration as provided in Government Regulation No. 34/2011, which concluded that the threat of serious injury during the period of investigation was mostly caused by imports of bare galvalum with thickness not exceeding 0.7 mm. Members have the right to choose measure most suitable for the achievement of objectives in imposing the safeguard measure as provided in the last sentence of Article 5.1 of the Agreement on Safeguards. As the United States has pointed out the use of the phrase "suitable" to the achievement of the objectives, the sentence leaves to a Member's discretion what particular measure may or may not be "suitable" in particular circumstances.¹¹⁷ In this case, Indonesia has decided based on its national interest consideration that the most suitable safeguard measure is only to impose the safeguard measure on the Product Concerned until 0.7 mm.

57. Members have the right to choose the measure most suitable for the achievement of objectives in imposing the safeguard measure as provided in the last sentence of Article 5.1 of the Agreement on Safeguards.¹¹⁸ Therefore, Indonesia submits that its safeguard measure is justified under Article 5.1 of the Agreement on Safeguards.¹¹⁹

G. Most-Favored-Nation

1. Whether Article 9.1 of the Agreement on Safeguards justifies inconsistent measure to Article I:1 of the GATT 1994

58. The complainants stated that the measure at issue imposed by Indonesia is inconsistent with Article I:1 of the GATT 1994. The complainants argued that first, the measure falls within the scope of Article I:1 of the GATT 1994,¹²⁰ and that the products covered by the specific duty are "like" the products exempted from the application of the specific duty.¹²¹ Additionally, the exemption from the specific duty is not extended "immediately" and "unconditionally" to the

¹¹¹ Indonesia's opening statement at the first meeting, para. 61.

¹¹² Ibid. para. 195.

¹¹³ Indonesia's rebuttal submission, para. 108.

¹¹⁴ Ibid. para. 110.

¹¹⁵ Indonesia's rebuttal submission, para. 111.

¹¹⁶ Indonesia's rebuttal submission, para. 111; referring to Panel Question No. 41.

¹¹⁷ Indonesia's rebuttal submission, para. 11.

¹¹⁸ Ibid. para. 113.

¹¹⁹ Ibid. para. 114.

¹²⁰ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.142.

¹²¹ Ibid. para. 5.144.

subject products from all Members' territories.¹²² Therefore, clearly, the exemption from the specific duty is not extended immediately and unconditionally.¹²³

59. Indonesia submits that Article XIX:1 of the GATT 1994 has clearly provided an exemption to suspend obligations incurred by a contracting party under the GATT 1994 as an emergency action on imports of particular products in order to prevent or remedy serious injury caused by an unforeseen increase in imports.¹²⁴ The word "obligations" in Article XIX:1 of the GATT 1994 refers to any obligation under the GATT 1994 including MFN obligation in Article I:1 of the GATT 1994.¹²⁵ Otherwise, Article 2.2 of the Agreement on Safeguards would be superfluous and would create a conflict between Article 9.1 of the Agreement on Safeguards and the MFN principle provided for in Article I:1 of the GATT 1994.¹²⁶

60. The complainants then submitted that Indonesia's safeguard measure is not justified under Article 9.1 of the Agreement on Safeguards because it is not based on the basic pre-requisite that imports must come from "developing countries".¹²⁷ In this case, imports from six of the exempted Members, i.e. EU members Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania cannot qualify as imports coming from *developing countries*.¹²⁸ This means that Indonesia's exemption of these imports does not fulfill the requirements of Article 9.1 of the Agreement on Safeguards.¹²⁹

61. Indonesia argues that this exemption can be justified under Article 9.1 of the Agreement on Safeguards as the exempted countries in MOF Regulation 137/2014 are all developing countries.¹³⁰ With regards to the countries the complainants have taken issue with, Indonesia notes that there is no universal threshold for the status of countries throughout the world, and as such the status has been self-determined.¹³¹ In any case, there have been multiple cases which have also included Croatia, Lithuania and/or Romania in its list of exempted developing countries in accordance to Article 9.1 of the Agreement on Safeguards.¹³²

62. Further, with regards to the import shares of the exempted countries, KPPI has found that the import shares of Viet Nam, Taiwan and Republic of Korea collectively constitute 96.26 per cent of the total import shares in 2012. The remaining 3.74 per cent of import shares are comprised of imports from Japan, People's Republic of China and Singapore.¹³³ As the totality of import shares consists of the aforementioned countries, it would be logical to infer that the 118 exempted countries have import shares during the POI are less than 3 per cent and their combination does not exceed 9 per cent, as required by Article 9.1 of the Agreement on Safeguards.¹³⁴ For these reasons, Indonesia submitted that it has complied with its obligations under Article 9.1 of the Agreement on Safeguards.¹³⁵

2. Whether the complainants have failed to be consistent with regards to the basis of their claim during the course of this proceeding

63. Lastly, Indonesia also argued that the complainants have been changing the basis of their claim during the course of this proceeding.¹³⁶

64. In its Request for the Establishment of a Panel, the complainants had claimed that the inconsistency is based on the fact that the specific duty imposed by Indonesia applies to products

¹²² Ibid. para. 5.149.

¹²³ Ibid.

¹²⁴ Indonesia's first written submission, para. 210.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.132.

¹²⁸ Ibid.

¹²⁹ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.132.

¹³⁰ Indonesia's first written submission, para. 214.

¹³¹ Ibid. para. 215.

¹³² Ibid.

¹³³ Ibid. para. 216.

¹³⁴ Ibid.

¹³⁵ Ibid. para. 219.

¹³⁶ Ibid. para. 115.

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.¹³⁷ In their first written submission, the complainants were very clear that they are challenging the whole list of 120 exempted Members excluded by PMK 137/2014 to be inconsistent with Article I:1 of the GATT 1994.¹³⁸

65. In its first written submission, the complainants had only mentioned *three* European Union members, namely Croatia, Lithuania and Romania.¹³⁹ The number of countries contended by the complainants was again altered in the complainants' opening statement at the first meeting of the Panel, where they contended the exclusion of *five* European Union members, adding Bulgaria and Poland to its previous submission.¹⁴⁰ In their response to the Panel question, the complainants again changed the number to a total of six countries, adding Hungary and Latvia and removing Lithuania from its original list of European Union member states in the first written submission.¹⁴¹

66. Now, the claim has totally changed from challenging the whole list of exempted countries that allegedly violates the MFN obligation to challenging the six member states of the European Union excluded from the application of the safeguard measure that is not in line with Article 9.1 of the Agreement on Safeguards.¹⁴² It is been challenging for Indonesia to make a defense on this moving target.¹⁴³

67. Indonesia has submitted the source of the exclusion list which is the IMF for list of "emerging markets and developing countries" as the basis to determine the list of excluded countries. Those countries that are both listed in the IMF and are WTO members will be excluded under Article 9.1 of the Agreement on Safeguards.¹⁴⁴ In the absence of any clear list of developing countries from the WTO, Indonesia submits it has discretion to use any other reliable source it deems appropriate to determine the status of WTO developing country Members for the purpose to comply with Article 9.1 of the Agreement on Safeguards and Indonesia is not obliged to check every statement made by every country in the WTO to check whether or not they have claimed to be developing or developed country.

