WORLD TRADE ORGANIZATION

WT/DS490/R/Add.1
WT/DS496/R/Add.1

18 August 2017

(17-4425)

Page: 1/83

Original: English

INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

ANNEX A

INTERIM REVIEW AND WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

INTERIM REVIEW AND WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 1 July 2016

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

General

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

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

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

Submissions

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

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Chinese Taipei[1] or Viet Nam requests such a ruling, Indonesia shall submit its response to the request in its first written submission. If Indonesia requests such a ruling, Chinese Taipei and Viet Nam shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

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

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

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

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

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

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

Questions

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

Substantive meetings

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

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

a. The Panel shall invite Chinese Taipei and Viet Nam to make an opening statement to present their respective cases first. Subsequently, the Panel shall invite Indonesia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its opening statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other parties the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party/parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Chinese Taipei and Viet Nam presenting their statements first.

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

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

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

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party/parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's/parties' written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

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

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

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

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to

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

Descriptive part

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

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

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

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

Interim review

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

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

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

Service of documents

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

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 8 paper copies of all documents, except exhibits, it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD or USB key and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD, a USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXXXX@wto.org. If a CD-ROM or DVD or USB key is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other parties. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 22 July 2016

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated as confidential within the meaning of Article 3.2 of the Safeguards Agreement by the investigating authorities of the Indonesia in the safeguards investigation at issue in this dispute, unless the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or of a third party, or an outside advisor to a party or third party for the purposes of this dispute. A person having access to BCI shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures.

5. An outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

6. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.

7. Submission of BCI by parties or third parties:

   (i) The party or third party submitting BCI shall indicate the presence of such information in any document submitted to the Panel, as follows: the first page or cover of the document, and each page of the document, shall contain the notice "Contains Business Confidential Information" at the top of the page. The specific business confidential information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. A party submitting BCI in the form of, or as part of, an Exhibit shall so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit IDN-1 (BCI)).

(ii) Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

(iii) In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7 (i).

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

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

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

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

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

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

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

2.1 Panel's overall analysis and findings

2.1. The complainants maintain that the Panel's finding that the specific duty is *not* a safeguard measure is based on a "theory" that was not argued by the parties, who in fact all agreed and argued that the specific duty *is* a safeguard measure within the meaning of the Agreement on Safeguards and Article XIX of the GATT 1994. The complainants assert that the parties were not given "a full opportunity to present arguments on the Panel's theory"[2], and "[i]n these circumstances", that "it is incumbent on the Panel to consider carefully and to address in detail in its final report" the "arguments" presented in their comments on the Interim Report[3], which call upon the Panel to: (a) "clarify" and "explain" various aspects of the analysis and findings set out in Section 7.3 of the Interim Report; (b) "provide its views" on a number of alleged implications of that analysis and those findings; and (c) "review its reasoning" in the light of three sets of considerations.[4]

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

2.3. It is well established that the interim review stage of a panel proceeding is intended to allow parties to "submit comments on the draft report issued by the panel, and to make requests 'for the panel to review precise aspects of the interim report'".[7] The interim review process is not an opportunity for parties to advance arguments as to why they consider a particular "theory" allegedly relied upon by a panel in its Interim Report to be incorrect. Neither is it a time for parties to enter into a debate about the merits of a panel's interpretation of relevant legal provisions[8], *a fortiori* when they have exchanged views on the subject matter during the course of a proceeding (as the parties have done in this dispute[9]). Panels are not required to defend their findings and

[1] These include changes in paragraphs 7.47, 7.63, 7.67, 7.93, 7.95, 7.96, 7.126, 7.132, and 7.139, and in footnotes 12, 51, 65, 109, 133, 134, 139, 177, 182, 231, 250, and 272.
[2] Complainants' request for interim review, paras. 2.1 and 2.2.
[3] Complainants' request for interim review, para. 2.3.
[4] Complainants' request for interim review, paras. 2.6-2.9.
[5] Indonesia's comments on complainants' request for interim review, para. 8.
[6] Indonesia's comments on complainants' request for interim review, paras. 3, 8, 10, and 11.
[7] Appellate Body Report, *EC – Sardines*, para. 301. (fn omitted)
[8] Panel Report, *Japan – Alcoholic Beverages II*, para. 5.2.
[9] See below, paras. 2.5-2.7

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

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

2.5. The complainants argue that the parties were not given a full opportunity to make submissions in relation to the "Panel's theory". We note, however, that while a panel must fully explore all pertinent issues with the parties, it is not required to engage with the parties upon the findings and conclusions that it intends to make in resolving a dispute.[11] The complainants in this dispute acknowledge that the parties "had the opportunity late in the proceedings to respond to questions from the Panel that are relevant to the legal theory developed by the Panel in the Interim Report".[12] Indeed, following Indonesia's confirmation that it did not have a binding tariff obligation with respect to imports of galvalume inscribed into its GATT Schedule of Concessions[13], the parties were specifically requested to come to the second substantive meeting prepared to discuss the consequences of this fact for our evaluation of the merits of the complainants' claims, including as elaborated in paragraphs 40 and 41 of Indonesia's second written submission.[14] At the same time, the parties were given advance notice of four questions we intended to pose during the second substantive meeting with respect to the definition of a safeguard measure.[15] Thus, the timing of our decision to explore the parties' shared characterization of the specific duty as a safeguard measure reflects the fact that the issue did not concretely arise until after the first substantive meeting, when Indonesia confirmed that it was "unbound" with respect to the level of tariffs it was entitled to apply on imports of galvalume.[16]

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

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

[10] Panel Report, *Japan – DRAMS (Korea)*, para. 6.2.
[11] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1137.
[12] Complainants' request for interim review, para. 2.2.
[13] Indonesia's response to Panel question No. 7.
[14] Panel communication to the Parties of 14 December 2016.
[15] Panel communication to the Parties of 14 December 2016.
[16] We note, in this respect, that Indonesia was asked at the first substantive meeting to identify the relevant GATT 1994 obligation suspended as a result of the specific duty imposed on imports of galvalume. Indonesia responded by saying that it believed, but could not confirm at that stage, that it was a 40% duty rate inscribed into its GATT Article II Schedule of Concessions. Indonesia subsequently confirmed in its written answer to Panel questions following the first substantive meeting that it had no tariff obligation inscribed into its GATT Schedule of Concession for galvalume, and that it was, therefore, "unbound" with respect to that product. (Indonesia's response to Panel question No. 7).
[17] Complainants' comments on paragraphs 40 and 41 of Indonesia's second written submission, para. 2.2.

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

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

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

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

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

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

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

[18] Indonesia's second written submission, para. 41.
[19] Complainants' request for interim review, para. 2.18.
[20] Complainants' request for interim review, para. 2.15.
[21] Complainants' request for interim review, para. 2.16.
[22] Indonesia's comments on complainants' request for interim review, para. 8.
[23] Complainants' request for interim review, para. 2.18.

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

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

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

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

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

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

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

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

[24] Complainants' request for interim review, para. 2.26.
[25] Complainants' request for interim review, para. 2.26.
[26] Complainants' request for interim review, para. 2.26. (emphasis original)
[27] Complainants' request for interim review, paras. 2.27 and 2.32 (including fn 20).
[28] Complainants' request for interim review, para. 2.27.
[29] Indonesia's comments on complainants' request for interim review, para. 8.

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

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

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

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

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

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

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

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

[30] Complainants' request for interim review, para. 2.31.
[31] Complainants' request for interim review, para. 2.31.
[32] Indonesia's comments on complainants' request for interim review, para. 8.

3.12. Finally, we note that it is well established that the common understanding of the parties in dispute is not "in and of itself dispositive" of a particular issue and it cannot, therefore, supplant the objective assessment that a panel is required to perform under the terms of Article 11 of the DSU.[33] It follows that, as a matter of law, the fact that the parties in this proceeding may have argued that the specific duty is a safeguard measure is not determinative of the legal characterization of that duty under Article XIX of the GATT 1994 and the Agreement on Safeguards. As our detailed analysis shows, we did not lightly dismiss the parties' arguments, but very carefully examined and explored them with the parties at the first available opportunity after Indonesia confirmed that it had no binding tariff obligation inscribed into its GATT Schedule of Concessions for imports of galvalume. Ultimately, the parties' submissions (including their reliance on the unappealed panel report in *Dominican Republic – Safeguard Measures* – which we have explained differed in several important respects from the present dispute[34]) did not convince us of the merits of their position.

3.13. Accordingly, we deny the complainants' request that the Panel rule on its claims under the Agreement on Safeguards and Article XIX of the GATT 1994.[35]

4 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

4.1 Paragraph 7.24 of the Interim Report

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

4.2 Paragraph 7.30

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

4.3 Paragraph 7.33

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

4.4 Paragraphs 7.38 and 7.39

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

[33] Panel Report, *China – Publications and Audiovisual Products*, para. 6.46.
[34] Panel Report, fn 61.
[35] Our findings on this point also cover the complainants' analogous requests for alternative findings on the merits of their claims in Sections 7.5.3 and 7.5.4 of the Final Report. (Complainants' request for interim review, paras. 2.46, 2.47, and 2.49).
[36] Complainants' request for interim review, para. 2.10.
[37] Complainants' request for interim review, para. 2.10.
[38] Complainants' request for interim review, para. 2.12.
[39] Complainants' request for interim review, para. 2.21.

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

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

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

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

4.5 After paragraph 7.39

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

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

4.6 Paragraph 7.43

4.10. Indonesia requests that two sentences be inserted into this paragraph to record its view that the complainants' shifted the focus of their arguments with respect to the exclusion of 120 countries from the scope of application of the specific duty during the course of the proceeding.[43] The complainants ask us to deny Indonesia's request, arguing *inter alia* that Indonesia has not explained why the statements made in the two sentences are essential to our findings under Article I:1 of the GATT 1994.[44]

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

[40] Complainants' request for interim review, para. 2.21.
[41] Complainants' request for interim review, para. 2.21.
[42] Complainants' request for interim review, paras. 2.22 and 2.23.
[43] Indonesia's request for interim review, paras. 4-6.
[44] Complainants' comments on Indonesia's request for interim review, para. 2.3.

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

4.7 Paragraph 7.48

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

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

4.8 Paragraph 7.49

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

4.9 Paragraph 7.56

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

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

4.10 Paragraph 7.57

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

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

[45] Complainants' request for interim review, para. 2.33.
[46] Indonesia's request for interim review, paras. 7-10.
[47] Indonesia's request for interim review, para. 9; complainants' request for interim review, paras. 2.34 and 2.35.
[48] Indonesia's request for interim review, paras. 11-14.
[49] Complainants' comments on Indonesia's request for interim review, paras. 2.8-2.17.
[50] Indonesia's request for interim review, paras. 15-18.
[51] Complainants' comments on Indonesia's request for interim review, paras. 2.18-2.20.
[52] Complainants' request for interim review, para. 2.36.

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

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

4.11 Paragraph 7.61

4.20. Indonesia requests that this paragraph be amended to capture the full range of arguments it presented during the course of the proceeding.[53] The complainants submit that the additional arguments that are the subject of Indonesia's request are not essential to our analysis, and accordingly consider that it is not necessary to include them in the Final Report.[54] Separately, the complainants request that we insert an additional paragraph after paragraph 7.61 to reflect their response to Indonesia's arguments already recorded in paragraph 7.61.[55]

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

4.12 Paragraph 7.66

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

4.23. Separately, the complainants request that paragraph 7.66 be modified to correctly state the POI used in the underlying investigation and to note their opposition to Indonesia's assertion that the Indonesian Statistics Bureau does not officially publish half-yearly import statistics by country.[58] The complainants also request that we make a finding on the question of whether KPPI had access to the data for the first half of 2013.[59] Indonesia did not specifically respond to the complainants' requests.

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

4.13 Paragraph 7.67

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

[53] Indonesia's request for interim review, paras. 19-22.
[54] Complainants' comments on Indonesia's request for interim review, paras. 2.21 and 2.22.
[55] Complainants' request for interim review, para. 2.37.
[56] Indonesia's request for interim review, paras. 23-26.
[57] Complainants' comments on Indonesia's request for interim review, paras. 2.28-2.31.
[58] Complainants' request for interim review, paras. 2.38-2.41.
[59] Complainants' request for interim review, para. 2.42.

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

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

4.14 Paragraph 7.69

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

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

4.15 Paragraph 7.71

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

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

4.16 Paragraph 7.77

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

[60] Complainants' request for interim review, para. 2.43.
[61] Complainants' request for interim review, para. 2.44.
[62] Complainants' request for interim review, para. 2.45.
[63] Indonesia's request for interim review, paras. 27-30.
[64] Complainants' comments on Indonesia's request for interim review, paras. 2.32 and 2.33.
[65] Indonesia's request for interim review, paras. 31 and 32.

4.17 Paragraph 7.78

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

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

4.18 Paragraph 7.80

4.34. Indonesia requests that the description of the relevant facts in paragraph 7.80 be modified to: (a) explain that the "trend" was determined using the LOGEST function, which Indonesia submits ensured that "KPPI was not comparing the number based on end-to-end points"; (b) clarify that the complainants' evidence (Exhibit TPKM/VNM-35) (BCI) is disputed by Indonesia; and (c) indicate as a relevant fact that the petitioners' highest market share between 2010 and 2012 remained lower than their market shares at the beginning of the POI in 2008 and 2009, and that the imports' market share continuously increased between 2008 and 2012 except in 2009.[68] The complainants request that we reject Indonesia's proposed changes, arguing that the Final Disclosure Report does not support a finding by the Panel that the "trends" measuring the performances of several serious injury indicators and calculated on the basis of the LOGEST function do not result from a mere comparison of end points. As regards Indonesia's other requested changes, the complainants argue that the Panel required to neither discuss each and every factual element that is before it nor accept the same meaning and weighting of the evidence that is advanced by Indonesia.[69]

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

4.19 Paragraph 7.81

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

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

[66] Indonesia's request for interim review, paras. 33 and 34.
[67] Complainants' comments on Indonesia's request for interim review, para. 2.34.
[68] Indonesia's request for interim review, paras. 35-37.
[69] Complainants' comments on Indonesia's request for interim review, paras. 2.35 and 2.36.
[70] Indonesia's request for interim review, paras. 38-40.
[71] Complainants' comments on Indonesia's request for interim review, paras. 2.37 and 2.38.
[72] Panel question No. 64.
[73] Panel question No. 69.

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

4.20 Paragraph 7.84

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

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

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

4.21 Paragraph 7.93

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

4.22 Paragraph 7.98

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

4.23 Paragraph 7.101

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

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

[74] Indonesia's request for interim review, paras. 41-43.
[75] Complainants' comments on Indonesia's request for interim review, paras. 2.39 and 2.40.
[76] Complainants' request for interim review, para. 2.48.
[77] Complainants' request for interim review, para. 2.50.
[78] Complainants' request for interim review, para. 2.51.
[79] Indonesia's request for interim review, paras. 44-46.
[80] Complainants' comments on Indonesia's request for interim review, para. 2.41.

4.24 Paragraph 7.102

4.45. Indonesia requests that the description of the relevant facts presented in paragraph 7.102 be modified to: (a) explain that the LOGEST function used to derive the data analysed by KPPI ensured that KPPI was not making end-point to end-point comparisons; and (b) indicate that the petitioners' highest market share between 2010 and 2012 remained lower than their market shares at the beginning of the POI in 2008 and 2009, and that the market share held by imports continuously increased between 2008 and 2012 except in 2009.[81] The complainants submit that Indonesia's requests should be denied, arguing that the Final Disclosure Report does not support a finding that the "trends" based on the LOGEST function necessarily lead to the conclusion that KPPI's analysis did not involve a mere comparison of end points. As regards Indonesia's second requested change, the complainants consider that this constitutes a request to introduce factual findings that were not considered relevant by the Panel and that it should, accordingly, be rejected.[82] Separately, the complainants request that the Panel make a finding on whether "the data and facts assessed in these proceedings support KPPI's conclusion that the petitioners' market share decreased because it was absorbed by the market share of imports".[83]

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

4.25 Paragraph 7.103

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

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

4.26 Paragraph 7.105

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

4.27 Paragraph 7.110

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

[81] Indonesia's request for interim review, paras. 47-49.
[82] Complainants' comments on Indonesia's request for interim review, paras. 2.42 and 2.43.
[83] Complainants' request for interim review, para. 2.52.
[84] Complainants' request for interim review, para. 2.53.
[85] Complainants' request for interim review, paras. 2.54-2.58.

the complainants, Indonesia confirmed that it possessed relevant injury data with respect to the narrower product types with a thickness not exceeding 0.7 mm. The complainants request that this fact be reflected in paragraph 7.110.[86]

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

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

4.28 Paragraph 7.111

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

4.29 Paragraph 7.112

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

4.55. The complainants separately request that we identify references for the statements made in the first and the second sentences of paragraph 7.112.[91] Indonesia has not specifically commented on the complainants' request. We have inserted two new footnotes identifying the supporting references.

4.30 Paragraph 7.113

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

[86] Complainants' request for interim review, paras. 2.59-2.61.
[87] Complainants' request for interim review, para. 2.62.
[88] Complainants' request for interim review, para. 2.63.
[89] Complainants' request for interim review, para. 2.64.
[90] Indonesia's request for interim review, paras. 50-52.
[91] Complainants' request for interim review, para. 2.65.
[92] Complainants' request for interim review, paras. 2.66 and 2.67.

4.31 Paragraph 7.118

4.57. The complainants request that we delete the adverb "however", which contrasts the first sentence with the second sentence of paragraph 7.118.[93] Indonesia did not specifically comment on the complainants' request. We do not find it appropriate to make the requested change. In our view, it is clear from a comparison between the WTO panel reports in *Ukraine – Passenger Cars*, *Korea – Dairy*, and *US – Wheat Gluten* on the one hand and the Appellate Body report in *US – Wheat Gluten* on the other hand, that the three panels, unlike the Appellate Body, appear to have viewed Article 12.2 of the Agreement on Safeguards as placing a timeliness requirement on Members with respect to the obligation to provide the requisite pertinent information. Accordingly, we deny the complainants' request.

4.32 Paragraph 7.123

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

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

4.33 Paragraphs 7.124-7.126

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

4.34 Paragraph 7.125

4.61. The complainants request that the correct legal basis for their claims be inserted into this paragraph and that footnote 254 be amended so that it better supports the fifth sentence of paragraph 7.125.[96] Indonesia did not specifically comment on the complainants' request. We have made the requested changes.

