



WORLD TRADE
ORGANIZATION

WT/DS490/R
WT/DS496/R

18 August 2017

(17-4424)

Page: 1/47

Original: English

INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

REPORT OF THE PANEL

TABLE OF CONTENTS

1 INTRODUCTION	8
1.1 Complaints by Chinese Taipei and Viet Nam.....	8
1.2 Panel establishment and composition.....	8
1.3 Panel proceedings.....	9
1.3.1 General	9
2 FACTUAL ASPECTS	9
2.1 The measures at issue	9
3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....	10
3.1 Chinese Taipei and Viet Nam ("Complainants").....	10
3.2 Indonesia	11
4 ARGUMENTS OF THE PARTIES	12
5 ARGUMENTS OF THE THIRD PARTIES.....	12
6 INTERIM REVIEW.....	12
7 FINDINGS	12
7.1 Standard of review, treaty interpretation, and burden of proof.....	12
7.1.1 Standard of review	12
7.1.2 Treaty interpretation.....	14
7.1.3 Burden of proof	14
7.2 Introduction.....	14
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	15
7.3.1 Definition of a safeguard measure.....	15
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	16
7.3.2.1 No binding WTO tariff obligation with respect to imports of galvalume	16
7.3.2.2 No other relevant GATT obligations preclude the adoption of the specific duty	17
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	20
7.3.4 Conclusion	22
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	23
7.5 The complainants' claims under the Agreement on Safeguards and Articles XIX:1(a) and XIX:2 of the GATT 1994.....	24
7.5.1 Unforeseen developments and the effect of GATT 1994 obligations	24
7.5.1.1 Parties' arguments.....	24
7.5.1.2 Relevant law	25
7.5.1.3 Relevant facts	26
7.5.2 Increased imports.....	27
7.5.2.1 Parties' arguments.....	27

7.5.2.2 Relevant law	28
7.5.2.3 Relevant facts	29
7.5.3 Threat of serious injury	30
7.5.3.1 Parties' arguments	30
7.5.3.2 Relevant law	31
7.5.3.3 Relevant facts	32
7.5.4 Causation	34
7.5.4.1 Parties' arguments	34
7.5.4.2 Relevant law	35
7.5.4.3 Relevant facts	36
7.5.4.3.1 "Other Factors"	36
7.5.4.3.2 "Causal link"	38
7.5.5 Application of the specific duty	39
7.5.5.1 Parties' arguments	39
7.5.5.2 Relevant law	39
7.5.5.3 Relevant facts	40
7.5.6 Notification	40
7.5.6.1 Parties' arguments	40
7.5.6.2 Relevant law	41
7.5.6.3 Relevant facts	42
7.5.7 Consultations	43
7.5.7.1 Parties' arguments	43
7.5.7.2 Relevant law	44
7.5.7.3 Relevant facts	45
8 CONCLUSIONS AND RECOMMENDATIONS	47

LIST OF ANNEXES**ANNEX A**

INTERIM REVIEW AND WORKING PROCEDURES OF THE PANEL

Contents		Page
Annex A-1	Working Procedures of the Panel	A-2
Annex A-2	Additional Working Procedures of the Panel concerning Business Confidential Information	A-7
Annex A-3	Interim Review	A-9

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Integrated executive summary of the arguments of the complainants	B-2
Annex B-2	Integrated executive summary of the arguments of Indonesia	B-25

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

Contents		Page
Annex C-1	Integrated executive summary of the arguments of Australia	C-2
Annex C-2	Integrated executive summary of the arguments of the European Union	C-4
Annex C-3	Integrated executive summary of the arguments of Japan	C-7
Annex C-4	Integrated executive summary of the arguments of Ukraine	C-10
Annex C-5	Integrated executive summary of the arguments of the United States	C-12

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), *were such discrimination considered by an importing Member to be necessary to prevent or remedy serious injury*. Our views are strictly limited to the discriminatory application of a safeguard measure that may result from compliance with Article 9.1, which is explicitly intended to afford S&D to qualifying developing country Members.

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.