68. The complainants also rely on the proposition that Members providing GSP schemes consider themselves as developed country. Thus, since EU provides GSP scheme, all 28 EU Members shall be considered as developed countries.¹⁴⁵ Indonesia has rebutted this proposition by submitting evidence that in fact Croatia still received GSP scheme from Canada, Japan, New Zealand, Russia, and the United States according to UNCTAD list of beneficiaries of GSP as was also referred to by the complainants in Exhibit TPKM/VNM-23.¹⁴⁶ The complainants also never refute the examples Indonesia has referred to from other safeguard measure imposition notifications which have also included several European Union member states in its list of exempted developing countries according with Article 9.1 of the Agreement on Safeguards.¹⁴⁷

¹³⁷ Indonesia's rebuttal submission, para. 116; referring to Request for the Establishment of a Panel by Viet Nam and Request for the Establishment of a Panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 1.7(a)(iv).

¹³⁸ Indonesia's rebuttal submission, para. 117; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.133.

¹³⁹ Indonesia's rebuttal, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.133 footnote 159.

¹⁴⁰ Indonesia's rebuttal submission, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 7.2.

¹⁴¹ Indonesia's rebuttal submission, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 42.

¹⁴² Indonesia's rebuttal submission, para. 120.

¹⁴³ *Ibid.*

¹⁴⁴ "Emerging market and developing economies". International Monetary Fund, Web. accessed 5 November 2016, <<http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/weoselagr.aspx>>, see Exhibit IDN-45.

¹⁴⁵ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para 2.134.

¹⁴⁶ "Generalized System of Preferences: List of Beneficiaries". UNCTAD, Web. accessed 5 November 2016, <http://unctad.org/en/PublicationsLibrary/itcdtsbmisc62rev6_en.pdf>, see Exhibit IDN-44.

¹⁴⁷ Indonesia's first written submission, para. 215.

69. In conclusion, Indonesia reiterates that the complainants cannot claim an inconsistency with Article I:1 of the GATT without taking into account Indonesia's obligations to the Agreement on Safeguards.¹⁴⁸ Indonesia submits that the list of excluded country of the Safeguard Decree is consistent with Article 9.1 of the Agreement on Safeguards and therefore does not violate Article I:1 of the GATT 1994.¹⁴⁹

H. Notification

70. The complainants argued that Indonesia's notification is inconsistent with Article 12.2 of the Agreement on Safeguards because Indonesia failed address four mandatory components of notifications, which are precise description of the proposed measure, the proposed date of introduction of the measure, a timetable for progressive liberalization, and the rate and amount of the increase in imports of the product concerned in relative terms.¹⁵⁰ In response to this, Indonesia argued that the four components alleged by the complainants to be non-existent has in fact provided by Indonesia in its notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards dated 27 May 2014 and 23 July 2014.

71. With respect to the proposed date of introduction of the measure and the timetable for progressive liberalization, Indonesia argued that these components have been provided in Indonesia's notification under Article 12.1(b) and/or Article 12.1(c) of the Agreement on Safeguards.¹⁵¹ Therein, it was stated that with reference to the proposal of the investigating authority, and taking into account the need to effectuate the safeguard measure as proposed and the relevant requirements stipulated in the Agreement on Safeguards, the Government of the Republic of Indonesia has decided to impose the safeguard duty.¹⁵²

72. As for the rate and amount of the increase in imports of the subject product in relative terms, Indonesia has notified the WTO's Committee on Safeguards through its Notification under Article 12.1(b) of the Agreement on Safeguards. Therein, particularly in Table 2, Table 4 and Table 5, the rate and amount of the increase in imports of the subject product relative to the national consumption has been provided.¹⁵³

73. In addition, Indonesia also argued that it has provided the percentage (relative terms) of country wise imports of the subject product relative to the total imports with its comparison between 2008 and 2012 provided in Table 3 of Indonesia's notification under Article 12.1(b).¹⁵⁴

74. The complainants also argued that the lack of such pertinent components could not be rectified by addressing the relevant items in subsequent notifications. They referred to the Appellate Body's statement in *Korea – Dairy* saying that Members must notify the relevant information prior to the imposition of the measure so as to enable other Members to pursue their interests in the appropriate fora.¹⁵⁵ Further, they argued that Indonesia only notified these requirements six days after the measure had entered into force, and therefore other Members, including the complainants, were deprived of their right to protect their interests by seeking consultations or by other means prior to the entry into force of Indonesia's safeguard measure.¹⁵⁶

75. In response to this, Indonesia put forward two arguments. First, there is no limitation on the number of how many times a Member could submit a notification under Articles 12.1(b) or 12.1(c) of the Agreement on Safeguards. Indonesia also provided twelve cases where Members submitted a supplemental notification under Articles 12.1(b) or 12.1(c).¹⁵⁷

¹⁴⁸ Ibid. para. 127.

¹⁴⁹ Ibid.

¹⁵⁰ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.160

¹⁵¹ Indonesia's first written submission, para. 234.

¹⁵² Ibid.

¹⁵³ Ibid. para. 236.

¹⁵⁴ Ibid. para. 237.

¹⁵⁵ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.165.

¹⁵⁶ Ibid. para. 5.166.

¹⁵⁷ Indonesia's first written submission, para. 239.

76. Second, on the timing of the notifications, Indonesia referred to the Appellate Body in *US – Wheat Gluten*¹⁵⁸ which disagreed with and reversed the panel's interpretation that Article 12.1(c) requires the notification to be made both "immediately" and before implementation of the safeguard measure.¹⁵⁹ The Appellate Body decision in *US – Wheat Gluten* that Article 12.1 of the Agreement on Safeguards deals with *when* the notification must be made, and Article 12.2 of the Agreement on Safeguards clarifies *what* information must be included in the notification under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards.¹⁶⁰ The content requirement of Article 12.2 of the Agreement on Safeguards, therefore, does not prescribe *when* the notification under 12.1(c) must take place.¹⁶¹ While the two articles are explicitly related, a Member may breach one provision and not the other.

77. Indonesia noted that the complainants had only raised a claim under Article 12.2 of the Agreement on Safeguards, which only concerns the content of Indonesia's notification under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards but not the timing.¹⁶² Indonesia also noted that the complainants acknowledged that Indonesia has notified three out of four mandatory components in its notification of 23 July 2014.¹⁶³ However, Indonesia noted the complainants' assertion that Article 12.2 has temporal connection with the notification under Articles 12.1(b) and 12.1(c) is in contradiction with the Appellate Body's clear ruling in *US – Wheat Gluten*.¹⁶⁴ Indonesia referred to the statement of the Appellate Body in *US – Wheat Gluten* that a Member could violate one Article without violating the others.¹⁶⁵

78. In conclusion, Indonesia reiterates that it has provided all pertinent information required under Article 12.2 of the Agreement on Safeguards in its Article 12.1(b) and 12.1(c) notifications on 27 May 2014 and 23 July 2014.