4.35 Paragraph 7.133

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

4.36 Paragraph 7.136

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

---

[93] Complainants' request for interim review, para. 2.69.
[94] Complainants' request for interim review, para. 2.70.
[95] Complainants' request for interim review, paras. 2.71 and 2.72.
[96] Complainants' request for interim review, paras. 2.73-2.76.
[97] Complainants' request for interim review, para. 2.77.
[98] Complainants' request for interim review, paras. 2.78 and 2.79.

4.37 Paragraph 7.140

4.64. The complainants request that this paragraph be amended to identify the date on which Chinese Taipei reminded KPPI of its "pre-consultations" obligations under Article 12.3.[99] Indonesia did not specifically comment on the complainants' request. We have made the requested modification.

4.38 Paragraph 7.141

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

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

4.39 Paragraph 8.2

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

4.40 Paragraph 8.4

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

---

[99] Complainants' request for interim review, para. 2.80.
[100] Complainants' request for interim review, paras. 2.81 and 2.82.
[101] Complainants' request for interim review, para. 2.83.
[102] Complainants' request for interim review, para. 2.84.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE COMPLAINANTS

1 INTRODUCTION

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

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

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

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

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

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

2 LEGAL ARGUMENTS

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

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

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

[1] Indonesia's rebuttal submission, paras. 40-41.
[2] Indonesia's rebuttal submission, para. 41.

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

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

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

2.5. Moreover, in the complainants' view, the suspension of *any GATT obligation* made under the scope of Article XIX of the GATT 1994 and following the procedures laid out in the Agreement on Safeguards would always amount to a "safeguard measure" within the meaning of Article 1 of the Agreement on Safeguards. The most commonly cited examples of those obligations are those set out in Articles II and XI of the GATT 1994. However, the panel in *Dominican Republic – Safeguard Measures* found that the safeguard measure at issue consisted of the suspension of the Dominican Republic's obligation under Article I:1 of the GATT 1994.[7]

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

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

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

[3] Complainants' response to Panel's question 49.
[4] Complainants' response to Panel's question 49.
[5] Complainants' response to Panel's question 47.
[6] Complainants' response to Panel's question 48.
[7] Complainants' response to Panel's question 49.
[8] Complainants' response to Panel's question 49.
[9] The complainants have presented evidence indicating that as from 30 May 2015, Indonesia has increased its applied tariff rate from 12.5% to 20% with respect to the subject product. Complainants' comments on Indonesia's responses to the Panel's question 53.
[10] Complainants' response to Panel's question 49.
[11] Indonesia's responses to the Panel's questions 47 and 48.

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

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

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

2.2 The effects of GATT obligations / unforeseen developments

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

2.11. Notwithstanding the characterization of the measure at issue, the complainants consider that Indonesia applied a safeguard measure inconsistently with the requirements of Article XIX:1(a) of the GATT 1994. In particular, KPPI failed to identify the specific obligation in its Final Disclosure Report and also failed to explain how this obligation would have led to the alleged increase in imports that threatened to cause serious injury to its domestic industry.[16] The complainants consider that the Panel should follow the precedent established by the panel in *Dominican Republic – Safeguard Measures*. In that case, the panel found that the investigating authority did not identify these obligations "in its report" and did not explain how they resulted in the increase in imports that led to serious injury in respect of its domestic industry. Thus, "it [was] not possible to conclude that the report of the competent authority contain[ed] a reasoned and adequate explanation" as to how the Dominican Republic incurred GATT obligations within the meaning of Article XIX:1(a) of the GATT 1994.[17]

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

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

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

[12] Complainants' comments on Indonesia's responses to the Panel's questions 47 and 48.
[13] Complainants' comments on Indonesia's responses to the Panel's questions 47 and 48.
[14] Indonesia's rebuttal submission, para. 41.
[15] Complainants' first written submission, paras. 5.142-5.150.
[16] Complainants' response to Panel's question 47; Complainants' first written submission, para. 5.28.
[17] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.148-7.149.
[18] Complainants' first written submission, paras. 5.15-5.33.

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

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

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

2.17. Indonesia acknowledged KPPI's erroneous conclusion in its Final Disclosure Report[25] but requested the Panel not to be "fixated only on the conclusion itself". Rather, the Panel should "look to the context of the case".[26] On this basis alone, the complainants have argued that the Panel could conclude that KPPI did not adequately demonstrate a logical connection between the unforeseen developments and the increase in imports and, consequently, find that Indonesia's safeguard measure is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards. Even if the Panel could grant Indonesia its request, given the brevity of KPPI's explanation on "unforeseen developments", it is unclear to which further "context" the Panel could look.

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

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

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

[19] Indonesia's first written submission, paras. 53.
[20] Indonesia's first written submission, para. 53; Indonesia's response to Panel's question 8, paras. 11-12.
[21] Complainants' rebuttal submission, para. 2.9.
[22] Panel Report, *US – Steel Safeguards*, para. 10.115.
[23] Panel Report, *US – Steel Safeguards* para. 10.115. (emphasis added)
[24] Complainants' first written submission, para. 5.27; complainants' rebuttal submission, para. 2.9; Complainants' response to Panel's question 55.
[25] Indonesia's first written submission, para. 64.
[26] Indonesia's first written submission, para. 64.
[27] Appellate Body Report, *US – Steel Safeguards*, para. 322.

economic growth during the period of investigation (POI).[28] The complainants consider that these data cannot be taken into account by the Panel as they constitute an *ex-post* explanation.

2.21. Indonesia has alleged that KPPI was not obliged to explain why Indonesia's purchasing power remained high during the 2008 global financial crisis, nor the occurrence of the 2008 global financial crisis.[29] The complainants note that, pursuant to the last sentence of Article 3.1 of the Agreement on Safeguards, KPPI was obliged to show that every pertinent fact upon which it relied for its determination was properly addressed and explained in the Final Disclosure Report. Further, the panel in *Argentina – Preserved Peaches* concluded that "as a minimum, some discussion should be done by the competent authorities as to *why* they were unforeseen at the appropriate time, and *why* conditions in the second clause of Article XIX:1(a) occurred 'as a result' of circumstances in the first clause".[30]

2.2.3 Conclusion

2.22. In the light of the foregoing, KPPI's determination of unforeseen developments and the effect of GATT obligations is inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.

2.3 Increased imports

2.23. KPPI's determination of increased imports is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1 (and for Viet Nam also Articles 4.2(a) and 4.2(c)) of the Agreement on Safeguards because KPPI failed to provide a reasoned and adequate explanation of why the increase in imports was "recent enough".[31]

2.24. The Agreement on Safeguards does not specify explicitly the maximum permissible time gap between the end of the POI and the date of the determination of injury or threat thereof and the imposition of the final measure. Nevertheless, the discretion of the competent authority as to the length of these gaps is not unfettered. First, the analysis of increased imports must be based on the increase that is *"recent enough"*, as has been confirmed in a consistent line of the decisions of the Appellate Body and previous panels. Second, more generally, the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 require Members to apply a safeguard measure exclusively as a response to an *emergency*, and subject to conditions set out in Article XIX and the Agreement on Safeguards. An excessively long gap between a POI and the determination of injury or threat thereof and the imposition of the final measure casts doubt on the urgency of the situation. The Appellate Body and previous panels have attached particular importance to developments in the most recent portions of a POI, in particular in determinations of threat of serious injury.[32]

2.25. The Agreement on Safeguards does not establish an absolute standard of how recent the increase must be. Thus, the reasonableness of a time gap between the end of a POI and the serious injury determination or the imposition of the safeguard measure must necessarily depend on the specific circumstances of each investigation. These circumstances may include, among others: the availability of data, the manner in which imports behave and fluctuate during the POI, market conditions within the importing Member, and external macroeconomic factors that might be relevant to the case. In light of these circumstances, one may evaluate whether the data on increased imports serve as a reasonable proxy for current imports. As in any trade remedy dispute, this evaluation must be based on the investigating authority's explanation of its relevant determination. Furthermore, it must take into account the exceptional nature of a safeguard remedy.[33]

2.26. To be clear, the complainants do not suggest that there may not be any time gap between the end of the POI and the determination of injury or the imposition of the safeguard. On the

[28] Indonesia's response to Panel's question 9, para. 17.
[29] Indonesia's first written submission, para. 56.
[30] Panel Report, *Argentina – Preserved Peaches*, para. 7.23. (emphasis added)
[31] Complainants' first written submission, paras. 5.35, 5.36; complainants' rebuttal submission, para. 2.30.
[32] Complainants' first written submission, paras. 5.40-5.44.
[33] Complainants' rebuttal submission, paras. 2.35, 2.36; complainants' opening statement at the first meeting of the Panel with the parties, para. 3.2.

contrary, there will ordinarily be some reasonable time gap to allow the investigating authority to analyse the data that it already collected and to complete its investigation. However, where additional data become available in sufficient time to be taken fully into account, they must be considered in the investigation.[34]

2.27. In light of the specific circumstances of the investigation at issue, the complainants submit that a time gap of 9 months (instead of 15 months) between the end of the POI and the issuance of KPPI's Final Disclosure Report (i.e. final determination) would have been reasonable because of the following facts:

a. During the investigation, the data on imports were available with a time lag of a maximum of six months;

b. Indonesia's first written submission makes clear that as of 12 December 2013, KPPI had an active exchange of information with the petitioners on their "production process, labour and production target"; and, on 8 January 2014, KPPI "assessed the petitioners' structural adjustment". As the investigation was still underway at that time, and KPPI was effectively engaged in collecting industry data, it was in a position to extend the POI ending in December 2012, and to collect further data on the increase in imports for, at least, the first half of 2013. This means that the gap between the end of the POI in mid-2013 and the issuance of the Final Disclosure Report in March 2014 would have been 9 months;

c. In its question 57, the Panel asked Indonesia whether the official data on the volume of imports of the subject product for the first six months of 2013 were available for KPPI by the end of 2013 or, at the very least, before the issuance of KPPI's Final Disclosure Report. Given that Indonesia did not answer this specific question, it would be appropriate for the Panel to infer that the official data on the volume of imports of the subject product for the first six months of 2013 were indeed available to KPPI by the end of 2013 at least; and

d. The complainants had neither an obligation under Article XIX of the GATT 1994 or the Agreement on Safeguards, nor an actual procedural opportunity to request KPPI to update the data. Until the period almost immediately preceding Indonesia's notification of KPPI's threat of serious injury determination in May 2014, the complainants and their exporters were kept in the dark regarding any further developments in this investigation.[35]

2.28. Despite these facts, the relevant time gaps in the investigation at issue are as follows:

a. The gap between the end of the POI and the issuance of KPPI's Final Disclosure Report is 15 months;

b. The gap between the end of the POI and Indonesia's notification under Article 12.1(b) is 17 months; and

c. The gap between the end of the POI and the imposition of the safeguard measure is 19 months.

2.29. Given the length of these time gaps, the Final Disclosure Report should have, but did not, include a reasoned and adequate explanation as to why more recent data (i.e. the data for the first half of 2013) could not be used, and why the data used provided "a reasonable indication of current trends".[36]

2.30. KPPI failed, however, to provide such an explanation. Indeed, Indonesia itself acknowledged that the time gaps were abnormal when it referred to several bureaucratic reasons that allegedly

[34] Complainants' response to Panel's question 61.

[35] Complainants' rebuttal submission, paras. 2.37-3.38; complainants' response to Panel's question 11; complainants' comments on Indonesia's response to Panel's question 57.

[36] Complainants' rebuttal submission, paras. 2.39-2.40 (citing Appellate Body Report, *US – Tyres (China)*, para. 147).

delayed the issuance of the Final Disclosure Report, such as a change of KPPI's Chairperson and the Minister of Trade.[37]

2.31. In order to remedy the shortcomings in the First Disclosure Report, during the first substantive meeting of the Panel, Indonesia submitted a table showing that imports of the subject product continued to increase in 2013 (by approximately 30 per cent) from the levels of 2011 and 2012. However, the standard governing the Panel's review of KPPI's analysis limits it to examine only KPPI's explanation of the facts in the Final Disclosure Report and not information that was not assessed by KPPI. Moreover, as explained in the complainants' response to Panel's question 13, the complainants' claim has a systemic feature that goes beyond specific facts.[38]

2.32. Indonesia further alleges that the analysis of the additional data was not feasible as the assessment of injury is dependent on the availability of audited financial statements of the domestic industry – these statements are only available on an annual basis. Therefore, because it was not possible to conduct the injury analysis on a semi-annual basis, it was also not possible to assess the increase in imports on that basis. The complainants demonstrated that this is an unsubstantiated *ex-post* explanation, which moreover contradicts the evidence before the Panel.[39]

2.33. Indonesia relies erroneously on the alleged similarity between the relevant time gaps in the present dispute and in *Ukraine – Passenger Cars* (i.e. 15 and 16 months respectively) to support its view that a 16-month time gap is WTO-consistent. However, the facts in *Ukraine – Passenger Cars* and the present dispute can be distinguished. In that case, the panel found that Japan had not put forward specific arguments to suggest that the investigation took longer than needed. It also highlighted the fact that "the competent authorities were actively engaged [with Japan] right up to the end of the investigation", and "published a notice specifically on the extension of the investigation".[40] In light of these facts taken together, the panel concluded that the 16-month time gap in that dispute was WTO-consistent, while emphasizing that it took this decision "in the particular circumstances of [that] case".[41]

2.34. In the present dispute, the circumstances are very different. The complainants have argued, and Indonesia has acknowledged, that the time gaps at issue were "abnormal" due to several bureaucratic factors that delayed the issuance of the Final Disclosure Report. KPPI had access to data on volume of imports for, at least, the first half of 2013, but were ignored. Indonesia did not issue any notice as to the possible delay and extension of the investigation. Nor did Indonesia engage actively with exporting countries in the course of the investigation. Thus, the Panel should reject Indonesia's approach to justify the abnormal time gaps at issue based on a similar absolute number of months, which is 16 months.[42]

2.35. In addition, Indonesia quoted out of context a statement in the *Argentina – Footwear (EC)* panel report allegedly suggesting that an investigating authority does not have to continuously update the data in its investigation. The complainants, however, demonstrated that, in *Argentina – Footwear (EC)*, the panel faulted the Argentine authority for not expanding the POI to include more recent data. The panel's decision in that dispute is, therefore, in line with the complainants' arguments in this case. Contrary to Indonesia's argument, that decision does not suggest that the investigating authority is not required to update the data on the volume of imports and injury when more relevant or recent data exist, such as in the present dispute.[43]

2.36. Finally, Indonesia alleged that the only provisions relevant to the complainants' claims on "increased imports" are Articles 2.1 and 4.2(a) of the Agreement on Safeguards, and Article XIX:1 of the GATT 1994, and the complainants failed to make their *prima facie* case with respect to their claims under Article 3.1 (last sentence) and Article 4.2(c) of the Agreement on Safeguards. In the complainants' view, however, there is a substantial overlap between the claims under the

[37] Complainants' opening statement at the first meeting of the Panel with the parties, para. 3.3.
[38] Complainants' rebuttal submission, para. 2.44.
[39] Complainants' comments on Indonesia's response to Panel's question 57, para. 1.30; complainants' response to Panel's question 60.
[40] Panel Report, *Ukraine – Passenger Cars*, paras. 7.175-7.176.
[41] Panel Report, *Ukraine – Passenger Cars*, para. 7.177.
[42] Complainants' opening statement at the second meeting of the Panel with the parties, paras. 3.6-3.8; Complainants' response to Panel's question 12.
[43] Complainants' response to Panel's question 60 (quoting Panel Report, *Argentina – Footwear (EC)*, paras. 8.213-8.215).

substantive provisions, such as Articles 2.1, 4.2(a) and Article XIX:1, and the claims under Articles 3.1 and 4.2(c). If an investigating authority fails to provide a proper explanation of its finding on increased imports, it will violate the afore-mentioned substantive obligations and also act inconsistently with the requirements of Article 3.1 (last sentence) and Article 4.2(c) of the Agreement on Safeguards. Pursuant to the latter provisions, investigating authorities must explain "all pertinent issues of fact and law" in a reasoned manner.[44]

2.37. In the light of the foregoing, KPPI's determination of increased imports is inconsistent with Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994.

2.4 Threat of serious injury

2.4.1 KPPI failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards

2.38. The complainants submit that Indonesia acted inconsistently with its obligations under Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards because KPPI (i) failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards, i.e. the rate and amount of the increase in imports in relative terms and utilized capacity; and (ii) failed to provide a reasoned and adequate explanation of how the facts supported its serious injury determination. In addition, Viet Nam submits that KPPI's finding of threat of serious injury is inconsistent with the definition of "threat of serious injury" under Articles 4.1(a), 4.1(b) and 4.1(c) of the Agreement on Safeguards.[45]

2.39. The complainants note that Table 4 of the Final Disclosure Report provides a summary of the rate and amount of the increase in imports of the subject product in absolute terms only. Article 4.2(a) of the Agreement on Safeguards contains express language requiring investigating authorities to evaluate "the rate and amount of the increase in imports of the product concerned in absolute and relative terms".[46]

2.40. The complainants have explained that the term "relative" is defined as "[c]onsidered in relation or in proportion to something else", or more appropriately in the context of Article 4.2(a) as "[e]xisting or possessing a specified characteristic only in comparison to something else; not absolute." Therefore, the express language of Article 4.2(a) requires a comparison of imports with "something else".[47]

2.41. The complainants submit that "something else" is domestic production. Indeed, a reading of Article 4.2(a) and Article 2.1 of the Agreement on Safeguards, indicates that the increase in imports "in relative terms" must relate to "*domestic production*", and not to "domestic consumption"[48], as Indonesia proposes. The European Union shares the complainants' view.[49] A comparison of imports with domestic consumption is already contemplated in Article 4.2(a) under the terms "the share of the domestic market taken by increased imports". Thus, Indonesia's approach would render redundant either the requirement to analyse the increased imports in relative terms or the requirement to assess the share of the domestic market taken by increased imports.[50]

2.42. The complainants consider that there is no contradiction between the Article 2.1 and Article 4.2(a). Both refer to two different moments in the investigation process. On the one hand, Article 2.1 requires a demonstration of an increase in imports for the imposition of a safeguard measure, either absolute or relative to domestic production. On the other hand, to arrive at this demonstration, Article 4.2(a) requires an assessment of whether imports have increased in absolute and relative terms. In this case, the assessment of the increase in imports from the

[44] Complainants' response to Panel's question 14; complainants' rebuttal submission, paras. 2.33-2.34.
[45] Complainants' first written submission para, 5.57.
[46] Appellate Body Report, *Argentina – Footwear,* para. 129. See also, complainants' rebuttal submission para. 2.53.
[47] Complainants' response to Panel's question 18.
[48] Complainants' opening statement in the first meeting of the Panel with the parties, para. 4.2.
[49] EU's response to Panel's question 1, para. 4.
[50] Complainants' rebuttal submission, para. 2.54.

two perspectives is required.[51] Australia[52] and the United States[53] also agree that there is no contradiction between the requirements of Articles 2.1 and 4.2(a).