I. Consultation

79. The complainants argued that Indonesia failed to provide a meaningful opportunity for prior consultations, as no consultations were held on the proposed measure before its application.¹⁶⁶ In the absence of prior consultations, Indonesia deprived the complainants of the opportunity to review the information provided under Article 12.2 of the Agreement on Safeguards, to exchange views on the measure, and to reach an understanding with Indonesia on an equivalent level of concessions. Furthermore, as explained, the obligation under Article 12.3 to provide a meaningful opportunity for consultations before the measure take effect does not depend on whether a request for consultations was made by the affected Member.¹⁶⁷

80. Furthermore, the complainants also argued that regardless of whether consultations were held or not, Indonesia failed to provide sufficient information within the meaning of Article 12.2 of the Agreement on Safeguards to allow for the possibility, through consultations, for a meaningful exchange on the proposed measure.¹⁶⁸

81. In response to this, Indonesia stated that it has given multiple opportunities for consultations prior to the application of the safeguard measure and the fact that no prior consultation was ever held was not because Indonesia has failed to provide an opportunity for prior consultation.¹⁶⁹ Indonesia also provided the chronology which demonstrated that KPPI has provided numerous opportunities for the complainants to have consultations, but it is the

¹⁵⁸ Appellate Body Report, *US – Wheat Gluten*, para. 125.

¹⁵⁹ Indonesia's first written submission, para. 240.

¹⁶⁰ Appellate Body Report, *US – Wheat Gluten*, para. 123.

¹⁶¹ *Ibid.*

¹⁶² The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.7.

¹⁶³ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 43(i).

¹⁶⁴ Indonesia's rebuttal submission, para. 130.

¹⁶⁵ *Ibid.*

¹⁶⁶ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.185.

¹⁶⁷ *Ibid.* para. 5.187.

¹⁶⁸ *Ibid.* para. 5.189.

¹⁶⁹ Indonesia's first written submission, para. 245.

complainants that kept on avoiding such meeting.¹⁷⁰ Indonesia also referred to the panel in *Korea – Dairy* which considered that consultations may be adequate even in circumstances where prior notifications of a finding of serious injury or of any proposed measure are incomplete.¹⁷¹ In fact, one of the purposes of the consultations is to review the content of such notifications, and thereby augment it if necessary.¹⁷²

82. Indonesia also submits that the Panel should only assess Indonesia's compliance with Article 12.2 of the Agreement on Safeguards regarding whether or not its notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards dated 27 May 2014 and 23 July 2014 had contained all pertinent information required under Article 12.2 of the Agreement on Safeguards.¹⁷³ The Panel should not assess the timing of such notifications as it falls under purview of Article 12.1 of the Agreement on Safeguards as it is not challenged by the complainants.¹⁷⁴ Pursuant to the Appellate Body decision in *US – Wheat Gluten* the Panel shall not mix the requirements in Article 12.1, 12.2 and 12.3 of the Agreement on Safeguards when assessing the current claim concerning notification only under Article 12.2 of the Agreement on Safeguards.¹⁷⁵ In Indonesia's rebuttal submission, Indonesia highlighted the fact that the chronology they provided in their first written submission was never challenged by the complainants, and it shows that no consultation was ever held because Viet Nam repeatedly rescheduled the consultation due to its internal administrative reasons.¹⁷⁶ As for the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, all requests were made way before the date of determination of threat of serious injury or way after.

83. Indonesia noted that nothing in the text of Article 12.3 nor has there been any WTO case law which supports the complainants' contention that the safeguard measure shall not be applied when the consultation has started and were still on-going.¹⁷⁷ In fact, the wording of Article XIX:2 of the GATT 1994 seems to suggest that action under paragraph 1 may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.¹⁷⁸ It is our view that the obligation of an implementing Member is to provide *adequate opportunity* for prior consultation should not be contingent upon the other interested party's schedule availability. This is because an exporting Member can unlimitedly delay the application of safeguard by trying to prolong, postpone or rescheduling the consultations, and the implementing Member has to wait for the consultation to actually occur, even if it means sacrificing its own domestic industries to suffer serious injury just for the sake of complying with Article 12.3 of the Agreement on Safeguards.

84. In conclusion, Indonesia stated that it has provided an opportunity for consultations to the complainants and therefore acted in accordance with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards.¹⁷⁹

J. Suggestion for Implementation

85. In their opening statement at the first meeting of the Panel, the complainants requested the Panel to exercise the discretion accorded to it by Article 19.1 of the DSU and to suggest that the *only* manner in which Indonesia could remove the various allegations of inconsistencies at issue is by immediately withdrawing the safeguard measure at issue.¹⁸⁰ Indonesia strongly disagrees with this proposition.

86. Indonesia acknowledges that the Panel has the authority to *suggest* ways in which a member could implement their recommendation, *i.e.* to bring the measure into conformity with its WTO obligation. However, as also noted by the panel in *US – Line Pipe*, although the panel has

¹⁷⁰ Ibid. paras. 251, 254.

¹⁷¹ Panel Report, *Korea – Dairy*, para. 7.150.

¹⁷² Ibid. para. 7.150.

¹⁷³ Indonesia's opening statement at the second meeting, para. 81.

¹⁷⁴ Indonesia's opening statement at the second meeting, para. 81.

¹⁷⁵ Appellate Body Report, *US – Wheat Gluten*, para. 124.

¹⁷⁶ Indonesia's rebuttal submission, para. 138.

¹⁷⁷ Ibid. para. 139.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid. para. 143.

¹⁸⁰ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 9.3.

"the authority under Article 19.1 of the DSU to make a specific suggestion does not mean that we must or should do so in a given case".¹⁸¹

87. Indonesia submits that in order to comply with a Panel's recommendation, *i.e.* to bring its measure into conformity with its WTO obligation, an implementing member is free to choose the means it takes to comply with its obligation. This has been firmly established in the case of *US – Offset Act (Byrd Amendment)*, by emphasizing on the principle that "choosing the means of implementation is, and should be, the prerogative of the implementing Member".¹⁸² In practice out of the 56 cases that the complainants requested the panel to exercise its right under Article 19.1 DSU, there are only 8 cases in which the panel specifically suggested the implementing Member to revoke its measure.¹⁸³ However, these cases are exceptional. On the contrary, there have been more than 48 cases in which the panel refused to suggest an implementing Member to revoke its measure.¹⁸⁴ Therefore, the Panel needs to be very cautious in exercising this right similar to the previous cases and must provide a reasoned and adequate explanation on why the respondent cannot exercise its prerogative right to choose the means of implementation of the inconsistent measure. The Panel would also need to explain what fundamental obligations have been violated by Indonesia so that the *only* way to comply with the panel ruling is by withdrawing the safeguard measure.

88. Contrary to the complainants who never submitted any explanation as to why *only* way to comply with the panel ruling is by withdrawing the safeguard measure, Indonesia in its rebuttal submission has submitted on ways to comply with the panel rulings, assuming *arguendo* (*quod non*) that the Panel found inconsistencies of Indonesia's safeguard measure.¹⁸⁵

89. Therefore, Indonesia submits that in the event that the Panel finds any inconsistency with Indonesia's WTO obligations, we would respectfully request the Panel to reject the complainants' request on for the Panel to suggest that the *only* manner in which Indonesia could remove the various allegations of inconsistencies at issue is by immediately withdrawing the safeguard measure at issue. Rather, the Panel should confer Indonesia the discretion to choose the means in which Indonesia could implement the Panel's recommendation.

III. CONCLUSION

90. In light of the foregoing, Indonesia requests the Panel to find that KPPI has fulfilled all its obligations under GATT 1994 and the Agreement on Safeguards and therefore requests the Panel to reject all claims made by the complainants.

¹⁸¹ Panel Report, *US – Line Pipe*, para. 8.6.

¹⁸² Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 52.

¹⁸³ See Exhibit IDN-48.

¹⁸⁴ Indonesia's rebuttal submission, para. 151.

¹⁸⁵ *Ibid.* paras. 152-155.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA****I. THE EXCEPTIONAL NATURE OF SAFEGUARD MEASURES**

1. Safeguard measures are both extraordinary and exceptional in nature.¹ Care must be taken to ensure any safeguard measure fully complies with the stringent standards of Article XIX of the GATT and the Agreement on Safeguards.

II. THE DOCTRINE OF PARALLELISM

2. Existing WTO case law on the doctrine of parallelism² has focused on the source of the product in question. In this case the complainants argue the doctrine should apply to its scope.³ In Australia's view, the key concern is the same, regardless of whether the doctrine is applied to product scope or source: that is, to ensure any safeguard measures applied are justified by the findings of the preceding investigation.⁴

3. The product scope has fundamental legal implications for the results of an investigation.⁵ Any discrepancy in the scope of the product as investigated and the scope of the product subject to the safeguard measure must be adequately explained by the investigating authority, including to demonstrate non-attribution of injury caused by products excluded at the application of measures phase.⁶

4. Australia does not consider Article 5.1 of the Agreement on Safeguards to be a relevant legal basis for a decision not to apply safeguard measures to a sub-set of products, which themselves meet the requirements to apply safeguards. In Australia's view, Article 5.1 does not deal with *whether* to apply safeguard measures, but rather *how* Members must calibrate safeguard measures to ensure they are not applied beyond the extent necessary to prevent or remedy the serious injury found and to facilitate adjustment.⁷

5. Nonetheless, Australia considers that it would be possible for an investigating authority to choose *not* to apply safeguard measures to a subset of products, even where all relevant requirements have been met. There is nothing in the Agreement on Safeguards that requires an investigating authority to impose a safeguard measure. However, this does not nullify the investigating authority's obligation to ensure that any safeguard measures it *does* apply are justified by the results of the preceding investigation.

III. THREAT OF SERIOUS INJURY

6. While Article 2.1 of the Safeguards Agreement only requires a Member to make a finding of increased imports absolute *or* relative to domestic production in order to apply a safeguards measure, Article 4.2(a) requires that the Member first evaluate, *inter alia*, "the rate and amount of the increase in imports of the product concerned in absolute *and* relative terms".

¹ See Appellate Body Reports, *Argentina – Footwear (EC)*, paras. 93-94; *US – Line Pipe*, paras. 80-81; *Korea – Dairy*, para. 86.

² Appellate Body Reports, *US – Line Pipe*; *US – Steel Safeguards*; *US – Wheat Gluten*; *Argentina – Footwear (EC)*; and Panel Report, *Dominican Republic – Safeguard Measures*.

³ The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and Vietnam's First Written Submission, para. 5.115.

⁴ Or as the Panel recalled in *US – Steel Safeguards* at para. 10.595, "the requirement of parallelism... is that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application".

⁵ For example, the like or directly competitive products at issue; the relevant domestic industry; whether imports have increased; whether the domestic industry has suffered serious injury or threat thereof; whether the imports at issue have caused the serious injury or threat thereof; and whether the unforeseen developments can be shown to have caused such injury.

⁶ See Appellate Body Report, *US – Steel Safeguards*, paras. 450-452, 472.

⁷ Article 5.1 thus disciplines, for example, the quantum of safeguard duties or the level of quantitative restrictions applied to ensure they do not exceed what is necessary.

7. Australia agrees with the complainants that it would render inutile the requirement in Article 4.2(a) to examine the "share of the domestic market taken by increased imports" if the Article 4.2(a) requirement to examine increased imports in "relative terms" could be satisfied by simply examining imports relative to domestic consumption. Article 4.2(a) is "unambiguous that at a minimum each of the factors listed, in addition to all other factors that are 'relevant', must be considered."⁸

8. Article 4.2(a) mandates what an investigating authority must *evaluate* in its safeguards investigation, while Article 2.1 deals with the necessary *threshold to apply* safeguard measures once a determination has been made.

IV. NOTIFICATIONS

9. In Australia's view, any deficiencies in the timing of notifications should properly be dealt with under Article 12.1 of the Agreement on Safeguards, not Article 12.2.

10. The Appellate Body in *US – Wheat Gluten* established that, whereas Article 12.1 deals with *when* notifications must be made, Article 12.2 clarifies *what* information must be included in notifications under Article 12.1(b) and 12.1(c).⁹ While the two articles are explicitly related,¹⁰ a Member may breach one provision and not the other.

⁸ Panel Report, *Argentina – Footwear (EC)*, para. 8.206. See also Panel Reports, *Korea – Dairy*, para. 7.55; *US – Wheat Gluten*, para. 8.39.

⁹ Appellate Body Report, *US – Wheat Gluten*, para. 123.

¹⁰ Article 12.2 refers to Articles 12.1(b) and 12.1(c).

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION**

1. The European Union intervenes in this case (concerning a safeguard measure by Indonesia on imports of certain flat-rolled products of iron or non-alloy steel) because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Agreement on Safeguards and the General Agreement on Tariffs and Trade (the GATT 1994). This executive summary integrates comments made by the European Union in the Third Party Hearing on 6 October and in its reply to the written questions by the Panel of 20 October 2016.

2. Regarding the co-complainants claim that Indonesia did not provide a reasoned and adequate explanation on how **unforeseen developments** resulted in the increase in imports that allegedly caused serious injury, the European Union considers that the global financial crisis in 2008 to which Indonesia referred qualifies as an unforeseen development. However, investigating authorities must not only show the existence of unforeseen developments; they must also establish a logical connection between the unforeseen developments and the increased imports of the *specific product* on which the safeguard measure is imposed. This is particularly important where the alleged unforeseen developments are macroeconomic events having effects across a number of industries.

3. On the question of **how recent the data** used by the investigating authority must be, the European Union referred in its written submission to a number of cases where the Appellate Body and previous panels have dealt with the question. The European Union pointed out that the investigation period must be "the recent past", but that there can be no strict numerical rule which would apply in each and every case. The question whether the data used is recent enough should be decided on a case-by-case basis, taking into account the actual availability of data (normally, import statistics are available within three to four months; this time span might be longer where aggregated data is used) and allowing for a reasonable delay for processing the data and drawing conclusions. The acceptable length of this delay will vary in each case, depending, *inter alia*, on the complexity of the case, the nature of the industry concerned and the technical capacity of the country imposing the measures, particularly in the case of developing countries. Where investigations take longer, the investigating authorities should consider updating the data in the course of the investigation, to the extent feasible. The European Union also highlighted the possibility for the defendant to justify longer time lapses if it encounters practical difficulties in using more recent data or in updating information. Such justification can be provided *ex post*, during the panel proceedings.

4. With respect to the **threat of serious injury**, while Article 4.2(a) is not as explicit as Article 2.1 with regard to the evaluation of the increased imports relative to domestic production, the European Union considers that Article 2.1 provides for helpful context in understanding the obligation in Article 4.2(a). Accordingly, taking into account the contextual reference to domestic production in Article 2.1, as well as the fact that another factor in Article 4.2(a) is linked to domestic consumption (the share of the domestic market taken by increased imports), the European Union considers that an interpretation giving meaning to each of the treaty terms supports the proposition that the reference to the increase in imports in relative terms in Article 4.2(a) is to be understood as relative to domestic production. The increase in imports of the product concerned in relative terms is a relevant factor and it is informed by the overarching requirement in Article 4.2(a) (all factors to be evaluated must be *relevant*, in the sense of "having a bearing on the situation of that industry").