2.43. Moreover, the complainants consider Indonesia's argument that the increase in imports in relative terms to domestic consumption is not the same as the share of the market taken by imports unfounded. The distinction suggested by Indonesia is artificial and not supported by the text of Article 4.2(a) of the Agreement on Safeguards. This provision refers to the "share" of the market taken by imports, which must be understood as referring to the analysis of the absolute market share taken by imports. Article 4.2(a) does not refer to the relative increase in the market share of imports. This is, again, another new interpretation put forward by Indonesia in its attempt to justify KPPI's failure to conduct the required analysis under Article 4.2(a).[54]

2.44. The fact remains, however, that what Indonesia considers as different factors are, in fact, the same. There is no meaningful difference between the analysis of the relative increase in imports against domestic consumption and the analysis of the market taken by imports. In any event, even if Indonesia's interpretation were to be considered, KPPI nevertheless did not provide an adequate explanation of "the share of the domestic market taken by increased imports" in the Final Disclosure Report.[55]

2.45. Furthermore, the complainants note that, together with Article XIX of the GATT 1994, Article 2.1 of the Agreement on Safeguards accords Members the right to apply a safeguard measure subsequent to a determination that imports have increased absolutely or relative to domestic production.[56] The Appellate Body has emphasised the need for coherence between Articles 2.1 and 4.2 of the Agreement on Safeguards. In fact, it has stated that the conditions set out in Article 2.1 are further elaborated in Article 4.2.[57] Therefore, the phrase "increase in imports" in Articles 4.2(a) and 4.2(b) must be "read as referring to the same set of imports envisaged in Article 2.1".[58]

2.46. KPPI did not include Bluescope's "captive capacity" reserved for pre-painted galvalume production as part of the analysis of the situation of the domestic industry.[59] The complainants note that bare galvalume was the product subject to KPPI's investigation and eventual safeguard measure. Contrary to Indonesia's assertions during the course of the current dispute,[60] the complainants have presented evidence indicating that bare galvalume is used in the production of painted galvalume.[61] Accordingly, Bluescope requires bare galvalume (which Bluescope also produces) as an input in its production of painted galvalume. Hence, the two segments of production of bare galvalume are relevant for: (i) production for the merchant market and, (ii) production for the captive market. Hence, KPPI's statement that Bluescope does not consume its own bare galvalume for its own captive consumption[62] is not supported by the facts.

2.47. In this case, however, the Final Disclosure Report contains no indication that KPPI conducted the serious injury analysis with respect to both segments of the domestic industry. Nor does it contain an explanation of why the analysis of the merchant market alone was representative of the overall industry, or how, despite the absence of an analysis of production for the captive market, the findings of KPPI still provided a reasoned and adequate explanation of the alleged serious injury that affected the domestic industry.[63]

2.48. The complainants also note that the price of pre-painted galvalume is higher than that of bare galvalume. Therefore, producers, like Bluescope, that have the facilities to produce both products would opt to produce the higher value pre-painted galvalume. Since Bluescope sells both

[51] Complainants' rebuttal submission para. 2.57.
[52] Australia's response to Panel's question 1, para. 2.
[53] U.S. response to Panel's question 1, para. 4.
[54] Complainants' opening statement in the second meeting of the Panel with the parties, para. 4.4.
[55] Complainants' opening statement in the second meeting of the Panel with the parties, para. 4.5.
[56] Complainants' response to Panel question 26.
[57] Appellate Body Report, *US – Steel Safeguards*, paras. 449.
[58] Appellate Body Report, *US – Steel Safeguards*, paras. 450.
[59] Complainants' first oral statement para. 4.5.
[60] Indonesia's opening statement in the second meeting of the Panel with the parties, para. 45.
[61] Complainants' response to Panel's question 70.
[62] Indonesia's response to Panel question 24(ii), para. 46.
[63] Complainants' rebuttal submission, para. 2.63.

products, it is reasonable to conclude that decreased sales of bare galvalume are a result of its increase in sales of the downstream pre-painted galvalume.

2.4.2 KPPI failed to explain its finding of threat of serious injury in spite of indications of positive performance of the domestic industry

2.49. KPPI concluded that the domestic industry "suffered a threat of serious injury" based mainly on two factors: (i) a decrease in market share and (ii) a decrease in profits.[64] However, KPPI failed to explain its finding of threat of serious injury in spite of indications of positive performance of the domestic industry.

2.50. While it is true that "[a]n evaluation of each listed factor will not necessarily have to show that each such factor is declining",[65] the competent authority must provide a reasoned and adequate explanation of how those factors showing positive performance do not negate the finding of serious injury or threat thereof.[66] A comprehensive and holistic analysis of all relevant factors is therefore required.[67]

2.51. With respect to the decrease in market share, KPPI made findings based on tables 5, 6, and 7.[68] Its conclusion that during the POI, the market share of imports increased by 6 per cent, while the petitioner's market share decreased by 4 per cent[69] is not enough to explain adequately "the share of the domestic market taken by increased imports" as contemplated by Article 4.2(a). KPPI analysed this injury indicator based solely on a comparison of ending points of the POI.[70] The Appellate Body stated that "the competent authorities are required to consider the trends in imports over the POI (rather than just comparing the end points) under Article 4.2(a).[71]

2.52. If KPPI had analysed the trends it would have noticed that, in fact, from 2010 onwards, the market share trend of the petitioners shows a significant increase. Based on the information provided in the Final Disclosure Report in paragraph 26(a) and tables 7 and 8, and evidence provided by Indonesia, the complainants have attempted to establish the specific market shares of imports and of the petitioners. These data show that between 2010 and 2012 the petitioners (as compared to imports and other domestic producers) experienced the highest market share increase in the Indonesian market for the products at issue. There was therefore no indication of threat of serious injury based on an alleged decline in market share.[72]

2.53. The complainants also noted that KPPI uses indices that are contradictory and that do not support its conclusions. For example, the indices referred to in line 3 of Table 7 do not allow a reasonable understanding of how KPPI arrived at the increase in market share of imports of 6 per cent over the POI.[73]

2.54. Moreover, the complainants observed that KPPI did not determine the total domestic market in the light of the participation of domestic producers other than the petitioners. Moreover, as noted by the importers, part of the domestic industry's production was used for Bluescope's own captive consumption. KPPI also noted that this petitioner produced both "Bare and Painted Galvalum". This fact should have been taken into account to establish the total domestic market. However, KPPI failed to do so.[74]

2.55. With respect to decrease in profits, the majority of the factors examined also showed positive trends during the period of investigation. This is the case in particular with respect to changes in level of sales, production, productivity, employment. KPPI, however, failed to provide a

[64] Complainants' first written submission para. 5.77.
[65] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.
[66] Complainants' first written submission, para. 5.78.
[67] Complainants' first written submission, para. 5.79.
[68] Complainants' first written submission, para. 5.81.
[69] Complainants' first written submission, para. 5.81.
[70] Complainants' first written submission, para. 5.82.
[71] Appellate Body Report, *Argentina – Footwear (EC),* para. 129.
[72] Complainants' rebuttal submission, para. 2.68.
[73] Complainants' opening statement at the first meeting of the Panel, para. 4.4.
[74] Complainants' first written submission, para. 5.83.

reasoned and adequate explanation of the positive performance of these factors during the POI and whether these factors affected the domestic industry.[75]

2.56. Finally, the data on which KPPI based its injury assessment have been selectively used in a different manner for different serious injury indicators. For instance, Table 8 of the Final Disclosure Report indicates that domestic sales were calculated based on data from only the domestic producers that requested the investigation, while Table 17 and paragraph 55 show that the increase in installed capacity was calculated on the basis of data pertaining to *all* domestic producers. It is clear that KPPI conducted an examination of serious injury to the domestic industry based on inconsistent databases. Without a proper explanation of why that non-uniform set of data did not affect the objectivity of its injury determination, KPPI could not, therefore, have arrived at an accurate and unbiased picture of the determination of serious injury to the domestic industry.[76]

2.4.3 KPPI failed to explain how it found a "threat of serious injury" based solely on the evaluation of "actual" injury

2.57. While KPPI arrived at the conclusion that the domestic industry "suffered a threat of serious injury", this determination was based only on the analysis of actual injury of the domestic industry. KPPI failed to analyse whether the alleged serious injury was "clearly imminent" within the meaning of Article 4.1(b) of the Agreement on Safeguards.[77]

2.58. While Indonesia subsequently attempted to explain how KPPI arrived at the determination of threat of serious injury,[78] the complainants consider this an *ex-post* explanation that cannot be considered by the Panel. Nevertheless, the explanations provided by Indonesia, which are either not reflected or clearly explained in the Final Disclosure Report, do not fulfil the criteria established by various panels and the Appellate Body: it is not for panels to cobble together disjointed reference in the investigating authority's report in order to find support for its conclusions.[79]

2.4.4 KPPI's failure to conduct the serious injury determination in accordance with Articles 3.1, 4.1(b), 4.2(a) and 4.2(c) implies also the inconsistency of that determination with Article XIX:1(a) of the GATT and Article 2.1

2.59. Indonesia has argued that the complainants failed to explain how their claim based on Articles 3.1, 4.1(b), 4.2(a) and 4.2(c) results in inconsistencies with Article XIX of GATT and Article 2.1 of the Agreement on Safeguards.

2.60. The complainants submitted that Indonesia's argument has no legal merit. According to Article 1 of the Agreement on Safeguards, the agreement establishes "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Thus, by virtue of Article 1, any violation of the rules for the application of safeguard measures, including Articles 3.1, 4.1(b), 4.2(a) and 4.2(v), necessarily entails a violation of Article XIX of the GATT 1994.[80]

2.61. Similarly, with respect to Article 2.1 of the Agreement on Safeguards, the Appellate Body has stated that "Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure'". The Appellate Body has further noted that "the conditions set forth in Article 2.1 are further elaborated in Article 4.2".[81] The Appellate Body's statement necessarily implies that any violation of the conditions set forth in Article 4.2 also results in a violation of Article 2.1, and, ultimately, of Article XIX of the GATT 1994.

[75] Complainants' first written submission, paras. 5.85-5.87.
[76] Complainants' opening statement at the first meeting of the Panel, para. 4.3; complainants' responses to Panel Question 16 and 17.
[77] Complainants' first written submission, para. 5.90.
[78] Indonesia's first written submission, paras. 134-136.
[79] Appellate Body Report, *US – Steel Safeguards*, para. 326.
[80] Complainants' response to the Panel's question 21.
[81] Appellate Body Report, *US – Line Pipe,* para. 188.

2.4.5 Conclusion

2.62. Based on the foregoing, the complainants submit that KPPI's serious injury determination is inconsistent with Article XIX:1(a) of the GATT 1994, and Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards. In addition, Viet Nam also submits that this determination is inconsistent with Articles 4.1(a), 4.1(b) and 4.1(c) of the Agreement on Safeguards.

2.5 Causal link

2.5.1 KPPI failed to establish the causal link between increased imports of the subject product and serious injury

2.63. The complainants submitted that KPPI's determination is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(b) and 4.2(c) of the Agreement on Safeguards because KPPI failed to provide a reasoned and adequate explanation of how the investigated imports *caused* serious injury to the domestic industry. KPPI also failed to provide an explanation of how factors other than the investigated imports may have also caused serious injury to the domestic industry.[82]

2.64. The complainants noted that the causal link analysis conducted by KPPI is based on very limited data and cannot be considered as a proper basis for a positive determination of the existence of causation.[83] KPPI relied largely on the coincidence of the alleged increased imports and the alleged injurious indicators. However, this coincidence in time is not dispositive of the existence of a causal link. There may be situations where a coincidence in time "may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link".[84]

2.65. Moreover, the complainants argued that KPPI's reliance on an analysis of coincidence in time is flawed. KPPI drew the conclusion that this alleged "coincidence" showed a causal link from the fact that imports increased while the petitioners' market share decreased. Furthermore, Indonesia has recognised the presence of other domestic producers in the market that accounted for part of domestic consumption – the complainants consider that these other domestic producers, and *not* imports, have usurped part of the petitioners' market share.

2.66. In the light of the known circumstances, an objective investigating authority could not have reached the same conclusion as KPPI did. Despite the finding of a "coincidence" of an upward trend (imports) and an alleged downward trend (petitioners' market share), KPPI could not have treated this coincidence as "objective evidence" that the decrease in market share was caused by the increase in imports. The facts show that the decrease in the petitioners' market share was caused by the presence of the other domestic producers in the market. Hence, KPPI's analysis of causation based on the coincidence in time was erroneous. KPPI's finding of an alleged coincidence based on a simple assertion made in paragraph 61 of the Final Disclosure Report cannot qualify as "objective evidence" of causation, within the meaning of Article 4.2(b), first sentence, and cannot meet the standards of a "reasoned and adequate explanation" or a "detailed analysis" of causation under Articles 3.1, last sentence, and 4.2(c), respectively.[85]

2.67. Furthermore, as noted by the complainants in their response to Panel's question 28,[86] there was actually no coincidence between the alleged decline in the petitioners' market share and the increase in imports. In fact, table 7 of the Final Disclosure Report indicates that from 2010-2012, being the most recent part of the POI, the petitioners' market share experienced steady growth. On the other hand, imports also increased at the same time.[87]

2.68. In addition, the complainants have provided evidence indicating that from 2010 onwards, while national consumption continued to grow, the petitioners' market share grew significantly larger than the market share of imported products. This fact further indicates that KPPI's causal

[82] Complainants' first written submission, para. 5.94.
[83] Complainants' first written submission, para. 5.95.
[84] Panel Report, *US – Steel Safeguards*, para. 10.305.
[85] Complainants' rebuttal submission, para. 2.85.
[86] Complainants' response to Panel's question 28.
[87] Complainants' rebuttal submission para. 2.86.

link conclusion, that "the trend of Petitioners' market shares decreased because it was absorbed by import market share as elaborated in table 7"[88] is incorrect. In fact, it was the petitioners (and not imports) that benefitted the most during the most recent period of the POI of the growth in national consumption.[89]

2.69. Furthermore, KPPI failed to discuss any other factors that might have affected the conditions of competition in the market; how these factors may have affected competition between domestic and imported products; and failed to provide any reasoned and adequate explanation in this respect. KPPI addressed only the relative position of national consumption, imports (including their market share), and the petitioners' market share as provided in Table 7 and paragraph 41 of the Final Disclosure Report.[90] In fact, the only manner in which KPPI addressed the competitive relationship between domestic products and imports in the context of causation was through a comparison between the trends in the petitioners' market share and import trends.[91]

2.70. The complainants argued that KPPI failed to provide any data relating to the conditions of competition between the different imported and domestic products.[92] KPPI failed to focus on the "nature of the interaction between imported and domestic products in the domestic market".[93] A proper analysis of prices in the context of the conditions of competition would have cast doubt on the causal link between increased imports and serious injury.[94] Since 2009, the average price of imports increased while the petitioners' selling price declined. Thus, while the petitioners' products became cheaper, imported products became more expensive. Nonetheless, the market share of imports (with a higher price) increased, while the market share of the petitioners' products (with a lower price) decreased. This fact indicates that there might have been factors other than prices (e.g. quality) that influenced the choice of consumers and the degree of actual competition in the market.[95]

2.71. Similarly, KPPI should have examined the extent to which there was a causal link between increased imports and serious injury, given the restrictions in competition imposed by the introduction of a technical standard on the products at issue. As Taiwan Steel & Iron Industry Association (TSIIA) noted in its "Comments on the Petition and Information", the introduction of this measure in 2009 by Indonesia's National Standardization Agency restricted the access of imports to the Indonesian market, and created a "monopolistic" position for domestic products. As a result, domestic producers improved their ability to raise prices.[96]

2.72. Instead, Indonesia stated that KPPI's assessment of conditions of competition was reflected in Section D of the Final Disclosure Report.[97] However, the complainants note that Section D addresses the evaluation of other factors that allegedly caused serious injury to the domestic industry.[98] Thus, Indonesia's response indicates that KPPI conflated the conditions of competition analysis, which is relevant under Article 4.2(b), first sentence, with the question of the non-attribution of injurious effects to the investigated imports, which is relevant under Article 4.2(b), second sentence.[99]

2.73. In relation to whether domestic and imported products were able to compete in terms of technical quality, KPPI's "analysis" was limited to the assertion that domestic products were manufactured on the basis of standards of the International Standardization Organization (ISO), and, therefore, were therefore able to compete with imports.[100] This bald assertion cannot constitute a proper analysis of conditions of competition, and "objective evidence" of causation within the meaning of Article 4.2(b), first sentence, of the Agreement on Safeguards. Indonesia did not explain whether imports were subject to the same standards; whether the use of the same

[88] Complainants' rebuttal submission para. 2.87.
[89] Complainants' rebuttal submission para. 2.89.
[90] First Written Submission para. 5.108.
[91] Complainants' response to Panel's question 30.
[92] Complainants' first written submission, para. 5.108.
[93] Panel Report, *Argentina – Footwear (EC),* para. 8.250.
[94] Complainants' opening statement at the first meeting of the Panel with the parties, para. 5.1.
[95] Complainants' rebuttal submission para. 2.92; complainants' response to Panel's question 30.
[96] Complainants' rebuttal submission para. 2.93; complainants' response to Panel's question 30.
[97] Indonesia's response to Panel's question 34, para. 55.
[98] Complainants' rebuttal submission para. 2.90.
[99] Complainants' rebuttal submission para. 2.90.
[100] Complainants' rebuttal submission para. 2.90.

standards established competition in the market; or whether other considerations, such as price, quality, or the relatively dominant position of one of the suppliers, may have had a bearing in the conditions of competition in the market.[101]

2.5.2 Non-attribution: KPPI failed to explain how factors other than the investigated imports caused serious injury to the domestic industry

2.74. KPPI's analysis of non-attribution was made dependent on whether any interested parties raised arguments concerning the existence of factors other than imports affecting the domestic industry. While the Final Disclosure Report contained a discussion of such other factors as increased national consumption, domestic competition, and the domestic product's ability to compete with imports, it did not contain an analysis of other factors that would have had a direct impact on the indicators that determined the alleged serious injury to the domestic industry. These other factors are the presence of other domestic producers (having a potential impact on market share) and the existence of significant investments by domestic producers (having a potential impact on the situation of profits and losses).[102]

2.75. Concerning the domestic industry's decline in market share, KPPI did not take into account the other domestic producers, which accounted for 23 per cent of domestic production.[103] In the complainants' view, none of the findings referred to by Indonesia reflects a proper non-attribution analysis concerning the presence of other domestic producers threatening to cause serious injury to the petitioners. These findings were made as part of the evaluation of serious injury and not in the context of the determination of the causal link. Furthermore, KPPI's finding that imports increased, while the petitioners' market access allegedly decreased, does not provide any information with respect to the presence of other domestic producers in the market. There is no finding in the Final Disclosure Report in which KPPI clearly identified this other factor, examined whether it caused injurious effects to the petitioners, or separated those effects from those attributable to the investigated imports.[104]

2.76. For example, tables 7 and 8 of the Final Disclosure Report indicate that from 2010 onwards the petitioners experienced a significant growth in their market share. The complainants have presented evidence to show that the increase in the petitioners' market share outstripped the increase in the market share of imports. This indicates that from 2010 onwards, there was no impairment of the petitioners' market share that could have been attributable to imports. The only period in the POI when the petitioners' experienced a decline in their market share was between 2008 and 2010. However, imports also experienced a simultaneous decline in market share, while the market share of other domestic producers doubled in size. Therefore, there is no clear indication that the petitioners' loss of market share at this time is attributable to imports, but there is enough evidence on the record to show that the market share losses experienced by the petitioners could have been (at least partly) attributed to the contemporaneous increase in market share of the other domestic producers.[105]

2.77. With respect to the alleged decline in profits, KPPI noted that during the POI, the domestic industry increased its installed capacity significantly.[106] This means that the domestic industry expanded, indicating that there was increased investment in these facilities. KPPI however did not examine the question of whether the increase in losses may be explained by increased costs, including increased labour costs, caused by this additional capacity.[107] The complainants note that KPPI's analysis and findings with respect to the expansion of the installed capacity was meant to address a different situation: the importers' allegation that the petitioners' capacity could not meet the demand of bare galvalume from the downstream industry, and that this was the real development that led to the increase in imports. As a result, KPPI concluded that the increase in imports was not caused by the domestic industry's inability to meet the national consumption.[108]

[101] Complainants' rebuttal submission para. 2.91.
[102] Complainants' first written submission para, 5.110.
[103] Complainants' first written submission para, 5.111.
[104] Complainants' rebuttal submission, para. 2.98.
[105] Complainants' rebuttal submission, paras. 2.99-2.100.
[106] Complainants' first written submission, para. 5.112.
[107] Complainants' first written submission, para. 5.112.
[108] Complainants' rebuttal submission, para. 2.101.

2.78. Thus, KPPI's analysis was not a non-attribution analysis within the meaning of Article 4.2(b), second sentence, of the Agreement on Safeguards.[109] Moreover, the fact that the increase in national consumption may have encouraged the expansion of installed capacity does not negate the fact that the petitioners' losses could have been the result (at least partially) of the cost of expansion. There was no separation of these injurious effects from the serious injury that was determined; there was also no non-attribution of those effects on the investigated imports.[110]

2.5.3 KPPI's failure to establish a causal link in accordance with Article 4.2(b) implies also the inconsistency with Article XIX:1(a) of the GATT 1994 and Article 2.1 of the Agreement on Safeguards

2.79. Indonesia has argued that the complainants failed to explain how their claim based on Article 4.2(b) results in inconsistencies with Article XIX of GATT and Articles 2.1, 3.1 and 4.2 of the Agreement on Safeguards.[111]

2.80. Indonesia's argument ignores the legal relationship between, on the one hand, Article 4.2(b), and, on the other, Article XIX of the GATT 1994 and Articles 2.1, 3.1 and 4.2(c) of the Agreement on Safeguards. According to Article 1 of the Agreement on Safeguards, the agreement establishes "rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994." Thus, by virtue of Article 1, any violation of the rules for the application of safeguard measures, including Article 4.2(b) of the Agreement on Safeguards, entails a violation of Article XIX of the GATT 1994.

2.81. Similarly, as the Appellate Body has stated that "Article 2.1 reflects closely the 'basic principles' in Article XIX:1(a) of the GATT 1994 and also sets forth 'the conditions for imposing a safeguard measure'". The Appellate Body has further noted that "the conditions set forth in Article 2.1 are further elaborated in Article 4.2". The Appellate Body's statement necessarily implies that any violation of the conditions set forth in Article 4.2 also results in a violation of Article 2.1, and, ultimately, of Article XIX of the GATT 1994.

2.82. Furthermore, Indonesia's argument also ignores that a violation of Article 4.2(b) is established through the absence of a "reasoned and adequate explanation" and a "detailed analysis" of causation, as required by Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards. Accordingly, any violation of Article 4.2(b) has to be found through a violation of Articles 3.1, last sentence, and 4.2(c) of the Agreement on Safeguards.

2.5.4 Conclusion

2.83. In light of the above, the complainants reiterate that KPPI's causal link determination is inconsistent with Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on Safeguards.

2.6 Parallelism

2.84. The complainants submit that Indonesia failed to ensure the required "parallelism" between the product scope of the investigation and the product scope of the safeguard measure at issue. Indonesia, therefore, acted inconsistently with Articles 2.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards. In particular, following the completion of the investigation at issue, Indonesia narrowed down the product scope of the safeguard measure from the subject product with "thickness not exceeding 1.2 mm" to that with "thickness not exceeding 0.7 mm". Indonesia has not disputed the existence of this gap. It is thus clear that Indonesia failed to comply with the requirement of parallelism. Moreover, given Indonesia's failure to observe this requirement, Indonesia also failed to provide a reasoned and adequate explanation of how its determinations based on a broader product scope satisfied the requirements of the afore-mentioned provisions within the meaning of Article 3.1 (last sentence) of the Agreement on Safeguards.[112]

[109] Complainants' rebuttal submission, para. 2.102.
[110] Complainants' rebuttal submission, para. 2.103.
[111] Indonesia's first written submission, paras. 152-155.
[112] Complainants' rebuttal submission, paras. 2.110-2.116; complainants' first written submission, para. 5.115.

2.85. The requirement of parallelism has been inferred from the parallel language in Articles 2.1 and 2.2 of the Agreement on Safeguards. These provisions both refer to "product … being imported". The Appellate Body has clarified that the term "product" in Articles 2.1 and 2.2 has the same meaning in both provisions. However, the requirement of parallelism permeates the text of the whole Agreement on Safeguards, and can be derived from the use of similar notions in different parts of Article 2.1, Article 4.2, as well as Article XIX:1(a) of the GATT 1994.[113]

2.86. If the product scope of the safeguard investigation does not correspond to that of the final measure, it calls into question whether the imports covered by the measure, alone, would have given rise to the same positive findings on increased imports, serious injury (or threat thereof) and causal link in accordance with Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards and Article XIX:1 of the GATT 1994. For example, in *US – Steel Safeguards*, the Appellate Body clarified that "imports *excluded* from the application of the safeguard measure must be considered a factor 'other than increased imports' within the meaning of Article 4.2(b)", and that "[t]he possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 4.2(b)".[114] In other words, in the absence of the correspondence ("parallelism") between the product scope of the investigation and that of the safeguard measure, the results of the investigation become unreliable.[115]

2.87. The Appellate Body has clarified that to make a *prima facie* case of the inconsistency of a safeguard with the requirement of parallelism, the complainant must merely demonstrate the existence of a *gap* between the imports covered by the investigation and those falling within the scope of the measure. If the gap is established, it is incumbent upon the respondent to refer the panel to a reasoned and adequate explanation on the record that establishes explicitly that the latter set of imports, by itself, satisfies the conditions for the application of the measure, as set out in Article 2.1 and elaborated in Article 4.2 of the Agreement on Safeguards.[116]

2.88. As noted, Indonesia did not dispute the fact that KPPI failed to observe the requirement of parallelism. Indonesia, however, argued that the requirement of parallelism does not apply to the facts in the present dispute, as this requirement prohibits only discrimination based on origin. The complainants disagree. The requirement of parallelism addresses concerns that arise equally with respect to narrowing the product scope of the safeguard measure, as well as with respect to limiting the product sources to which the measure applies. In both of these situations, it seeks to eliminate any room for arbitrariness or manipulation by investigating authorities that may turn the application of a safeguard into a means of disguised discrimination or a disguised restriction on international trade. If, in any of these situations, the requirement of parallelism is not observed, one would not be able to state with certainty that the imports subject to the measure, by themselves, satisfy the conditions for the application of the measure set out in the Agreement on Safeguards. This view was also supported by many third parties in this dispute.[117]

2.89. In addition, Indonesia contended that the narrowing of the product scope of the measures is justified under Article 5.1 (the first and last sentences) of the Agreement on Safeguards. According to Indonesia, a measure with a narrower scope is less trade restrictive and more suitable for the achievement of Indonesia's objective to remedy serious injury and facilitate adjustment. The complainants, however, explained that Article 5.1 (the first and last sentences) does not serve as a justification for violations of other obligations under the Agreement on Safeguards, including the requirement of parallelism. On the contrary, the first sentence of Article 5.1 imposes an obligation with respect to the manner in which a safeguard measure is applied, by restricting the extent of the latter to what is necessary to address the injury (or threat thereof) and to facilitate adjustment. Likewise, the last sentence of Article 5.1 restricts a Member's ability to use means

[113] Complainants' rebuttal submission, para. 2.113 (citing Appellate Body Report, *US – Wheat Gluten*, para. 96; Appellate Body Report, *US – Steel Safeguards,* para. 450); complainants' response to Panel's question 36.

[114] Appellate Body Report, *US – Steel Safeguards*, para. 450.

[115] Complainants' rebuttal submission, para. 2.114.

[116] Complainants' rebuttal submission, para. 2.115 (citing Appellate Body Report, *US – Line Pipe*, paras. 186-188).

[117] Complainants' rebuttal submission, paras. 2.117-2.118 (citing Australia's third party oral statement at the first meeting of the Panel with the parties, para. 9; EU's third party oral statement at the first meeting of the Panel with the parties, paras. 3, 6; and EU's response to Panel's question 4, para. 9). See also complainants' response to Panel's question 36 (citing Japan's third party submission, para. 53).

that are not conducive to achieving the objectives of remedying or preventing serious injury (or threat thereof) and facilitating the adjustment.[118]

2.90. In fact, Article 5.1 can be interpreted in a coherent and harmonious manner with the requirement of parallelism and other requirements of the Agreement on Safeguards. In particular, a Member may exclude imports of certain models of the subject product from the scope of both the investigation and the application of the measure if, during the investigation, its investigating authority determines that the non-excluded models satisfy, by themselves, the requirements of Articles 2.1 and 4.2, and the excluded models were considered in the authority's non-attribution analysis. In this case, the requirement of parallelism is not violated, as the product scopes of the investigation and of the safeguard measure are the same. Furthermore, based on Article 5.1 (first sentence), a Member may reduce the level or quantum of the safeguard it imposes on *all models* of the investigated product. This measure would also be consistent with the requirement of parallelism.[119]

2.91. On the other hand, as the EU pointed out, if, during the investigation, the authority did not differentiate between various models (e.g. A and B) of the subject product, but, following the completion of the investigation, proposes to narrow down the scope of the measure to only Model A, it will be obligated to "re-do the investigation in such a way so as to collect relevant data with respect to that particular model". The failure of the investigating authority to re-do its investigation would lead to a breach of the requirements of Articles 2.1 and 4.2 (including the non-attribution obligation under Article 4.2(b), second sentence), as well as Article 5.1, first sentence of the Agreement on Safeguards.[120]

2.92. In the present case, neither the Final Disclosure Report, nor any other document on the record suggests that, in its findings, KPPI had differentiated between different sub-categories of the subject product, in particular, the sub-category of the product with thickness not exceeding 0.7 mm and that with thickness not exceeding 1.2mm. Indonesia alleged that "[t]he national interest consideration stage revealed that the threat to serious injury during the period of investigation was mostly caused by imports of bare galvalum with thickness not exceeding 0.7 mm". This is, however, an *ex-post* explanation, which is not reflected in the determinations under review. The Panel should, therefore, disregard this argument.[121]

2.93. In addition, Indonesia cited the panel reports in *Ukraine – Passenger Cars* and *US – Steel Safeguards* in support of its position that amendments of proposed safeguard measures based on political decisions are common. The complainants, however, demonstrated that Indonesia's references to these cases are inapposite. In *Ukraine – Passenger Cars*, the investigating authority did not exclude any product in respect of which the investigation was conducted from the application of the measure. In *US – Steel Safeguards*, even though the final measure was imposed on the group of the products that was narrower than the group of the products investigated initially, the investigating authority had conducted a segregated analysis of injury with respect to each of these product groups and reached separate determinations on each of them.[122]

2.94. Indonesia also alleged that it would be virtually impossible to obtain import data only for subject products with thicknesses not exceeding 0.7mm. This statement is inconsistent with Indonesia's own actions. If Indonesia did not possess the relevant data on the increased imports, there was no basis for KPPI's decision to exclude products from the scope of the safeguard measure. Furthermore, as Indonesia confirmed in its responses to Panel's questions 37 (paragraph 60) and 39, KPPI did apparently possess the data on injury with respect to the models with thicknesses not exceeding 0.7mm. To be clear, however, the Final Disclosure Report does not analyse the injurious effects of those specific models.[123]

[118] Complainants' rebuttal submission, paras. 2.117-2.119; complainants' response to Panel's question 40.
[119] Complainants' rebuttal submission, para. 2.120.
[120] Complainants' rebuttal submission, para. 2.121 (citing EU's response to Panel's question 5, para. 13).
[121] Complainants' rebuttal submission, para. 2.122 (citing Indonesia's responses to Panel's questions 37 and 39).
[122] Complainants' rebuttal submission, paras. 2.123-2.125 (citing Panel Report, *Ukraine – Passenger Cars*, paras. 2.7, 7.3-7.4; and Panel Report, *US – Steel Safeguards*, paras. 1.7-1.17, 1.30-1.34).
[123] Complainants' rebuttal submission, para. 2.126.

2.95. Finally, Indonesia argued that if the Panel were to agree with the complainants' broad interpretation of the requirement of parallelism, this would add to or diminish the rights and obligations of Members under the Agreement on Safeguards, contrary to the requirements of Article 3.2 of the DSU. As explained, however, the complainants' interpretation of the requirement of parallelism is based on the text, context, object and purpose of the Agreement on Safeguards and Article XIX of the GATT 1994. This interpretation does not expand the scope of Members' rights or obligations beyond those that already exist in relevant provisions of WTO covered agreements.[124]

2.96. In light of the foregoing, by imposing the safeguard measure at issue on a narrower product scope, without providing any reasoned and adequate explanation as to why such alteration of the product scope was warranted and supported by the underlying investigation, Indonesia acted inconsistently with Articles 2.1, 3.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards.

2.7 Violation of the Most-Favoured-Nation clause

2.97. The complainants have argued that pursuant to Regulation No 137.1/PMK.011/2014, Indonesia exempts the subject products originating in the listed 120 Members ("exempted Members") from the application of the specific duty. However, "like" products originating in the territory of Members that are not on the list, including the complainants, are subject to the specific duty. It is thus clear that Indonesia's safeguard measure grants an "advantage, favour, privilege or immunity" to the subject products from the exempted Members that is not accorded immediately and unconditionally to "like" products originating from all WTO Members. Indonesia's measure is, therefore, inconsistent with Article I:1 of the GATT 1994.

2.98. Indonesia has not rebutted the complainants' *prima facie* claim, nor has it presented a valid defence against this claim. Instead, Indonesia submits that Article 9.1 of the Agreement on Safeguards justifies the inconsistency of its measure with Article I:1 of the GATT 1994,[125] in that it "obliges Members applying a safeguard measure to exclude imports from developing country Members".[126] Indonesia argues that its safeguard measure is consistent with Article 9.1 of the Agreement on Safeguards as all exempted Members are developing countries.[127]

2.99. It has been established in case law that Article 9.1 of the Agreement on Safeguards can be invoked to justify a derogation from Article I:1 of the GATT 1994.[128] The complainants submitted, however, that Indonesia's safeguard measure is not justified under Article 9.1 of the Agreement on Safeguards because it does not fulfil the requirements of this provision. Indeed, imports from six of the exempted Members, i.e. European Union members Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania cannot qualify as imports coming from *developing countries*.

2.100. Specifically, the complainants explained that within the WTO, the general rule to determine a Member's development status is through "self-selection" and not any other criteria, including the International Monetary Fund's development status list suggested by Indonesia.[129] The complainants have presented evidence indicating that, upon their accession to the WTO in 1996 and 2000 respectively, Bulgaria and *Croatia* both made statements to the effect that they were not *developing countries* for the purposes of their WTO activities.[130]

2.101. In addition, Members who provide GSP schemes pursuant to paragraph 2(a) of the Enabling Clause[131] consider themselves as developed country Members, because this provision contemplates preferential tariff treatment "accorded by *developed* [Members] to products originating in *developing countries".*(emphasis added) The European Union grants tariff preferences to WTO developing country Members pursuant to its GSP scheme. Prior to their accession to the European Union, Hungary and Poland maintained their own GSP schemes. These two countries are original WTO Members that acceded to the European Union on 1 May 2004. In

[124] Complainants' opening statement at the second meeting of the Panel with the parties, para. 6.3.
[125] Indonesia's opening statement at the first meeting of the Panel with the parties, para. 64.
[126] Indonesia's first written submission, para. 213.
[127] Indonesia's first written submission, paras. 213 and 214.
[128] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.68 and 7.71.
[129] Indonesia's rebuttal submission, paras. 123.
[130] Complainant's response to Panel's question 42.
[131] GATT Decision of 28 November 1979.

that regard, these two countries would thus be considered *developed country* Members within the WTO before and after their European Union accessions.