5. The European Union also recalls that the analysis of all relevant factors under Article 4.2(a) is a distinct step from the establishment of a causal link between the increased imports of the product concerned and serious injury or threat thereof, even if the two aspects of the evaluation are related.

6. With respect to **the causal link**, the European Union agrees that it is up to the complainants to meet their burden of proof with regard to the alleged violations. While interconnected, different provisions in the Agreement on Safeguards contain multiple obligations and a violation of a certain provision does not necessarily result in a violation of other provisions.

7. The concept of **parallelism** as developed in the existing case-law is not applicable to the present case, but a similar concept may be relevant in the present proceedings. While in previous cases the application of the safeguard measure was narrowed down by excluding certain trade partners, in the present case the application of the safeguard measure is also narrowed down, but with respect to the product scope.

8. The European Union considers that a panel would need to ascertain whether there is a gap between the product scope of a safeguard investigation and the product scope of the application of safeguard measures and whether there is an explicit explanation that the imports of the product(s) covered by the measure threaten to cause serious injury to the domestic industry.

9. The European Union is mindful of the differences between the Anti-Dumping Agreement and the Agreement on Safeguards. The case-law under one agreement can not be automatically transposed to the other agreement, due to the complexities and particularities of each agreement. Furthermore, in *Mexico – Steel Pipes and Tubes* there was a widening of the product scope, as opposed to the present case, where the product scope is narrowed down.

10. On its own terms Article 2.1 of the Agreement on safeguards speaks of the application of a measure to "a product", which is later on referred as "such product ...being imported" in such quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. The second reference can be understood as a reference to the investigation.

11. Article 2.1 may be contextually informed by Article 5.1 of the Agreement on Safeguards. Article 5.1 refers to the *application* of safeguard measures "only to the extent necessary" to prevent or remedy serious injury. The European Union disagrees with Indonesia, which seems to suggest that the narrowing down of the product scope is a political decision (subject to the National Interest Consideration) which may not benefit from a panel's scrutiny in WTO proceedings.

12. The European Union can imagine an example where the product under investigation is composed of two models: model A and model B. In a scenario where an investigating authority collects cumulative data with regard to models A and B without differentiating between the two models with respect to serious injury and causation, and subsequently receives a request from the domestic industry concerning the narrowing down of the application of the safeguard measure, from models A and B to only model A, that investigating authority will need to re-do the investigation in such a way so as to collect relevant data with respect to that particular model. To the contrary, in a scenario where an investigating authority collects data and conducts the investigation with respect to model A, model B, and models A and B cumulatively, separating in each case the serious injury and causal link, respectively, that investigating authority may be able, under Article 5.1, to lawfully apply a safeguard measure with respect to, say, only model A, without breaching its obligations under Article 4.2.

13. On the co-complainants' claims under **Article I:1 of the GATT 1994**, the European Union takes the point of view that an exclusion pursuant to and compliant with Article 9.1 of the Safeguards Agreement can not constitute a violation of the most-favoured nation principle under the GATT 1994. Article 9.1 does not only allow the exclusion of certain developing countries; it even mandates it. In that sense, it is a justified deviation from MFN in the safeguard context. Article XIX of the GATT 1994 empowers contracting parties to suspend GATT obligations, including Article I:1, if its conditions (as clarified and reinforced by the Safeguards Agreement) are fulfilled. In that sense, Article I:1 and Article XIX of the GATT 1994, and the provisions of the Safeguards Agreement are an inseparable package of rights and disciplines.

14. According to the General interpretative note to Annex 1A, the ultimately relevant standard for safeguard measures is the one set by the Safeguards Agreement. The latter prevails in case of conflict, but should also more generally inform the way in which Article I:1 of the GATT 1994 is applied to safeguard measures. Article I:1 should be interpreted harmoniously with the relevant

provisions of the Safeguards Agreement. A particularity of the MFN standard for safeguards, as it is clear in both Article 2.2 and Article 9.1 of the Safeguards Agreement, is that it only applies between supplying countries. As the Appellate Body has pointed out in *US – Line Pipe*, Article 9.1 (in the same way as Article 2.2) is a provision on the *application* of measures. Thus, the European Union considers that the obligation to exempt developing countries with *de minimis* imports only applies if and when they are actually exporters of the product concerned to the country taking the measure, and not in a purely abstract, "preventive" manner. Therefore, in the European Union's view, the exclusion of six of its Member States, none of which currently exports, or has in the last 10 years exported the product at stake to Indonesia, is not an issue that is directly connected to the particular fact pattern at issue in this case – that is, the real world trade dispute that the Panel is called upon to adjudicate.

15. With regard to the **notification requirement** under Article 12 of the Agreement on Safeguards, the European Union acknowledges that in *US – Wheat Gluten* the Appellate Body found - for a safeguard measure in the form of a quota - that neither Article 12.1(c) nor Article 12.2 of the Agreement on Safeguards, considered in isolation, required that the relevant information must be disclosed in notifications made prior to the entry into force of the measure. However, equally on the basis of the Appellate Body Report in *US – Wheat Gluten*, as well as other cases, the European Union considers that when all of the relevant obligations (in particular Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994) are considered, the importing Member must submit all mandatory information prior to the entry into force of the measure.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****1 INTRODUCTION**

1. The Government of Japan intervenes in this dispute because of its systemic interest in ensuring the objective and consistent interpretation of the Agreement on Safeguards and the GATT 1994.

2 THE REQUIREMENT OF IMPORTS HAVING INCREASED AS A RESULT OF THE UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT 1994

2. The two elements of the first clause of Article XIX:1(a) of the GATT 1994, namely the "unforeseen developments" and the "effect of the GATT obligations", constitute circumstances that must be demonstrated as a matter of fact, distinct from the conditions established under the second clause.

3. With regard to the "unforeseen developments", Japan first notes that they refer to events or developments that were "unexpected".

4. Second, with respect to the point in time where given developments were unforeseen, any factual demonstration of "unforeseen developments" by the authorities must relate to developments that were "unexpected" at the time the Member incurred the relevant GATT obligation. The fact that a development occurred after the obligation has been incurred does not mean *per se* that such development was unforeseen or unexpected at that time. It is therefore necessary that in their published report the authorities assess and explain why the development which they have identified was unforeseen at the time the relevant obligation was negotiated. In the absence of such explanation, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled. In the present case, it does not appear to be any discussion in the Final Disclosure Report as to why the 2008 financial crisis should be regarded as "unforeseen".

5. Third, as regards the type of facts or events that may constitute "unforeseen developments", Japan considers that these are events that modify the competitive relationship between imported and domestic products to the detriment of the latter. This understanding is supported by the text of Article XIX:1(a), its broader context as well as the case law including the Working Party Report in "Hatters' Fur" case.