2.8 Notification

2.102. The complainants submitted that Indonesia's notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards did not satisfy the requirements under Article 12.2. Indonesia acted inconsistently with this provision, because it failed to provide in its notification dated 26 May 2014 "all pertinent information".[132]

2.103. According to Article 12.2, when making notifications under Articles 12.1(b) and (c), Members must provide the Committee on Safeguards with "all pertinent information", including (i) evidence of serious injury or threat thereof caused by increased imports within the meaning of Article 4.2 of the Agreement on Safeguards, (ii) the precise description of the product involved and the proposed measure, (iii) the proposed date of introduction, and (iv) the expected duration and timetable for progressive liberalization.[133]

2.104. In *Korea – Dairy*, the Appellate Body clarified that "the text of Article 12.2 makes it clear that a Member proposing to apply a safeguard measure is required to provide the Committee on Safeguards with all pertinent, not just *any* pertinent, information", and that "such information shall include certain items listed immediately after the phrase 'all pertinent information'" in Article 12.2.[134]

2.105. In addition, the complainants are of the view that Article 12.2 of the Agreement on Safeguards, read in its context, and in the light of its object and purpose, requires that all pertinent information be notified *before* the measure is applied. Moreover, Article 8.1 of the Agreement of Safeguards and Article XIX:2 of the GATT 1994 further supports this interpretation.[135]

2.106. In the present dispute, KPPI issued its Final Disclosure Report on 31 March 2014; Indonesia notified its threat of serious injury determination under Article 12.1(b) on 26 May 2014; the Minister of Finance promulgated Regulation No 137.1/PMK.011/2014 imposing the measure on 15 July 2014; and Indonesia notified its decision to impose the measure at issue under Article 12.1(c) on 23 July 2014, after the measure had already entered into force. Indonesia's notification under Article 12.1(b), which is the only relevant notification circulated *before the entry into force of the measure at issue*, does not sufficiently describe the proposed measure, the amount of safeguard duty, the date of introduction of the measure and timetable for the progressive liberalization of the measure.[136] Further, KPPI has failed to evaluate a mandatory factor for its injury analysis, i.e. the rate and amount of the increase in imports of the subject product in relative terms within the meaning of Article 4.2(a).[137]

2.107. Indonesia argued that the subsequent notification, dated 23 July 2014, could have rectified these deficiencies.[138] However, this notification was submitted *after* the measure took effect. Indonesia could not rectify the deficiencies of its notification under Article 12.1(b) by submitting a further notification too late to fulfil the purposes for which the notification of "all pertinent information" was required in the first place.[139] In any event, Indonesia also failed to provide all of the missing pertinent information in the subsequent notification dated 23 July 2014, in particular the rate and amount of the increase in imports in relative terms. Therefore, even if read together, both notifications are inconsistent with Article 12.2.[140]

---

[132] Complainants' rebuttal submission, para. 2.138.
[133] Complainants' first written submission, para. 5.153; complainants' opening statement at the first meeting of the Panel, para. 8.2; complainants' rebuttal submission, para. 2.138.
[134] Appellate Body Report, *Korea – Dairy*, para. 107 (original emphasis); complainants' rebuttal submission, para. 2.141.
[135] Complainants' rebuttal submission, para. 2.145; complainants' response to Panel's question 43.
[136] Complainants' rebuttal submission, para. 2.156; complainants' first written submission, para. 5.162.
[137] Complainants' first written submission, para. 5.164.
[138] Indonesia's rebuttal submission, para. 128.
[139] Complainants' rebuttal submission, para. 2.142; complainants' response to Panel's question 43.
[140] Complainants' rebuttal submission, para. 2.148.

2.108. Indonesia relied on the Appellate Body report in *US – Wheat Gluten* to argue that its notifications dated 26 May 2014 and 23 July 2014 complied with the requirements of Article 12.2.[141] That case, however, does not stand for the proposition that a Member is entitled to notify "all pertinent information", or rectify deficiencies in its notification of a finding of serious injury under Article 12.1(b), after it had already applied the safeguard measures. In *US – Wheat Gluten*, the Appellate Body discussed the narrower question of whether a Member can notify its decision to apply or extend a safeguard measure within the meaning of Article 12.1(c) after the decision to apply or extend the measure was taken. It answered this question in the affirmative. However, even if a Member is entitled to submit its notification under Article 12.1(c) after the adoption of the safeguard measure, that Member must still comply with the requirements of Article 12.2. It can do so by notifying "all pertinent information" in preceding notifications, for example, a notification under Article 12.1(b).[142]

2.109. Furthermore, the complainants agree with the European Union that the finding of the Appellate Body in *US – Wheat Gluten* must be read in the context of the specific facts of the case. In that dispute, the safeguard measure at issue was a quota, the effect of which does not materialize immediately after the measure is imposed. In contrast, in the present dispute, the safeguard measure is imposed in the form of a duty, which has immediate effects. In these circumstances, it is important that the Members other than the one imposing the measure are fully aware of the details of the measure before its entry into force and before its effects materialize in order to raise concerns in the Committee on Safeguards, or seek consultations under Article 12.3 on how to maintain a substantially equivalent level of concessions.[143]

2.110. In addition, as Japan noted in its response to Panel's Question 6, the Appellate Body's findings in *US – Wheat Gluten* do not address the question of whether there is a violation of Article 12.2 in circumstances similar to the present dispute. Japan also pointed out that whether a notification complies with Article 12.2 requires an examination of whether the Member *proposing to* apply the measure notified all pertinent information, including the *proposed* measure and the *proposed* date of introduction.[144] This is impossible in a case where the measure has already entered into force, because the Member is no longer *proposing* to apply a measure.[145]

2.111. Indonesia further argued that it could not provide all the information required in its notification of 26 May 2014, as the final decision on some of the elements of the "pertinent information" was taken through the promulgation of Regulation No. 137/2014 on 15 July 2014. While the complainants appreciate Indonesia's clarification that it is the Ministry of Finance that takes the decision to apply a safeguard measure, this fact did not preclude Indonesia from notifying "all pertinent information" in a manner consistent with Article 12.2, and, thereby respecting the rights of other Members under this provision. It is a well-established principle that a Member cannot invoke its internal procedures or legislation to justify a violation of its obligations under WTO law. Moreover, Indonesia did not explain why certain pertinent information could not have been included in Indonesia's 26 May notification, while other items could be included in that notification. In fact, the proposed measure and the timetable for the progressive liberalization were already set out in the Final Disclosure Report, published on 31 March 2014, and have not been changed since.[146]

2.112. In light of the foregoing, Indonesia acted inconsistently with Article 12.2 of the Agreement on Safeguards by failing to notify all pertinent information in its 26 May notification, even if read together with its 23 July notification.

[141] Indonesia's first written submission, para. 240; Indonesia's opening statement at the first meeting of the Panel with the parties, paras. 66-68; Indonesia's rebuttal submission, para. 128.

[142] Complainants' responses to Panel's question 44; complainants' rebuttal submission, para. 2.150.

[143] European Union's response to Panel's Question 6, para. 17; complainants' rebuttal submission, para. 2.151.

[144] Japan's response to Panel's Question 6, para. 11.

[145] Complainants' rebuttal submission, para. 2.152.

[146] Complainants' rebuttal submission, para. 2.156 (citing Article 27 of the 1969 Vienna Convention on the Law of Treaties; Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 46; and Panel Report, *Argentina – Textiles and Apparel*, footnote 198).

2.9 Consultations

2.113. Indonesia's failure to provide a meaningful opportunity for consultations prior to the application of the safeguard measure at issue is inconsistent with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards. Indonesia did not respond adequately to the complainant's requests for prior consultations, nor did it provide Members with all pertinent information enabling them to review the proposed measure in a meaningful manner and to engage in the consultations with Indonesia.[147]

2.114. The Appellate Body in *US – Line Pipe*, affirming its findings in *US – Wheat Gluten*, noted that consultations must be held *prior to* the application of the measure in order to afford the Members an adequate opportunity to consider the likely consequences of the measure before it takes effect.[148] This position was followed by the panel in *Ukraine – Passenger Cars* when it observed that "Article 12.3 gives affected Members a right to an adequate opportunity for consultations *before, not after*, a safeguard measure is applied".[149]

2.115. Indonesia alleged that it provided multiple opportunities for prior consultations but the complainants failed to seize these opportunities.[150] This allegation is unfounded. In fact, Chinese Taipei reminded KPPI of its obligation to hold prior consultations under Article 12.3 on three occasions, but KPPI simply ignored Chinese Taipei's repeated requests. Chinese Taipei was not required under Article 12.3 to continue repeating its requests for prior consultations.[151] With respect to Viet Nam, its first letter dated 24 April 2014 requesting consultations did not receive an answer until 4 July 2014, i.e. more than two months later. This answer was provided just three days before the Minister of Finance signed Regulation No. 137.1/PMK.011/2014 imposing the measure,[152] and less than two weeks before the regulation was promulgated. Moreover, KPPI sent its answer on Friday 4 July 2014, and proposed to schedule the consultations in Jakarta on Tuesday of the following week, 8 July 2014, i.e. only two working days later and after the decision to impose the safeguard had already been taken.[153] Thus, Indonesia did not provide the complainants with a meaningful opportunity to engage into consultations.

2.116. Indonesia argued that since Hoa Sen (Viet Nam's exporter) and Viet Nam received the Final Disclosure Report in May 2014, they had sufficient information to prepare for consultations.[154] However, Viet Nam never received the report from KPPI directly, despite its requests dated 24 April 2014 and 16 June 2014,[155] and Chinese Taipei received it only after the measure entered into force.[156] As the panel *in Ukraine – Passenger Cars* explained, Article 12.3 requires that all Members having substantial interests as exporters be given an opportunity for prior consultations.[157] Indonesia had to provide this opportunity by, *inter alia*, submitting a proper notification to the WTO Committee on Safeguards (as opposed to particular exporters) consistent with the requirements of Article 12.2. Indonesia failed to do so.[158]

2.117. It can hardly be disputed that the complainants have a "substantial interest" as exporters of the product concerned within the meaning of Articles XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards. As acknowledged by KPPI in the Final Disclosure Report, Chinese Taipei's share of Indonesia's total imports of the subject product was 21 per cent in 2012, whereas Viet Nam's share for the same products in the same year was 60.04 per cent, making

[147] Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.1.
[148] Appellate Body Report, *US – Line Pipe*, para. 108 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 136). Complainants' first written submission, para. 5.175; Complainants' rebuttal submission, para. 2.160.
[149] Panel Report, *Ukraine – Passenger Cars*, para. 7.521 (emphasis added); complainants' rebuttal submission, para. 2.160.
[150] Indonesia's rebuttal submission, paras. 134, 137, 138 and 140.
[151] Complainants' rebuttal submission, paras. 2.167-2.168; complainants' opening statement at the second meeting of the Panel, para. 9.2.
[152] Indonesia's response to Panel's question 46, para. 71.
[153] Complainants' rebuttal submission, para. 2.165.
[154] Indonesia's rebuttal submission, para. 140.
[155] Complainants' responses to Panel's questions 11 and 45; complainants' rebuttal submission, para. 2.169.
[156] Complainants' responses to Panel's questions 11 and 45; complainants' rebuttal submission, para. 2.169.
[157] Panel Report, *Ukraine – Passenger Cars,* para. 7.522.
[158] Complainants' opening statement the second meeting of the Panel with the parties, para. 9.4.

them two of the three primary exporting countries to Indonesia. Thus, it is clear that the obligations under Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards apply in this dispute.[159]

2.118. Indonesia relied on a statement in *Korea – Dairy* to argue that "consultations may be adequate even in circumstances where prior notifications of a finding of serious injury or of any proposed measure are incomplete".[160] In that dispute, however, the panel did not suggest that the opportunity for consultations may be considered adequate even when the Member proposing to apply a safeguard did not furnish some of the pertinent information listed in Article 12.2. Indeed, the panel, in a different passage, held that "Article 12.1, 12.2 and 12.3 taken together makes it clear that *before a definitive safeguard measure may be applied*, the Member proposing to apply it must notify all the pertinent information regarding the proposed measure and the factual basis (the injury finding) for applying it, and must provide an opportunity for consultations with Members whose trade will be affected by the proposed measure".[161]

2.119. Indonesia further attempted to justify its failure to provide adequate opportunities for prior consultations by arguing that the last sentence of Article XIX:2 of the GATT 1994 allows Members to apply provisional measures without holding these consultations. Indonesia appears to suggest that the safeguard at issue is a "provisional measure" within the meaning of that Article.[162] However, the imposition of "provisional measures" is subject to certain strict conditions, the fulfilment of which Indonesia has not demonstrated. For example, Indonesia did not establish that the alleged "provisional measure" was taken in "critical circumstances", or that the delay in the imposition of the measure would have caused damage to Indonesia's industry that would be difficult to repair, as envisaged under Article XIX:2. Moreover, according to Article XIX:2, the consultations must take place immediately after the provisional measure takes effect, which was not the case here. Indonesia's allegation that the measure at issue is a "provisional measure" is not supported by any evidence. Indonesia cannot invoke this provision by merely stating that "such is the case in the present case",[163] without explaining why this provision would apply to the facts of this dispute.[164]

2.120. Lastly, Indonesia argues that, during the consultations that took place after the imposition of the safeguard measure, the complainants did not raise the issue of the substantially equivalent level of concessions and other obligations that a Member proposing to impose a safeguard must endeavour to maintain under Article 8.1.[165] The complainants fail to see the relevance of this argument to their claim. As explained, there were no prior consultations between Indonesia and any of the complainants before the imposition of the safeguard, nor were adequate opportunities for these consultations provided.[166]

2.121. Regardless of whether consultations were held or not, Indonesia failed to provide sufficient information within the meaning of Article 12.2 of the Agreement on Safeguards to allow for the possibility, through consultations, for a meaningful exchange on the proposed measure. As has been previously discussed, Indonesia's notification dated 26 May 2014 does not contain all pertinent information. Thus, in the absence of sufficient information, Indonesia could not have provided an "adequate opportunity" for prior consultations within the meaning of Article 12.3 of the Agreement on Safeguards.[167]

2.122. In light of the foregoing, Indonesia acted inconsistently with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards by failing to provide adequate opportunities for prior consultations with Members having substantial interests as exporters.

---

[159] Complainants' first written submission, para. 5.188.
[160] Indonesia's opening statement at the first meeting of the Panel with the parties, para. 79; see also Indonesia's first written submission, paras. 262-263 (quoting Panel Report, *Korea – Dairy*, para. 7.150).
[161] Panel Report, *Korea – Dairy*, para. 7.120 (emphasis added); complainants' rebuttal submission, paras. 2.170-2.171.
[162] Indonesia's rebuttal submission, para. 139.
[163] Indonesia's rebuttal submission, para. 139.
[164] Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.3.
[165] Indonesia's rebuttal submission, para. 142.
[166] Complainants' opening statement at the second meeting of the Panel with the parties, para. 9.5.
[167] Complainants' first written submission, para. 5.189.

3 CONCLUSION

3.1. In the light of the foregoing, the complainants request the Panel to find that Indonesia acted inconsistently with Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards. Thus, the complainants request the Panel to recommend Indonesia to bring the measures into compliance with its WTO obligations.

4 SUGGESTION FOR IMPLEMENTATION

4.1. The complainants have repeatedly shown that Indonesia's safeguard measure violates various WTO provisions relating to safeguard measures. The nature and extent of Indonesia's violations warrant only one solution: the complete withdrawal of Indonesia's safeguard measure. Therefore, the complainants request this Panel to make a suggestion under Article 19.1 of the DSU that the only manner in which Indonesia can bring the safeguard measure at issue into conformity with its WTO obligations is by withdrawing it.

4.2. It is clear that Article 19.1 of the DSU grants panels the discretion to make such a suggestion. In circumstances in which a DSB recommendation could be implemented in different ways, a panel's suggestion may be unwarranted. However, as noted, this is not the case in the present dispute. In situations analogous to the present dispute, when panels found violations "to be of a fundamental nature and pervasive",[168] and when, in their view, there was no other way for the respondent to properly implement the DSB recommendation without revoking the measure, other panels have exercised their discretion under Article 19.1 and made this suggestion.[169]

4.3. In sum, the complainants submit that the gravity and extent of the inconsistencies of Indonesia's measure with WTO law warrant this Panel to suggest that the only way Indonesia can bring its measure into conformity with its WTO obligations is, simply, to withdraw it.[170]

[168] See Panel Report, *Guatemala – Cement II*, para. 9.6.

[169] See Panel Report, *Guatemala – Cement II*, para. 9.6. See also Panel Report, *Argentina – Poultry Anti-Dumping* Duties, para. 8.7; Panel Report, Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.12; and *Ukraine – Passenger Cars*, paras. 8.7-8.8.

[170] Complainants' opening statement at the second meeting of the Panel with the parties, paras. 10.1-10.3.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. This dispute raises the important issue as to how a WTO developing country Member could effectively utilize the Emergency Action on Imports of Particular Products or commonly known as "Safeguard Measure". All WTO Members recognize the needs to have an emergency instrument to temporarily limit imports in order to remedy serious injury or threat thereof of the domestic industry and to facilitate adjustment regardless whether the imports are traded fairly or not. The safeguard instrument should also be practicable especially for WTO developing country Members which would have their own limitations. There must be a balance between the strict and high standards to apply for a safeguard measure on one hand, and the ability of WTO Members especially the developing ones to comply with these high standards on the other. The safeguard measure is not a safety valve that is put inside a safety vault that no one could have the key or combination to open it without trigerring the alarm.

2. Steel industry is a very strategic industry in every country including Indonesia. Therefore, when these industries are seriously injured or threatened to be seriously injured because of surge of imports as a WTO Member Indonesia has the right to impose a safeguard measure. Indonesia understands that the standards to impose a safeguard measure are very high and exacting. Thus, the Indonesia Safeguard Committee (hereinafter referred to as "KPPI") has conducted a very thorough long investigation prior to making any recommendation to impose the safeguard measure on Subject Good to ensure impartial and objective investigations taking into account the due process rights of all parties including the petitioners, exporters, government of exporting countries, importers and the users industries.

3. As one of the emerging market economies of the world with the fourth biggest population in the world, as well as its increasing purchasing power, Indonesia is facing the impact of globalization and is consequently becoming one of the most targeted export destinations in the Southeast Asia region. Indonesia's domestic market particularly for the Subject Good is not only attractive to local producers, but also foreign producers. Therefore, the quantity of imports has increased by more than three times in 2012 compared to 2008, in line with the increasing market share of the imported products. This situation justifies the initiation of investigation as well as the imposition of a temporary emergency safeguard measure.

II. LEGAL ISSUES AND CLAIMS

A. Burden of Proof

4. Indonesia submits that the complainants have failed to make its *prima facie* case of some of their claims concerning: (1) increased imports; (2) threat of serious injury; and (3) causal link. The complainants cited multiple alleged inconsistencies of the Government of Indonesia with the provisions either from the GATT 1994 or the Agreement on Safeguards. Those articles contain multiple distinct obligations and each has their own burden of proof that the complainants have to establish. By only mentioning those multiple articles in the introduction part, in legal standard section and in the conclusion of the respective part of the complainants' first written submission, Indonesia submits that the complainants have failed to meet their burden of proof to establish a *prima facie* evidence as to why the challenged measures violate those multiple provisions and therefore such claims must be rejected by the Panel.

5. Indonesia would like to recall that complaining WTO Members engaging in the WTO dispute settlement proceeding must meet the certain applicable high standards. These high standards are reflected in the stringent requirements for a panel request, which *must connect the challenged measures with the provisions of the covered agreements claimed to be infringed, so that the respondent is aware of the basis for the claims.*[1] The Appellate Body has noted that the

[1] Appellate Body Report, *US – Gambling*, para. 141.

requirement to make a *prima facie* case – made in the course of submission to the panel – demands the same high standards.[2] The evidence and arguments underlying a *prima facie* case must therefore be sufficient to identify the challenged measure and identify the relevant WTO provision and obligations contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[3] The complainants clearly have not met this condition by merely citing multiple provisions either from the GATT 1994 or the Agreement on Safeguards.

6. Indonesia submits that an explanation about the legal standards of certain provisions in the GATT 1994 or Agreement on Safeguards without any explanation or connection to the challenged measure for sure does not fulfill a *prima facie* case. If the complainants' proposition is accepted by the Panel, this could have a significant impact for the future WTO dispute settlement proceeding, where the complainant could simply submit legal standards of the WTO provision without making any connection to the measure, and the respondent would still be obligated to counter and the Panel must also assess such claims.

7. Indonesia strongly disagrees with the complainants that the facts and legal arguments underlying claims under Article XIX:1 of the GATT 1994, Articles 2.1, 3.1, 4.2(a) and 4.2(c) of the Agreement on Safeguards are the same.[4] We note that those articles contain multiple distinct obligations and each has its own burden of proof for the complainants to meet.

8. Indonesia also disagrees with the complainants' proposition that any violation of the other relevant provisions of the Agreement on Safeguards will automatically result in an inconsistency with Article XIX:1 of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. This proposition would have tremendous impact on the future WTO dispute settlement concerning safeguard measures because all complaints will include inconsistency with Article XIX:1 of the GATT 1994 and Article 2.1 of the Agreement on Safeguards in any of their claims under the Agreement on Safeguards. We believe this would also undermine the existence of substantive requirements under those two articles that must be demonstrated by the complainants.

9. Indonesia notes that the Panel's decision in the *Ukraine – Passenger Cars* to exercise judicial economy clearly demonstrates that obligations under Article 2.1 on the one hand and Article 3.1 (last sentence) and 4.2(c) on the other hand are different. Otherwise, the panel in the *Ukraine – Passenger Cars* would make a decision similar to the complainants' proposition, whereby a violation of Article 2.1 of the Agreement on Safeguard would automatically entail a breach of Articles 3.1 and 4.2(c) of the Agreement on Safeguards.

B. Unforeseen Development

1. KPPI has provided the logical connection between the unforeseen development and increased imports

10. The complainants argued that KPPI failed to provide evidence or a reasoned or adequate explanation supporting the alleged "unforeseen developments", and how these developments led to the increase in imports.[5] They referred to the Appellate Body's finding in *US – Steel Safeguards*, which stated that a Member imposing a safeguard measure should adduce an explanation or data supporting the existence of the unforeseen development.[6] The complainants also argued that KPPI failed to provide a link between the 2008 global financial crisis, which was global and macroeconomic in nature, and the effects on the specific products at issue.[7]

11. In response to this, Indonesia emphasized on the panel's finding in *US – Steel Safeguards*, that the length and quantity of the explanation are not the factors that need to be considered, but rather, it is the nature of the facts, complexity, timing of the explanation, its extent, and its quality

[2] Ibid.
[3] Ibid.
[4] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 14.
[5] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.19.
[6] Ibid.
[7] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.29.

are the relevant factors.[8] Indonesia argued that KPPI has properly explained the logical connection, specifically in paragraph 52-53 of KPPI's final disclosure report.[9] Further, contrary to the complainants' explanation, Indonesia argued that KPPI has provided an explanation as to why the unforeseen event could result in increased imports of the specific product at issue. They argued that aside from Indonesia's purchasing power that remained high, there was a shift in preference from the use of wood material to light steel, which ultimately resulted the increase in demand of galvalume.[10] Therefore, Indonesia has explained the connection of why the unforeseen event could result in the increased imports of galvalum.

12. However, the complainants in their rebuttal submission argued that the factual assertions made by KPPI were multiple, implied complex economic reasoning, and required much more explanation.[11] For instance, they argued on what basis did KPPI assert that in a global economic crisis, Indonesia was the exception to the overall downturn.[12] The complainants also noted that the Final Disclosure Report does not contain any explanation of why the developments cited were unforeseen.[13] They stated that the explanation was required as a matter of fact and had to be contained in KPPI's Final Disclosure Report.[14]

13. In response, Indonesia in its rebuttal submission argued that the complainants have understood that the unforeseen development is the 2008 financial crisis.[15] Indonesia provided a series of evidence, which are reflected throughout the complainants' submission, demonstrating that the complainants have in fact understood which event is the unforeseen development.[16] Indonesia also argued that the 2008 global financial crisis could not have been foreseen by Indonesia when it undertook its WTO commitments on 1 January 1995.[17] They referred to the Panel's finding in *US – Steel Safeguards*, where the panel although found no explanation on how the Asian crisis constitutes unforeseen development in the USITC's Final Report, they stated that "we can assume that, as the crisis began in 1997, it could not have been foreseen by the United States negotiators in 1994, when the Uruguay Round ended".[18] In this respect, Japan as third party argued that the Panel made this finding after it read the US' second supplementary report, which discussed about the unforeseen development.[19] However, Indonesia was of the view that this is incorrect. It is clear that the panel made a finding based solely on the Final Report which does not discuss anything relating to unforeseen development, yet the panel made an assumption that the event in that case could not have been foreseen since it happened 3 years after the US' concession.[20] Therefore, Indonesia stated that the 2008 global financial crisis is an unforeseen event at the time Indonesia undertook its WTO commitments on 1 January 1995.[21]

14. With respect to the logical connection, Indonesia referred to the Panel's finding in *US – Steel Safeguards*, which stated that there are situations where the explanation "may be as simple as bringing two sets of facts together".[22] Further, Indonesia reiterated the explanation provided by KPPI in its Final Report, demonstrating that it has shown the logical connection between the unforeseen development and increased imports.[23]

[8] Indonesia's first written submission, para. 53.
[9] Ibid. para. 55.
[10] Indonesia's first written submission, para. 55.
[11] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.9.
[12] Ibid. para. 2.9.
[13] Ibid. para. 2.18.
[14] Ibid.
[15] Indonesia's rebuttal submission, para. 25.
[16] Indonesia's rebuttal submission, paras. 26-35.
[17] Ibid. para. 36.
[18] Ibid. para. 36.
[19] Japan's first written submission, para. 16.
[20] Panel Report, *US – Steel Safeguards,* paras. 10.79-80.
[21] Indonesia's rebuttal submission, para. 36.
[22] Panel Report, *US – Steel Safeguards*, para. 10.115.
[23] Indonesia's rebuttal submission, para. 38.

2. Whether KPPI's conclusion is erroneous

15. The complainants argued that KPPI's conclusion, *i.e.* the surge in imports is the unforeseen development itself is erroneous.[24] They referred to the panel's finding in *Argentina – Preserved Peaches*[25] which stated that the existence of "unforeseen developments" and increased imports must be demonstrated individually and independently of each other.[26] Therefore, they concluded that KPPI's conclusion in paragraph 54 of its Final Disclosure Report that the increase in imports was the unforeseen development that caused the increase in imports itself is erroneous.[27]

16. In response to this, Indonesia argued that the panel should not be fixated only on the conclusion, but to assess the whole context of the case.[28] Indonesia referred to several cases, such as *Argentina – Preserved Peaches* and *Chile – Price Band System* in arguing that it is the practice of the panel to look at the explanation and evidence provided by the competent authorities, rather than focusing on the conclusion itself.[29]

3. KPPI has provided the relevant GATT obligation

17. With respect to the demonstration of GATT obligation, the complainants firstly argued that the importing Member is required to show, as a matter of fact, that it has undertaken relevant GATT obligations or that it made concessions.[30] In response to this, Indonesia stated that it has demonstrated the relevant GATT obligation, as shown in Table 3 of the KPPI's Final Disclosure Report.[31]

18. During the second substantive meeting, the Panel asked several questions to both parties, so as to clarify the parties' understanding of the relevant GATT obligation. For instance, the panel asked whether the term "obligation" on the first and last part of Article XIX:1(a) of the GATT 1994 have to be the same. In this respect, the complainants are of the view that these obligations refer to the same GATT obligation, in line with the panel's finding in *Dominican Republic – Safeguard Measure*.[32] However, Indonesia is of the view that these obligations although might refer to the same GATT obligation, but it can also be different, particularly when the relevant obligation is MFN.[33]

19. Indonesia responded to the complainants' answer with respect to their reference to the Panel in *Dominican Republic – Safeguard Measure*, by arguing that if the GATT obligation involved is other than tariff concessions, for instance, MFN, and the terms "obligation" in the first and last part of Article XIX:1(a) have to be the same, then no investigating authority could ever demonstrate how the exclusion of some negligible imports from developing country Members could ever result in the increased imports.[34]

20. Further, Indonesia referred to the Appellate Body's finding in *Argentina – Footwear*, where it stated that to fulfill this requirement, a mere demonstration of the relevant GATT obligation would be sufficient.[35] At the present case Indonesia does not have any concession or commitment in its schedule for the Product Concerned because it is stated "unbound". In this circumstances Indonesia is of the view that the identification of the applied MFN rate as well as all other tariffs under regional or free trade agreement under Article XXIV of the GATT 1994 would fulfil the requirement "of the effect of the obligations incurred by a Member under this Agreement, including

[24] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.31.
[25] Panel Report, *Argentina – Preserved Peaches*, para. 7.24.
[26] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.33.
[27] Ibid. para. 5.33.
[28] Indonesia's first written submission, para. 64.
[29] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 64.
[30] Ibid. para. 5.28.
[31] Indonesia's response to Panel Question No. 6.
[32] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 47.
[33] Indonesia's response to Panel Question No. 47.
[34] Ibid. para. 4.
[35] Ibid. para. 11.

tariff concessions…". Otherwise it would be legally impossible to impose a safeguard measure on a product that has no tariff concession or commitment because the Member cannot fulfil the requirement "of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions…" as provided in Article XIX:1 (a) of the GATT 1994. It would be impossible to substantiate the effect of having no tariff concession under the GATT which have led to the increased imports.[36]

C. Increased Imports

21. The complainants argued that the abnormal time gap between the end of POI and the date of determination of threat of serious injury, which is 15 months, renders the increased imports not recent enough.[37] As reflected in their response to Panel question, the circumstances that might affect how recent a data should be, include the availability of data, the manner in which imports behave and fluctuate during the POI, market conditions within the importing Member, and external macroeconomic factors that might be relevant to the case.[38] Following their statement, they argued that based on the circumstances of the case[39] and the average time gap of past safeguards cases,[40] a time gap of 9 months would be more reasonable. Indonesia simply noted that instead of referring to an established case such as *Ukraine – Passenger Cars*, the basis they used for this argument, *i.e.* a mere average time gap of past cases, is unreasonable.

22. Further, Indonesia submitted that the complainants' argument has no basis. This is for two reasons. First, in light of the recent jurisprudence, *i.e. Ukraine – Passenger Cars*, the Panel established that a time gap of 16 months between the end of POI and the date of determination of injury is considered recent enough,[41] insofar the complainants failed to prove that the investigation "should have taken less time than it did".[42] In this case, Indonesia argues the time gap between the end of POI and the date of determination is 15 months, and the complainants have not submitted any evidence or arguments which would indicate that the investigation should have taken less time than it did. Further, Indonesia refers to the Panel's decision in *Argentina – Footwear*, where it clearly established that an investigating authority has no obligation to "continuously update the data in its investigation. Such a requirement would be unnecessarily burdensome and difficult to administer".[43] Indonesia is also of the view an investigating authority does not have any obligation to continuously update the import and/or injury data whenever such data is available.[44] This basis, in Indonesia's view, renders the complainants' argument completely invalid.

23. Indonesia also has submitted that that the 2013 annual import data was only published by Indonesia Statistic Bureau (BPS) on 4 August 2014 (5 months after the issuance of KPPI Final Disclosure Report)[45] and BPS does not officially publish half-yearly import statistic by country. It is the common practice of KPPI to refer to only to official annual import data published by BPS in order to correspond with the audited injury data to establish a causal link between them.[46]

24. Additionally, Indonesia submits the complainants' suggestion to take into account the data of the first half of 2013 is also contradictory. This is because by taking into account new data, KPPI would have to update not only its increased imports analysis, but also other relevant requirements, such as causal link, serious injury, etc. KPPI would also need to verify the collected data, which in itself requires time. Therefore, the implementation of the complainants' suggestion would undoubtedly result in a longer, if not the same, time required to complete the investigation.

---

[36] Ibid. para. 12.
[37] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.30.
[38] Ibid. para. 2.36.
[39] Ibid. para. 2.37.
[40] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement during the first meeting, para. 3.3; *see also*, Exhibit TPKM-VNM-12.
[41] Panel Report, *Ukraine – Passenger Cars*, para. 7.177.
[42] Ibid. para. 7.176.
[43] Panel Report, *Argentina – Footwear*, para. 8.213.
[44] Indonesia's response to Panel Question, No. 57.
[45] Indonesia's opening statement at the first meeting, para. 38 and see Exhibit IDN-43.
[46] Indonesia's response to Panel Question, Nos. 57-58.

D. Serious Injury

1. Whether the complainants' interpretation of the terms "increase in imports … in relative terms" under Article 4.2(a) is correct

25. In this respect, the complainants argue several issues, first, the complainants argue that KPPI failed to evaluate all relevant serious injury factors under Article 4.2(a) of the Agreement on Safeguards, in particular the rate and amount of increased imports in relative terms to domestic production.[47] Indonesia responded to this allegation by stating that the assessment of "relative terms" does not necessarily have to be compared with domestic production, but rather, the comparison with domestic consumption is also sufficient,[48] which KPPI has fulfilled. In response to this, the complainants put forward their interpretation of Article 4.2(a), which requires an investigating authority to make an assessment in relation to domestic production. They provided the definition of relative, which to be defined as "[c]onsidered in relation or in proportion to something else".[49] Second, they noted that the benchmark element is not defined in Article 4.2(a), but they argued that this benchmark could not be the domestic consumption, considering that such assessment would be redundant with the analysis on increased import.[50]

26. In response to the complainants' argument, Indonesia put forward several reasons as to why the complainants' interpretation is incorrect. First, there is a deliberate distinction of the drafter to differentiate between the two. Article 2.1 explicitly refers the relative term to domestic production while Article 4.2(a) does not. Second, Article 2.1 uses the conjunction "or" while Article 4.2(a) uses the conjunction "and". Third, Article 2.1 focuses about the relative term that refers to the increased imports while Article 4.2(a) is more focused on the determination of serious injury. Lastly, the panel's analysis in *US – Lamb* also affirms that the assessment of rate and amount of imports relative to domestic consumption (market share) fulfills one of the factors set out in Article 4.2.[51]

27. Indonesia further noted the admission of the complainants that the "relative" benchmark is not defined in Article 4.2(a) of the Agreement on Safeguards.[52] However, Indonesia disagrees with the complainants' assertion that a comparison with domestic consumption would be redundant as it would be the same as the assessment on the share of domestic market taken by increased imports.[53] Indonesia supported this contention by providing an example that the two assessments are different.[54]

2. Whether or not KPPI has evaluated the situation of the domestic industry in respect of the production destined for the captive market of Bluescope

28. The complainants have argued that KPPI failed to conduct a serious injury determination with respect to all segments of the domestic industry. Alternatively, they also argued that KPPI failed to provide a reasoned and adequate explanation of how, despite the absence of an analysis of the captive market, there was still an overall impairment of the domestic industry.[55] Particularly, the complainants noted that Bluescope produced both bare and painted galvalume. Accordingly, Bluescope's production of painted galvalume must have required bare galvalume, and therefore

[47] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.50.
[48] Indonesia's first written submission, paras. 125-131.
[49] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.53.
[50] Ibid. para. 2.54.
[51] Indonesia's response to Panel question No. 26; Indonesia's rebuttal submission, para. 67.
[52] Indonesia's rebuttal submission, para. 68.
[53] Ibid. para. 68.
[54] Ibid. para. 69.
[55] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.60; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 17.

two segments of production of bare galvalume were relevant, (i) production for the merchant market and (ii) production for the captive market.[56]

29. In response to this, Indonesia argued that KPPI had investigated and evaluated all data and information related to the petitioners as well as actual condition of the domestic industry.[57] As a matter of fact, KPPI had addressed this concern in paragraph 26(b) of its Final Disclosure Report. Although the investigation also revealed that Bluescope produces both bare and painted galvalum, however, it also revealed that the products produced by Bluescope is not used for its own consumption. Indonesia also responded this in its responses to Panel question.[58] Indonesia would like to recall panel's decision in *Argentina – Footwear*, in which the Panel clearly established that their assessment does not involve questioning the facts as determined by the national authority.[59] The Panel's obligation is to make an objective assessment pursuant to Article 11 of DSU.[60]

3. Whether or not KPPI has provided reasoned and adequate explanation concerning its threat of serious injury determination

30. The complainants argued that KPPI failed to explain its finding of threat of serious injury despite indications of positive performance of the domestic industry.[61] They argued that KPPI's assessment regarding the decrease in market share was conducted on the basis of comparing the end points of the POI.[62] They referred to the Appellate Body which stated that "the competent authorities are required to consider the trends in imports over the POI (rather than just comparing the end points) under Article 4.2(a)".[63]

31. In response to this, Indonesia argued that it has considered trends in imports over the whole POI, instead of resorting to an end-to-end comparison. This has been provided in Indonesia's response to the panel's question, by also providing the method of calculation that KPPI used in order to determine the trends in imports using exponential regression function to make average of a trend throughout certain period of time rather than just a comparison on end-to-end point.[64]

32. Further, Indonesia emphasized the finding of the Appellate Body in *Argentina – Footwear*, which stated that not all factors evaluated by the investigating authority is required to show a declining trend.[65] Further, Indonesia provided a summary of KPPI's assessment to determine threat of serious injury to the domestic industry:[66]

a. the petitioners cannot utilize the increase of domestic consumption because the share was taken by the increased imports;

b. the domestic sales had only increased by 29 per cent, therefore it was not in line with the greater domestic consumption increase of 34 per cent during the POI;

c. although the petitioners' production increased by 32 per cent during the POI, such increase still would not be sufficient to fulfil domestic consumption. Moreover, even with such increase, the petitioners' capacity utilization was still far below their installed capacity;

d. in an effort to increase their capacity utilization and productivity, the petitioners tried to set production target and increased their labour. However, such effort still failed to reach the expected capacity utilization and productivity. Even in 2012, one of the petitioners was forced to lay off 10 per cent of its labour because of the declining company performance;

[56] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.61.
[57] Indonesia's rebuttal submission, para. 82.
[58] Indonesia's response to Panel Question, no. 24.
[59] Panel Report, *Argentina – Footwear*, para. 7.12.
[60] Panel Report, *US – Wheat Gluten*, para. 8.6.
[61] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.77.
[62] Ibid. para. 5.82.
[63] Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.
[64] Indonesia's response to Panel Question No. 23.
[65] Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.
[66] Indonesia's first written submission, para. 136.

e. the petitioners' inventory increased significantly by 75 per cent during the POI due to the increasing share of imports as reflected in Table 7 above;

f. the petitioners suffered loss in 2008, 2009 and 2012 because they were forced to sell below their production cost in order to be able to compete with imports;

g. KPPI also found that during 2009–2012 import prices were always below petitioners' prices. This condition caused both price undercutting and price depression to the petitioners;

h. KPPI had also assessed other factors which might be causing threat serious injury to the domestic industry, i.e. increased capacity, competition with other domestic producers and quality of the products produced by petitioners. Based on KPPI's investigation, it found that such other factors did not contribute to the threat of serious injury to the domestic industry.