6. Fourth, Japan emphasises that the authorities must provide a "reasoned and adequate explanation" of how the facts support their determination of "unforeseen developments". Such "reasoned and adequate explanation" must be explicit in the sense that it must be clear and unambiguous and does not merely imply or suggest an explanation. Japan notes that the term "unforeseen development" is only used once in Section C.5 of the Final Disclosure Report in relation to increase in imports. This does not amount to a determination of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994 as an increase in imports and the unforeseen developments must necessarily be two distinct elements.

7. Furthermore, Article XIX:1(a) of the GATT 1994 requires a demonstration of a "logical connection" between the unforeseen developments and the increase in imports causing (or threatening to cause) serious injury. Importantly, what must be demonstrated is a logical connection not simply between the unforeseen developments and any type of increase in imports but between the unforeseen developments and the increase in imports which causes or threatens serious injury. In Japan's view, this is indicated in the text. Indeed, the term "unforeseen developments" in the text of Article XIX:1(a) is grammatically linked not only to "such increased quantities" but also to "under such conditions as to cause or threaten serious injury".

8. When examining these terms, it is important to emphasise that an increase in imports is not equivalent to serious injury or threat thereof nor does the former necessarily result in the latter. Serious injury of domestic producers or threat thereof is caused when domestic products are replaced by imported products or when the domestic products' prices are affected by imported products. These market phenomena together with the increase in imports arise only when there is a change in the competitive relationship between the imported and domestic products to the detriment of the latter.

9. Therefore, the "logical connection" will be demonstrated when the unforeseen developments have modified the competitive relationship between the imported and domestic products to the detriment of the latter, leading to an increase in imports causing, or threatening to cause, serious injury to the domestic industry.

10. While some events clearly change the competitive relationship between the imported and domestic products to the detriment of the latter thereby resulting in the increased imports and serious injury of domestic producers in a relevant market, other do not. In the latter scenario, the authorities carry a particular burden to explain the logical relationship between the unforeseen developments at hand and the increased imports causing or threatening serious injury.

11. Japan considers that Indonesia did not show a "logical connection" between the unforeseen developments and the increase in imports because it failed to explain the change in the conditions of competition between the domestic and imported products resulting in the increase in imports causing or threatening serious injury.

12. With regard to the effect of the GATT 1994 obligations, Japan underlines that, in order to satisfy this requirement, a Member must establish that the increase in imports occurred "as a result" of the effect of GATT 1994 obligations. More specifically, it must be explained how these GATT obligations had the effect of preventing that Member from taking WTO-consistent measures, such as an increase in import duties within the bound tariff rate and on an MFN basis, in order to prevent or remedy the change generated by the "unforeseen developments" in the competitive relationship between the domestic and imported products. Indeed, if the change generated by such unforeseen developments could be offset by a tariff increase, no tariff concession would need to be withdrawn to remedy the situation and thus safeguard measure would not be warranted.

3 THE CONDITIONS FOR THE APPLICATION OF SAFEGUARD MEASURES

3.1 The proper scope of the "domestic industry" in Article 4.1(c)

13. Pursuant to Article 2.1 of the Agreement on Safeguards, safeguard measures may be applied only if the product is being imported [...] as to cause or threaten to cause serious injury to the domestic industry. Article 4.1(c), in turn, defines domestic industry as either "the producers as a whole" or "those whose collective output [...] constitutes a major proportion", without providing any specific numerical threshold. In addressing the link between the phrase "major proportion" and the question of data coverage, the panel in *US – Lamb* made clear that a national authority is under an obligation to collect sufficiently representative information so as to ensure the representativeness of the data used for its final determination.

14. In the present case, Indonesia only evaluated serious injury factors of two domestic companies (mentioned as "petitioners") who only produced 77% of the total domestic production. While Japan does not take position as to whether the data examined by Indonesia are sufficiently representative, Japan would like to draw the Panel's attention to this issue because it may distort the overall analysis of threat of serious injury and causation.

3.2 The causation analysis

15. Article 2.1 of the Agreement on Safeguards provides that the product must be imported in such increased quantities and "under such conditions" as to cause or threaten to cause serious injury to the domestic industry. The phrase "under such conditions" indicates the need to "analyse the *conditions of competition* between the imported product and the domestic like or directly

competitive products *in the importing country's market*".¹ In other words, "for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are *such* that the increased imports can and do cause or threaten to cause serious injury".² Thus, in Japan's view, in the causation analysis, it is essential to examine the competitive relationship between the imported and domestic products in the domestic market of the importing country, including how the alleged increased imports substituted domestic products.

16. Japan notes that in the Final Disclosure Report, there is no analysis of the conditions of competition on the domestic market explaining how the increased imports caused or threatened to cause serious injury to the domestic industry. Thereby, Indonesia has failed to fulfill the requirement provided for in Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

4 THE REQUIREMENT OF "PARALLELISM" BETWEEN THE PRODUCT SUBJECT TO INVESTIGATION AND THE PRODUCT TO WHICH THE SAFEGUARD MEASURE IS APPLIED

17. The principle of parallelism is derived from a parallel language of Articles 2.1 and 2.2 of the Agreement on Safeguards which requires that the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2. While the existing case law has exclusively addressed the principle of "parallelism" as a geographical issue, Japan submits that the need for coherence and consistency which underlies the principle of parallelism should be applicable to all situations in which the scope of a safeguard measure excludes imports which were included in the scope of the investigation.

18. The identification of the investigated product has many legal implications for the conduct and outcome of the safeguard investigation. As a result, if the product scope on which the findings of the investigation are based does not correspond to the product scope of the safeguard measure that is applied, the whole investigation would be rendered unreliable.

19. Further, Japan is of the view that the requirements of Article 2.1 and Article 5.1 of the Agreement on Safeguards must be applied cumulatively and thus, while an investigating authority may rely upon Article 5.1 to justify the application of a safeguard measure to a narrower group of products than those subject to the underlying investigation, it must at the same time ensure that such narrower group of products – on its own – satisfies the conditions for the application of a safeguard measure set out in Article 2.1 of the Agreement on Safeguards.

20. Japan considers that there could be situations in which the product covered at the initiation of an investigation or during the course of the investigation is not exactly the same as the product to which the safeguard measure applies given that the scope of the product is modified after the investigation has been initiated. What matters is that the product with respect to which the assessment pursuant to Articles 2.1 and 4.2 of the Agreement on Safeguards is made and the product subject to the safeguard measure are the same.

5 REQUIREMENT THAT THE RELEVANT INFORMATION MUST BE DISCLOSED IN NOTIFICATIONS MADE PRIOR TO THE ENTRY INTO FORCE OF THE RELEVANT SAFEGUARD MEASURE

21. A notification made after the entry into force of the measure would not, by definition, be a notification made by a Member proposing to apply a safeguard measure because the measure is already in force. Therefore, the notification made under Article 12.1(c) of the Agreement on Safeguard would not comply with the requirements under Article 12.2 of the Agreement on Safeguards when it is made after the entry into force of the measure.

6 CONCLUSION

22. Japan would like to thank the Panel for considering its views and hopes that its comments will be useful for the Panel's analysis.

¹ Panel Report, *Argentina – Footwear (EC)*, para. 8.250.

² *Ibid.*

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE****I. BASIC REQUIREMENTS OF IMPOSITION OF SAFEGUARD MEASURES**

1. Ukraine observes the importance to consider the matter raised under the dispute in context of the synthesis of Article XIX of the GATT 1994 and the relevant provisions of the Agreement on Safeguards reaffirming this position with conclusions of the Appellate Body¹ stating that "any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994" and that "Articles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards"².

2. While the Article XIX:1 of the GATT 1994 establishes general provisions regarding the imposition of an emergency action the Article 2.1 of the Agreement on Safeguards provides more specific requirements in order to apply a safeguard measure.

II. REQUIREMENTS TO PROVIDE ADEQUATE OPPORTUNITY TO HOLD CONSULTATIONS PRIOR TO THE IMPOSITION OF THE MEASURE

3. Ukraine notices that for the purpose of the conformity of imposition of a safeguard measure with the provisions of WTO Agreements not only requirements set forth in the Article XIX:1 of the GATT 1994 and in the Article 2.1 of the Agreement on Safeguards must be complied but also the contracting party has to fulfil the requirements provided in Article XIX:2 and Article 12 thereof in order of a safeguard measure to correspond with the GATT 1994.

4. The mentioned position concerning the necessity of compliance of a safeguard measure with the requirements set forth in Article 12 of the Agreement on Safeguards regarding the notification and the requirements of providing adequate opportunity for prior consultations before imposing a safeguard measure is reiterated by the Appellate Body concluded its general point regarding the object and purpose of the notification requirements and stated that it is better served if it includes all the elements of information specified in Articles 12.2 and 4.2 of the Agreement on Safeguards. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3 of the Agreement on Safeguards, than they would otherwise be if the notification did not include all such elements.

III. REQUIREMENTS OF DETERMINING AND NOTIFYING ALL RELEVANT INFORMATION CONCERNING SERIOUS INJURY OR THREAT THEREOF

5. According to the Article 4.1 (b) of the Agreement on Safeguards for the purposes of this agreement "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2 of the same Article. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

6. Thereby Ukraine would like to accent on the importance of abidance of the provisions of Article 12.1 (b) of the Agreement on Safeguards, in particular with the aim to hold a meaningful prior consultations, stating that a Member shall immediately notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports.

7. The requirements for the abovementioned notification are set forth in Article 12.2 of the Agreement on Safeguards which determines that a Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information,

¹ Appellate Body Report, *Argentina – Footwear (EC)*, para.84.

² Appellate Body Report, *US – Lamb*, para. 70.

which shall include *inter alia* evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

8. The object and purpose of the notification requirements are mentioned in *Korea – Dairy*³ by the Appellate Body concluded its general point that it is better served if the notification includes all the elements of information specified in Articles 12.2 and 4.2 of the Agreement on Safeguards. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3 of the Agreement on Safeguards, than they would otherwise be if the notification did not include all such elements.

³ Appellate Body Report, *Korea – Dairy*, para. 111.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT****I. INTRODUCTION**

1. The United States will address certain issues of systemic concern regarding the interpretation and application of Articles 2.1, 4.2, 5.1, 9.1, 12.1, and 12.2 of the *Agreement on Safeguards* ("Safeguards Agreement"), as well as Articles I:1 and XIX:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. THE SAFEGUARDS AGREEMENT AND ARTICLE I:1 OF GATT 1994

2. Considering that the WTO Agreement is a single undertaking, a breach of Article I cannot be established without taking into account other relevant articles. Here, a possible Article I claim cannot be examined without considering Article XIX of the GATT 1994, as well as relevant provisions of the Safeguards Agreement.

3. Article XIX recognizes that a Member may suspend certain obligations under the GATT 1994 "to the extent necessary" to prevent injury. Whether this will result in the same treatment for like products from all Members may depend on the facts of the particular case. In any event, Article XIX does not state that Article I MFN obligations may not be suspended.

4. Turning now to the Safeguards Agreement, its Preamble states that the Agreement is intended "to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)." Accordingly, if the Safeguards Agreement states that different treatment is to be provided for like products of different Members, this serves as a clarification – to the extent any ambiguity existed before – that Article I does not preclude such differential treatment.

5. The Safeguards Agreement first states a general MFN principle: Article 2.2 provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." Article 9.1 then provides a more specific rule for a particular situation. Under Article 9.1, differential treatment is not only allowed, but it is *required*. Accordingly, when the conditions in Article 9.1 apply, the Safeguards Agreement clarifies that a Member following the obligation set out in Article 9 is acting in accordance with the GATT 1994, including Article I. On the other hand, if a Member provides differential treatment for products of different Members in a manner not provided for in Article 9, the Member may be acting inconsistently with its MFN obligations under Article 2.2 of the Safeguards Agreement, as well as under Article I of the GATT 1994.

6. As a final matter, the United States notes that it does not perceive any conflict between Article I of the GATT 1994 and the Safeguards Agreement. However, in the event of conflict, the Safeguards Agreement would prevail. The General Interpretive Note to Annex 1A to the WTO Agreement makes clear that if there is a conflict between a provision of GATT 1994 and "a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization" – which includes the Safeguards Agreement – then the latter "shall prevail to the extent of the conflict."

III. EXAMINATION OF CONTEMPORANEITY REQUIREMENTS FOR ESTABLISHING INCREASED IMPORTS UNDER ARTICLES 2.1 AND 4.2 OF THE SAFEGUARDS AGREEMENT AND ARTICLE XIX:1 OF GATT 1994

7. Whether or not increased imports data relied upon in support of a safeguard measure is sufficiently contemporaneous must be decided on a case by case basis, taking account of the facts of the particular situation and of the reasoning used by the authority. Articles XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2 of the Safeguards Agreement require competent authorities to establish that an increase in imports has caused or threatened to cause serious injury to a

domestic industry. The Safeguards Agreement does not, however, set out absolute standards for how recent, sudden, or significant an increase in imports must be in order to show that the increase caused or threatened to cause serious injury. This analysis is not a "mathematical or technical determination."

8. Based on a review of the record of this dispute, it does not appear that the evidence Indonesia relied upon was sufficiently close in time to the imposition of the safeguard, considering it ended 17 months prior to when the period of investigation closed. The record does not appear to include any explanation as to why more recent information was not sought or obtained. Nor does the record appear to explain how or whether this 17-month gap in data affected Indonesia's analysis in concluding that the product in question "is being imported" under such conditions as to threaten to cause serious injury.

9. Article 4.1(b) defines "threat of serious injury" to mean "serious injury that is *clearly imminent*." Without such explanation, Indonesia provides no basis for evaluating whether the safeguard measure reasonably addressed the condition of the domestic industry at the time it was imposed, or whether the measure was even necessary to prevent serious injury.

IV. OBSERVATIONS REGARDING FINANCIAL CRISES AND THEIR IMPACT ON THE ANALYSIS OF INCREASED IMPORTS UNDER ARTICLE XIX:1 OF GATT 1994

10. The parties, as well as certain third parties, have presented arguments as to whether Indonesia sufficiently explained how the financial crisis was an "unforeseen development," and how it led to increased imports in Indonesia. An examination of issues involving a financial crisis does not require the development of any special types of rules under the Safeguards Agreement. Rather, in justifying the imposition of a safeguard measure based in whole or in part on a financial crisis, a competent authority needs to satisfy the requirements of Article XIX:1 of GATT 1994. This inquiry will, necessarily, depend on the unique facts and circumstances accompanying each particular financial crisis, whether big or small, and a Member's decision to impose a safeguard measure on that basis, whether in whole or in part.