33. Indonesia also argued that with respect to the petitioners' positive performance, *e.g.* sales, production and capacity, it was merely the petitioners' effort to be able to compete with imports, which was clearly unsuccessful when during the same period, particularly during the most recent period in 2010–2011 when the petitioners' profit declined from 301 index point to 115 index point and ultimately suffered loss to -30 index point in 2012; while their inventory significantly increased from 118 index point in 2010 to 356 index point in 2011 and 460 index point in 2012.[67]

E. Causal Link

1. Whether KPPI failed to establish the causal link between increased imports of the subject product and serious injury

34. The complainants argued in their first written submission that KPPI relied largely on the coincidence of the alleged increased imports and the alleged injurious indicators.[68] They further referred to the Panel's finding in *US – Steel Safeguards*, which stated that there may be situations where a coincidence in time "may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link".[69] However, the complainants did not elaborate on this specific issue and instead referred to the explanation in the context of non-attribution analysis.[70]

35. In this respect, Indonesia emphasized that Article 4.2(b) contains two distinct obligations, each with burden of proof that has to be met.[71] Indonesia provided the finding of the Appellate Body in *US – Line Pipe*, where it explained the difference between the two obligations.[72] Indonesia argued that considering that the complainants did not elaborate on how Indonesia violates the first sentence of Article 4.2(b), and made an explicit reference to the analysis on non-attribution issue, the complainants have failed to meet their burden of proof.[73]

36. In the complainants' rebuttal submission, they denied Indonesia's argument and argued that there was actually no coincidence between the alleged decline in the petitioners' market share and the increase in imports.[74] They stated that the petitioners' market share experienced a steady increase from 2010 to 2012, and imports also increased, showing an upward trend during the same period.[75] They further concluded that both the petitioners' market share and imports experienced an upward trend.[76]

---

[67] Indonesia's rebuttal submission, para. 74.
[68] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.106.
[69] Panel Report, *US – Steel Safeguards*, para. 10.305.
[70] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.107.
[71] Indonesia's first written submission, para. 159.
[72] Appellate Body Report, *US – Line Pipe*, para. 208.
[73] Indonesia's first written submission, para. 161.
[74] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.86.
[75] Ibid.
[76] Ibid.

37. In response to this, Indonesia noted the complainants' inconsistency in arguing that KPPI was inconsistent with the first sentence of Article 4.2(b) of the Agreement on Safeguards. Indonesia argued that in the complainants' first written submission, they acknowledged that there is a coincidence of the increased imports and the injurious indicators and argued only that the coincidence is flawed due to some other factors.[77] However, in their response to Panel question, the complainants stated that no coincidence occur.[78] Indonesia stated that the argument is misleading and the complainants failed to establish *prima facie* case. In any event, Indonesia also explained that it there was a causal link between the increased imports and the downward trend of the petitioner's market share.[79] Indonesia referred to its response to the panel's question in providing the method on how to prove that the coincidence did occur.[80]

2. Whether KPPI has assessed other relevant factors with respect to Article 4.2(b) of the Agreement on Safeguards

38. In this instance, although the Final Disclosure Report contained a discussion of other factors such as increased national consumption, domestic competition, and the domestic product's ability to compete with imports,[81] the complainants argued that KPPI did not examine the question of whether the increase in losses may be explained by increased costs, including increased labor costs, incurred in installing and using this additional capacity.[82]

39. With respect to the decline in profits as a result of increase in installed capacity of the petitioners, Indonesia argued that KPPI in its Final Disclosure Report has evaluated such factor and found that the increase in the petitioners' installed capacity is in line with the increase of national consumption and therefore it was not a factor causing injury to the petitioner.[83] It further stated that the increase in consumption has indirectly encouraged the domestic industry to increase their production capacity in order to fulfill the demand. However, despite such effort, the domestic market share continued to decrease by 4 per cent while the market shares of imports increased by 6 per cent. Indonesia argued that this shows the increase in installed capacity is not the factor causing injury to the petitioners.[84]

40. With regard to the complainants' question of the domestic product's ability to compete with imports, Indonesia argued that KPPI has also evaluated this factor. In fact, KPPI explained in its Final Disclosure Report that the domestic products conform to the applicable standardization, which includes Indonesia National Standard (SNI) and International Organization for Standardization (ISO).[85]

41. Indonesia also noted that the assessment of other factors that might cause injury to the petitioners is not unlimited in nature.[86] They referred to the finding of the Appellate Body in *US – Wheat Gluten*, where the Appellate Body rejected the EC's argument that the competent authorities "have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant".[87]

F. Parallelism

42. Indonesia submits that the current principle of parallelism does not include the scope of products and therefore Indonesia's safeguard measure is consistent with the current established principle of parallelism.[88] In addition, Indonesia also argues that Indonesia's decision to impose

[77] Indonesia's rebuttal submission, para. 90.
[78] Ibid. para. 91.
[79] Indonesia's opening statement during second meeting, para. 54.
[80] Ibid.
[81] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.110.
[82] Ibid. para. 5.112.
[83] Indonesia's first written submission, para. 167.
[84] Ibid.
[85] KPPI's Final Disclosure Report, para. 57, see Exhibit IDN-8.
[86] Indonesia's first written submission, para. 168.
[87] Appellate Body Report, *US – Wheat Gluten,* para. 56.
[88] Indonesia's rebuttal submission, paras. 102-106.

the safeguard measure on narrower scope of products is in line with Article 5.1 of the Agreement on Safeguards.[89]

1. Whether the doctrine of parallelism stipulated in Article 2.2 of the Agreement on Safeguards apply to the present case

43. Indonesia submits that Indonesia's practice in the present case is allowed under WTO provisions and under Indonesian regulation. Amendments of proposed measures, including the alteration of the form of measure from quota to duties, reduction of the safeguard rates or quota, or reduction of duration of the safeguard measure based on political decisions are common in the application of safeguard measures.[90] Previous case laws which were used as examples include *Ukraine – Passenger Cars* and *US – Steel Safeguards*.[91]

44. Moreover, pursuant to GR 34/2011 concerning Anti-Dumping Measure, Countervailing Measure and Safeguard Measure, the Minister will take into account the National Interest Consideration from the relevant Ministries before making any decision to impose the safeguard measure based on the recommendation from KPPI. Therefore, political decisions to determine the form, rate, duration of the safeguard measure as well as to narrow down the scope of products imposed by the safeguard measure shall not be deemed to violate Articles 2.1, 3.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards provided that it does not broaden the scope of product and that it does not discriminate based on origin.

2. Whether the application of the safeguard measure resulted in a discrimination based on origin

45. Assuming *arguendo* that the doctrine of parallelism as regulated in Article 2 of the Agreement on Safeguards does apply to the present case, Indonesia argues that it does not discriminate the application of the safeguard measure based on origin.[92]

46. The principle of parallelism is neither in the text of the Agreement on Safeguards nor in Article XIX of the GATT 1994 and was first established by the panel in *Argentina – Footwear* case.[93] Subsequently, this unwritten principle was also raised in *US – Wheat Gluten*[94], *US – Line Pipe*[95], *US – Steel Safeguards*[96] and *Dominican Republic – Safeguard Measures.*[97] The principle was created based on the "parallel language used in the first and second paragraph of Article 2 of the Agreement on Safeguards.[98] The existing case law relating to the principle of parallelism exclusively relates to the exemption of FTA partners from the scope of the MFN application of the safeguard measure.

47. According to the Appellate Body in *US – Wheat Gluten,* the parallel language in Article 2.1 and 2.2 of the Agreement on Safeguards, which the complainants had referred to as the origin of the doctrine, would be given a different meaning if a Member, after including imports from all sources in the determination of serious injury, then excludes imports from one source from the application of the measure.[99]

48. Indonesia would like to emphasize that there is no discrimination based on origin for imported products excluded from the application of the safeguard measure. The complainants also have never challenged or put forward any evidence that such exclusion resulted in *de facto* discrimination based on origin.[100] Therefore, even if the doctrine of parallelism as regulated in Article 2 of the Agreement on Safeguard does apply to the present case, Indonesia has complied

[89] Ibid. paras. 108-113.
[90] Indonesia's first written submission, para. 183.
[91] Ibid. para. 183.
[92] Indonesia's first written submission, para. 186.
[93] Panel Report, *Argentina – Footwear (EC)*, paras. 8.81-8.87.
[94] Panel Report, *US – Wheat Gluten*, para. 8.156.
[95] Panel Report, *US – Line Pipe*, para. 4.25.
[96] Panel Report*, US – Steel Safeguards*, para. 3.1.
[97] Panel Report*, Dominican Republic – Safeguard Measures*, para. 7.64.
[98] Appellate Body Report, *US – Steel Safeguards*, para 439.
[99] Indonesia's first written submission, para. 189, referring to Appellate Body Report, *US – Wheat Gluten*, para. 96.
[100] Ibid. para. 190.

with its obligations as it has not discriminated the application of the safeguard measure based on origin, except those exempted under Article 9 of the Agreement on Safeguards.[101]

49. However, the complainants are now requesting the Panel to broaden this unwritten principle in two ways. First, from only covering the exclusion or discrimination based on origin now the complainants argued the principle of parallelism also covers the scope of products.[102] Second, that the parallel language of Articles 2.1 and 2.2 of the Agreement on Safeguards should now be expanded to include the parallel language of Articles 2.1, 4.2(a) and 4.2(b) of the Agreement on Safeguards as well as Article XIX of the GATT 1994.[103] The complainants argued that the requirement of parallelism permeates the text of the whole Agreement on Safeguards, and can be derived from the use of similar notions in Articles 2.1 and 4.2, as well as Article XIX:1(a) of the GATT 1994.[104]

50. Indonesia submitted that the complainants had requested the Panel to go beyond the text of the Agreement on Safeguards and even beyond the well-established case law by requesting the expansion of the principle of parallelism. The expansion does not include only that of the principle itself, but also the expansion of parallel provisions of Article 2.1 of the Agreement on Safeguards which is now to include Article XIX of the GATT that was not even mentioned in the complainants' request for the establishment of the panel.[105]

51. Indonesia would like to recall that Article 3.2 of the DSU states that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Indonesia agrees with the United States that the application and enforcement of abstract principles not set out in the WTO Agreement would be fundamentally at odds with the customary rules of interpretation of public international law.[106]

52. The Panel needs to be extremely cautious in addressing this claim as to not add or diminish the rights and obligations of Members provided in the Agreement on Safeguards. Indonesia is of the view, that if the Panel were to agree with the complainants' proposition, the Panel will open a "Pandora's Box" where the principle of parallelism could be further broadened in the future, especially in light of similar languages or terms used in Article 2.1 of the Agreement on Safeguards found throughout the Agreement on Safeguards, as was also acknowledged by the complainants.[107]

3. The *Mexico – Steel Pipes and Tubes* anti-dumping case is not applicable to the present case

53. The complainants have referred to *Mexico – Steel Pipes and Tubes,* an anti-dumping dispute, in which the panel stressed the importance of the obligation to ensure identity between the scope of the investigated product and the scope of the product to which the measure applies.[108] Indonesia submits that the *Mexico – Steel Pipes and Tubes* case is irrelevant to the present case as it is an anti-dumping case and the doctrine of parallelism claimed by the complainants is based on Article 2 of the Agreement on Safeguards and not the Anti-Dumping Agreement.[109]

54. Moreover, the facts considered in the referred case are vastly different from the set of facts being considered in the present case.[110] In that case, the issue was the investigating authority

[101] Ibid. para. 190.
[102] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.119.
[103] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 6.8; The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question Nos. 36 and 41.
[104] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 36.
[105] Ibid.
[106] United States' third-party response to Panel Question No. 40, para. 13.
[107] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 36.
[108] Indonesia's first written submission, para. 193.
[109] Ibid.
[110] Ibid. para. 194.

during the investigation added additional products in the scope of investigation which was to include tubing of 4"-6" and certain structural tubing.[111] However, in this case, the complainants have recognized that the difference in implementation is because Indonesia had narrowed down the scope of the product at issue from steel with a "thickness not exceed 1.2 mm" to that with a "thickness not exceeding 0.7 mm."[112]

4. Indonesia's actions are in compliance with Article 5.1 of the Agreement on Safeguards

55. In any event, Indonesia submits that its decision to impose the safeguard measure on narrower scope of product is in line with Article 5.1 of the Agreement on Safeguards.[113] Indonesia submits that a requirement for an application to meet the requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards would effectively render Article 5.1 of the Agreement on Safeguards inapplicable.[114]

56. Indonesia submits that Article 5 of the Agreement on Safeguards regulates the imposition of the safeguard measure.[115] Indonesia also referred to the Panel question which implied that by requiring that the conditions in Article 2.1 of the Agreement on Safeguards must be satisfied in relation to any product subject to a safeguard measure would preclude any Member to comply with Article 5.1 of the Agreement on Safeguards in applying a safeguard measure that is less trade-restrictive.[116] The narrowing down of the product scope has resulted in a less trade-restrictive measure. This decision was also not done in an arbitrary manner. Rather, it was based on the National Interest Consideration as provided in Government Regulation No. 34/2011, which concluded that the threat of serious injury during the period of investigation was mostly caused by imports of bare galvalum with thickness not exceeding 0.7 mm. Members have the right to choose measure most suitable for the achievement of objectives in imposing the safeguard measure as provided in the last sentence of Article 5.1 of the Agreement on Safeguards. As the United States has pointed out the use of the phrase "suitable" to the achievement of the objectives, the sentence leaves to a Member's discretion what particular measure may or may not be "suitable" in particular circumstances.[117] In this case, Indonesia has decided based on its national interest consideration that the most suitable safeguard measure is only to impose the safeguard measure on the Product Concerned until 0.7 mm.