11. Accordingly, the United States would not agree with the contention that some sort of heightened standard would apply in examining issues involving the significance of a financial crisis.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOR THE THIRD PARTIES

QUESTION I: THREAT OF SERIOUS INJURY

1. Article 2.1's express statement that an authority may apply a safeguard only if a product is being imported in increased quantities in absolute terms or *relative to domestic production* necessarily informs the interpretation of Article 4.2(a)'s reference to increased imports in "relative terms." Article 2.1 is clear that one of the possible preconditions for the imposition of a safeguard is an increase in imports *relative to domestic production*.

2. Article 4.2(a) discusses the factors to be considered by competent authorities in their investigation when evaluating whether "increased imports have caused or are threatening to cause serious injury to a domestic industry{,}" consistent with Article 2.1. Article 4.2(a) requires competent authorities to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." The Article then goes on to specify the factors to be considered – including the "rate and amount of the increase in imports of the product concerned in *absolute and relative terms*."

3. Note that Article 4.2 connects "absolute" and "relative terms" with "and," as opposed to the "or" used in Article 2.1. This difference reflects the differing roles of the two articles: Article 2.1 specifies the conditions for imposing a safeguard, while Article 4.2 specifies the factors that must be examined by an authority. Thus, Article 4.2 requires an authority to examine both absolute and relative increases; while Article 2.1 provides that either one of these two types of increases will meet this increased quantity condition.

4. The context of Article 2 – with its requirement for increases in absolute terms or relative to domestic production – indicates that Article 4.2(a)'s reference to increases in imports "in absolute

and relative terms" is a reference to these same numerical comparisons. That is, when Article 4.2(a) mentions increased imports in "relative terms" as a factor that competent authorities must consider in their investigation, this is a reference to the increase relative to domestic production as specified in Article 2.1.

5. Further, the structure and plain text of Article 4.2(a) indicate that its reference to increased imports in "relative terms" as a factor to be considered by competent authorities concerns *domestic production*, as opposed to domestic consumption or market share. In particular, the very next factor listed in Article 4.2(a), following its reference to increases in imports in relative terms, concerns "the share of the domestic market taken by increased imports." Market share is normally evaluated in terms of domestic consumption. If the "relative terms" in the prior clause were to mean relative to domestic consumption, then there would be no purpose to inclusion of a subsequent clause requiring an examination of domestic market share.

6. Moreover, the factors permissible for competent authorities to consider under Article 4.2(a), beyond those enumerated in the article, will depend on the particular facts and circumstances in the investigation at issue, including the impact on the domestic industry at issue. The Appellate Body stressed in *US – Wheat Gluten* that competent authorities must, where necessary, "undertake additional investigative steps . . . in order to fulfill their obligation to evaluate all relevant factors."

QUESTION II: PARALLELISM

7. Regarding Article 5.1, the first and last sentences of that Article do not preclude the application of a safeguard measure on a range of models of the investigated product that is narrower than the range of models for which investigating authorities made a finding of serious injury. The first sentence of Article 5.1 establishes the maximum permissible extent, or ceiling, for the application of a safeguard measure. It allows Members to apply safeguards "only to the extent necessary to prevent or remedy serious injury" caused by increased imports and to "facilitate adjustment" of the domestic industry. The first sentence of Article 5.1 does not contain any requirement to apply a safeguard to every model included in the investigation of serious injury.

8. The last sentence of Article 5.1 – "Members should choose measures most suitable for the achievement of these objectives" – accords Members discretion on choosing the appropriate safeguard measure. First, it is expressed in terms of "should," not "shall," which means that the sentence does not impose an obligation enforceable in dispute settlement. Second, by using the phrase "suitable" to achievement of objectives, the sentence leaves to a Member's discretion what particular measures may or may not be "suitable" in the particular circumstances.

9. Turning to "the principle of 'parallelism,'" the United States cautions that the application and enforcement of abstract principles not set out in the WTO Agreement would be fundamentally at odds with the customary rules of interpretation of public international law. To the extent that "parallelism" has any role in evaluating the consistency of a measure with obligations under the Safeguards Agreement, it is only if that term is used as a shorthand for a specific obligation, or set of obligations, expressly stated in the text of the agreement.

10. Here, the United States understands that "parallelism" is shorthand for the proposition that if imports from all geographic sources are considered in determining that increased imports are causing serious injury, while imports from a specific number of those sources are then excluded from the application of the safeguard measure, that could result in a measure that is inconsistent with the obligations in Article 2 of the Safeguards Agreement. The Appellate Body in *US – Wheat Gluten* found that such a gap between the two could only be justified if the investigating authorities establish that imports from countries covered by the safeguard measure satisfied the conditions for the application of the safeguard under Articles 2.1 and 4.2.

11. The present circumstances, by contrast, do not involve the exclusion of certain geographic sources and, therefore, do not implicate the Article 2.2 issue addressed in *Wheat Gluten*. Rather, the present dispute involves a Member's conclusion that applying the safeguard measure to all of the models of the imported product covered by the competent authorities' finding of serious injury was not necessary. This separate evaluation does not call into question the identity of the product or the conclusion that the product caused serious injury within the meaning of Article 2.1, and it

complies with the Article 2.2 obligation to apply any safeguard measure "to a product being imported irrespective of its source."

12. As is the case with Article 5.1, Article 2.1 does not require a Member to apply a safeguard measure to *every* model included in the Member's investigation of serious injury. The plain text of Article 2.1 states that a Member "*may* apply a safeguard measure" based on the conditions listed in the Article; it does not state that the Member must apply the safeguard measure to every model within the scope of products explicitly subject to the Member's injury investigation. In other words, Article 2.1 does not prevent a Member from choosing to narrow the scope of application of a safeguard measure.

QUESTION III: NOTIFICATIONS

13. Regarding notifications, Article 12 does not necessarily require that information be disclosed prior to entry into force of a safeguard measure. Rather, Article 12 provides that certain notifications must be made "immediately" upon three different events. Depending on the circumstances, this could result in notifications being made before or after entry into force.

14. Article 12.1 addresses timing, requiring Members to "immediately notify the Committee on Safeguards upon: (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it; (b) making a finding of serious injury or threat thereof caused by increased imports; and (c) taking a decision to apply or extend a safeguard measure."

15. Article 12.2 enumerates certain information to be provided in the notices under Article 12.1(b) and (c): "evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization." According to the Appellate Body in *US – Wheat Gluten*, Article 12.2 is concerned with the *content* of Article 12.1 notices, and not whether those notices are *timely*. By contrast, Article 12.1 concerns the timeliness of notices based on an "immediate" standard – which the Appellate Body in *US – Wheat Gluten* stated is focused on ensuring "the Committee on Safeguards and Members of the WTO have *sufficient* time to review the notification."

16. As to the content requirements of Article 12.2, the kind of information that must be provided in Article 12.1(b) and 12.1(c) notices will differ depending on the factual circumstances. Significantly, the Appellate Body in *US – Wheat Gluten* recognized that the adequacy of notices under Article 12 must be evaluated in the context of the information available to competent authorities at the time, the complexity of the notifications, the need for translations, and other factors. We further note that Article 3.2 imposes a blanket prohibition on disclosure of confidential information, which would apply even to information that might be considered "relevant" for purposes of Article 12.2.