57. Members have the right to choose the measure most suitable for the achievement of objectives in imposing the safeguard measure as provided in the last sentence of Article 5.1 of the Agreement on Safeguards.[118] Therefore, Indonesia submits that its safeguard measure is justified under Article 5.1 of the Agreement on Safeguards.[119]

G. Most-Favored-Nation

1. Whether Article 9.1 of the Agreement on Safeguards justifies inconsistent measure to Article I:1 of the GATT 1994

58. The complainants stated that the measure at issue imposed by Indonesia is inconsistent with Article I:1 of the GATT 1994. The complainants argued that first, the measure falls within the scope of Article I:1 of the GATT 1994,[120] and that the products covered by the specific duty are "like" the products exempted from the application of the specific duty.[121] Additionally, the exemption from the specific duty is not extended "immediately" and "unconditionally" to the

[111] Indonesia's opening statement at the first meeting, para. 61.
[112] Ibid. para. 195.
[113] Indonesia's rebuttal submission, para. 108.
[114] Ibid. para. 110.
[115] Indonesia's rebuttal submission, para. 111.
[116] Indonesia's rebuttal submission, para. 111; referring to Panel Question No. 41.
[117] Indonesia's rebuttal submission, para. 11.
[118] Ibid. para. 113.
[119] Ibid. para. 114.
[120] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.142.
[121] Ibid. para. 5.144.

subject products from all Members' territories.[122] Therefore, clearly, the exemption from the specific duty is not extended immediately and unconditionally.[123]

59. Indonesia submits that Article XIX:1 of the GATT 1994 has clearly provided an exemption to suspend obligations incurred by a contracting party under the GATT 1994 as an emergency action on imports of particular products in order to prevent or remedy serious injury caused by an unforeseen increase in imports.[124] The word "obligations" in Article XIX:1 of the GATT 1994 refers to any obligation under the GATT 1994 including MFN obligation in Article I:1 of the GATT 1994.[125] Otherwise, Article 2.2 of the Agreement on Safeguards would be superfluous and would create a conflict between Article 9.1 of the Agreement on Safeguards and the MFN principle provided for in Article I:1 of the GATT 1994.[126]

60. The complainants then submitted that Indonesia's safeguard measure is not justified under Article 9.1 of the Agreement on Safeguards because it is not based on the basic pre-requisite that imports must come from "developing countries".[127] In this case, imports from six of the exempted Members, i.e. EU members Bulgaria, Croatia, Hungary, Lithuania, Poland, and Romania cannot qualify as imports coming from *developing countries*.[128] This means that Indonesia's exemption of these imports does not fulfill the requirements of Article 9.1 of the Agreement on Safeguards.[129]

61. Indonesia argues that this exemption can be justified under Article 9.1 of the Agreement on Safeguards as the exempted countries in MOF Regulation 137/2014 are all developing countries.[130] With regards to the countries the complainants have taken issue with, Indonesia notes that there is no universal threshold for the status of countries throughout the world, and as such the status has been self-determined.[131] In any case, there have been multiple cases which have also included Croatia, Lithuania and/or Romania in its list of exempted developing countries in accordance to Article 9.1 of the Agreement on Safeguards.[132]

62. Further, with regards to the import shares of the exempted countries, KPPI has found that the import shares of Viet Nam, Taiwan and Republic of Korea collectively constitute 96.26 per cent of the total import shares in 2012. The remaining 3.74 per cent of import shares are comprised of imports from Japan, People's Republic of China and Singapore.[133] As the totality of import shares consists of the aforementioned countries, it would be logical to infer that the 118 exempted countries have import shares during the POI are less than 3 per cent and their combination does not exceed 9 per cent, as required by Article 9.1 of the Agreement on Safeguards.[134] For these reasons, Indonesia submitted that it has complied with its obligations under Article 9.1 of the Agreement on Safeguards.[135]

2. Whether the complainants have failed to be consistent with regards to the basis of their claim during the course of this proceeding

63. Lastly, Indonesia also argued that the complainants have been changing the basis of their claim during the course of this proceeding.[136]

64. In its Request for the Establishment of a Panel, the complainants had claimed that the inconsistency is based on the fact that the specific duty imposed by Indonesia applies to products

[122] Ibid. para. 5.149.
[123] Ibid.
[124] Indonesia's first written submission, para. 210.
[125] Ibid.
[126] Ibid.
[127] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.132.
[128] Ibid.
[129] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para. 2.132.
[130] Indonesia's first written submission, para. 214.
[131] Ibid. para. 215.
[132] Ibid.
[133] Ibid. para. 216.
[134] Ibid.
[135] Ibid. para. 219.
[136] Ibid. para. 115.

originating only in certain countries and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in all WTO Members.[137] In their first written submission, the complainants were very clear that they are challenging the whole list of 120 exempted Members excluded by PMK 137/2014 to be inconsistent with Article I:1 of the GATT 1994.[138]

65. In its first written submission, the complainants had only mentioned *three* European Union members, namely Croatia, Lithuania and Romania.[139] The number of countries contended by the complainants was again altered in the complainants' opening statement at the first meeting of the Panel, where they contended the exclusion of *five* European Union members, adding Bulgaria and Poland to its previous submission.[140] In their response to the Panel question, the complainants again changed the number to a total of six countries, adding Hungary and Latvia and removing Lithuania from its original list of European Union member states in the first written submission.[141]

66. Now, the claim has totally changed from challenging the whole list of exempted countries that allegedly violates the MFN obligation to challenging the six member states of the European Union excluded from the application of the safeguard measure that is not in line with Article 9.1 of the Agreement on Safeguards.[142] It is been challenging for Indonesia to make a defense on this moving target.[143]

67. Indonesia has submitted the source of the exclusion list which is the IMF for list of "emerging markets and developing countries" as the basis to determine the list of excluded countries. Those countries that are both listed in the IMF and are WTO members will be excluded under Article 9.1 of the Agreement on Safeguards.[144] In the absence of any clear list of developing countries from the WTO, Indonesia submits it has discretion to use any other reliable source it deems appropriate to determine the status of WTO developing country Members for the purpose to comply with Article 9.1 of the Agreement on Safeguards and Indonesia is not obliged to check every statement made by every country in the WTO to check whether or not they have claimed to be developing or developed country.

68. The complainants also rely on the proposition that Members providing GSP schemes consider themselves as developed country. Thus, since EU provides GSP scheme, all 28 EU Members shall be considered as developed countries.[145] Indonesia has rebutted this proposition by submitting evidence that in fact Croatia still received GSP scheme from Canada, Japan, New Zealand, Russia, and the United States according to UNCTAD list of beneficiaries of GSP as was also referred to by the complainants in Exhibit TPKM/VNM-23.[146] The complainants also never refute the examples Indonesia has referred to from other safeguard measure imposition notifications which have also included several European Union member states in its list of exempted developing countries according with Article 9.1 of the Agreement on Safeguards.[147]

[137] Indonesia's rebuttal submission, para. 116; referring to Request for the Establishment of a Panel by Viet Nam and Request for the Establishment of a Panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, para. 1.7(a)(iv).

[138] Indonesia's rebuttal submission, para. 117; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.133.

[139] Indonesia's rebuttal, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.133 footnote 159.

[140] Indonesia's rebuttal submission, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 7.2.

[141] Indonesia's rebuttal submission, para. 119; referring to the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 42.

[142] Indonesia's rebuttal submission, para. 120.

[143] Ibid.

[144] "Emerging market and developing economies". International Monetary Fund, Web. accessed 5 November 2016, <http://www.imf.org/external/pubs/ft/weo/2014/01/weodata/weoselagr.aspx>, see Exhibit IDN-45.

[145] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's rebuttal submission, para 2.134.

[146] "Generalized System of Preferences: List of Beneficiaries". UNCTAD, Web. accessed 5 November 2016, <http://unctad.org/en/PublicationsLibrary/itcdtsbmisc62rev6_en.pdf >, see Exhibit IDN-44.

[147] Indonesia's first written submission, para. 215.

69. In conclusion, Indonesia reiterates that the complainants cannot claim an inconsistency with Article I:1 of the GATT without taking into account Indonesia's obligations to the Agreement on Safeguards.[148] Indonesia submits that the list of excluded country of the Safeguard Decree is consistent with Article 9.1 of the Agreement on Safeguards and therefore does not violate Article I:1 of the GATT 1994.[149]

H. Notification

70. The complainants argued that Indonesia's notification is inconsistent with Article 12.2 of the Agreement on Safeguards because Indonesia failed address four mandatory components of notifications, which are precise description of the proposed measure, the proposed date of introduction of the measure, a timetable for progressive liberalization, and the rate and amount of the increase in imports of the product concerned in relative terms.[150] In response to this, Indonesia argued that the four components alleged by the complainants to be non-existent has in fact provided by Indonesia in its notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards dated 27 May 2014 and 23 July 2014.

71. With respect to the proposed date of introduction of the measure and the timetable for progressive liberalization, Indonesia argued that these components have been provided in Indonesia's notification under Article 12.1(b) and/or Article 12.1(c) of the Agreement on Safeguards.[151] Therein, it was stated that with reference to the proposal of the investigating authority, and taking into account the need to effectuate the safeguard measure as proposed and the relevant requirements stipulated in the Agreement on Safeguards, the Government of the Republic of Indonesia has decided to impose the safeguard duty.[152]

72. As for the rate and amount of the increase in imports of the subject product in relative terms, Indonesia has notified the WTO's Committee on Safeguards through its Notification under Article 12.1(b) of the Agreement on Safeguards. Therein, particularly in Table 2, Table 4 and Table 5, the rate and amount of the increase in imports of the subject product relative to the national consumption has been provided.[153]

73. In addition, Indonesia also argued that it has provided the percentage (relative terms) of country wise imports of the subject product relative to the total imports with its comparison between 2008 and 2012 provided in Table 3 of Indonesia's notification under Article 12.1(b).[154]

74. The complainants also argued that the lack of such pertinent components could not be rectified by addressing the relevant items in subsequent notifications. They referred to the Appellate Body's statement in *Korea – Dairy* saying that Members must notify the relevant information prior to the imposition of the measure so as to enable other Members to pursue their interests in the appropriate fora.[155] Further, they argued that Indonesia only notified these requirements six days after the measure had entered into force, and therefore other Members, including the complainants, were deprived of their right to protect their interests by seeking consultations or by other means prior to the entry into force of Indonesia's safeguard measure.[156]

75. In response to this, Indonesia put forward two arguments. First, there is no limitation on the number of how many times a Member could submit a notification under Articles 12.1(b) or 12.1(c) of the Agreement on Safeguards. Indonesia also provided twelve cases where Members submitted a supplemental notification under Articles 12.1(b) or 12.1(c).[157]

---

[148] Ibid. para. 127.
[149] Ibid.
[150] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.160
[151] Indonesia's first written submission, para. 234.
[152] Ibid.
[153] Ibid. para. 236.
[154] Ibid. para. 237.
[155] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.165.
[156] Ibid. para. 5.166.
[157] Indonesia's first written submission, para. 239.

76. Second, on the timing of the notifications, Indonesia referred to the Appellate Body in *US – Wheat Gluten*[158] which disagreed with and reversed the panel's interpretation that Article 12.1(c) requires the notification to be made both "immediately" and before implementation of the safeguard measure.[159] The Appellate Body decision in *US – Wheat Gluten* that Article 12.1 of the Agreement on Safeguards deals with *when* the notification must be made, and Article 12.2 of the Agreement on Safeguards clarifies *what* information must be included in the notification under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards.[160] The content requirement of Article 12.2 of the Agreement on Safeguards, therefore, does not prescribe *when* the notification under 12.1(c) must take place.[161] While the two articles are explicitly related, a Member may breach one provision and not the other.

77. Indonesia noted that the complainants had only raised a claim under Article 12.2 of the Agreement on Safeguards, which only concerns the content of Indonesia's notification under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards but not the timing.[162] Indonesia also noted that the complainants acknowledged that Indonesia has notified three out of four mandatory components in its notification of 23 July 2014.[163] However, Indonesia noted the complainants' assertion that Article 12.2 has temporal connection with the notification under Articles 12.1(b) and 12.1(c) is in contradiction with the Appellate Body's clear ruling in *US – Wheat Gluten*.[164] Indonesia referred to the statement of the Appellate Body in *US – Wheat Gluten* that a Member could violate one Article without violating the others.[165]

78. In conclusion, Indonesia reiterates that it has provided all pertinent information required under Article 12.2 of the Agreement on Safeguards in its Article 12.1(b) and 12.1(c) notifications on 27 May 2014 and 23 July 2014.

I. Consultation

79. The complainants argued that Indonesia failed to provide a meaningful opportunity for prior consultations, as no consultations were held on the proposed measure before its application.[166] In the absence of prior consultations, Indonesia deprived the complainants of the opportunity to review the information provided under Article 12.2 of the Agreement on Safeguards, to exchange views on the measure, and to reach an understanding with Indonesia on an equivalent level of concessions. Furthermore, as explained, the obligation under Article 12.3 to provide a meaningful opportunity for consultations before the measure take effect does not depend on whether a request for consultations was made by the affected Member.[167]

80. Furthermore, the complainants also argued that regardless of whether consultations were held or not, Indonesia failed to provide sufficient information within the meaning of Article 12.2 of the Agreement on Safeguards to allow for the possibility, through consultations, for a meaningful exchange on the proposed measure.[168]

81. In response to this, Indonesia stated that it has given multiple opportunities for consultations prior to the application of the safeguard measure and the fact that no prior consultation was ever held was not because Indonesia has failed to provide an opportunity for prior consultation.[169] Indonesia also provided the chronology which demonstrated that KPPI has provided numerous opportunities for the complainants to have consultations, but it is the

[158] Appellate Body Report, *US – Wheat Gluten*, para. 125.
[159] Indonesia's first written submission, para. 240.
[160] Appellate Body Report, *US – Wheat Gluten*, para. 123.
[161] Ibid.
[162] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.7.
[163] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's response to Panel Question No. 43(i).
[164] Indonesia's rebuttal submission, para. 130.
[165] Ibid.
[166] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's first written submission, para. 5.185.
[167] Ibid. para. 5.187.
[168] Ibid. para. 5.189.
[169] Indonesia's first written submission, para. 245.

complainants that kept on avoiding such meeting.[170] Indonesia also referred to the panel in *Korea – Dairy* which considered that consultations may be adequate even in circumstances where prior notifications of a finding of serious injury or of any proposed measure are incomplete.[171] In fact, one of the purposes of the consultations is to review the content of such notifications, and thereby augment it if necessary.[172]

82. Indonesia also submits that the Panel should only assess Indonesia's compliance with Article 12.2 of the Agreement on Safeguards regarding whether or not its notifications under Articles 12.1(b) and 12.1(c) of the Agreement on Safeguards dated 27 May 2014 and 23 July 2014 had contained all pertinent information required under Article 12.2 of the Agreement on Safeguards.[173] The Panel should not assess the timing of such notifications as it falls under purview of Article 12.1 of the Agreement on Safeguards as it is not challenged by the complainants.[174] Pursuant to the Appellate Body decision in *US – Wheat Gluten* the Panel shall not mix the requirements in Article 12.1, 12.2 and 12.3 of the Agreement on Safeguards when assessing the current claim concerning notification only under Article 12.2 of the Agreement on Safeguards.[175] In Indonesia's rebuttal submission, Indonesia highlighted the fact that the chronology they provided in their first written submission was never challenged by the complainants, and it shows that no consultation was ever held because Viet Nam repeatedly rescheduled the consultation due to its internal administrative reasons.[176] As for the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, all requests were made way before the date of determination of threat of serious injury or way after.

83. Indonesia noted that nothing in the text of Article 12.3 nor has there been any WTO case law which supports the complainants' contention that the safeguard measure shall not be applied when the consultation has started and were still on-going.[177] In fact, the wording of Article XIX:2 of the GATT 1994 seems to suggest that action under paragraph 1 may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.[178] It is our view that the obligation of an implementing Member is to provide *adequate opportunity* for prior consultation should not be contingent upon the other interested party's schedule availability. This is because an exporting Member can unlimitedly delay the application of safeguard by trying to prolong, postpone or rescheduling the consultations, and the implementing Member has to wait for the consultation to actually occur, even if it means sacrificing its own domestic industries to suffer serious injury just for the sake of complying with Article 12.3 of the Agreement on Safeguards.

84. In conclusion, Indonesia stated that it has provided an opportunity for consultations to the complainants and therefore acted in accordance with Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards.[179]

J. Suggestion for Implementation

85. In their opening statement at the first meeting of the Panel, the complainants requested the Panel to exercise the discretion accorded to it by Article 19.1 of the DSU and to suggest that the *only* manner in which Indonesia could remove the various allegations of inconsistencies at issue is by immediately withdrawing the safeguard measure at issue.[180] Indonesia strongly disagrees with this proposition.

86. Indonesia acknowledges that the Panel has the authority to *suggest* ways in which a member could implement their recommendation, *i.e.* to bring the measure into conformity with its WTO obligation. However, as also noted by the panel in *US – Line Pipe*, although the panel has

[170] Ibid. paras. 251, 254.
[171] Panel Report, *Korea – Dairy*, para. 7.150.
[172] Ibid. para. 7.150.
[173] Indonesia's opening statement at the second meeting, para. 81.
[174] Indonesia's opening statement at the second meeting, para. 81.
[175] Appellate Body Report, *US – Wheat Gluten*, para. 124.
[176] Indonesia's rebuttal submission, para. 138.
[177] Ibid. para. 139.
[178] Ibid.
[179] Ibid. para. 143.
[180] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the Socialist Republic of Viet Nam's opening statement at the first meeting, para. 9.3.

"the authority under Article 19.1 of the DSU to make a specific suggestion does not mean that we must or should do so in a given case".[181]

87. Indonesia submits that in order to comply with a Panel's recommendation, *i.e.* to bring its measure into conformity with its WTO obligation, an implementing member is free to choose the means it takes to comply with its obligation. This has been firmly established in the case of *US – Offset Act (Byrd Amendment)*, by emphasizing on the principle that "choosing the means of implementation is, and should be, the prerogative of the implementing Member".[182] In practice out of the 56 cases that the complainants requested the panel to exercise its right under Article 19.1 DSU, there are only 8 cases in which the panel specifically suggested the implementing Member to revoke its measure.[183] However, these cases are exceptional. On the contrary, there have been more than 48 cases in which the panel refused to suggest an implementing Member to revoke its measure.[184] Therefore, the Panel needs to be very cautious in exercising this right similar to the previous cases and must provide a reasoned and adequate explanation on why the respondent cannot exercise its prerogative right to choose the means of implementation of the inconsistent measure. The Panel would also need to explain what fundamental obligations have been violated by Indonesia so that the *only* way to comply with the panel ruling is by withdrawing the safeguard measure.

88. Contrary to the complainants who never submitted any explanation as to why *only* way to comply with the panel ruling is by withdrawing the safeguard measure, Indonesia in its rebuttal submission has submitted on ways to comply with the panel rulings, assuming *arguendo* (*quod non*) that the Panel found inconsistencies of Indonesia's safeguard measure.[185]

89. Therefore, Indonesia submits that in the event that the Panel finds any inconsistency with Indonesia's WTO obligations, we would respectfully request the Panel to reject the complainants' request on for the Panel to suggest that the *only* manner in which Indonesia could remove the various allegations of inconsistencies at issue is by immediately withdrawing the safeguard measure at issue. Rather, the Panel should confer Indonesia the discretion to choose the means in which Indonesia could implement the Panel's recommendation.

III. CONCLUSION

90. In light of the foregoing, Indonesia requests the Panel to find that KPPI has fulfilled all its obligations under GATT 1994 and the Agreement on Safeguards and therefore requests the Panel to reject all claims made by the complainants.

---

[181] Panel Report, *US – Line Pipe*, para. 8.6.
[182] Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 52.
[183] See Exhibit IDN-48.
[184] Indonesia's rebuttal submission, para. 151.
[185] Ibid. paras. 152-155.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. THE EXCEPTIONAL NATURE OF SAFEGUARD MEASURES

1. Safeguard measures are both extraordinary and exceptional in nature.[1] Care must be taken to ensure any safeguard measure fully complies with the stringent standards of Article XIX of the GATT and the Agreement on Safeguards.

II. THE DOCTRINE OF PARALLELISM

2. Existing WTO case law on the doctrine of parallelism[2] has focused on the source of the product in question. In this case the complainants argue the doctrine should apply to its scope.[3] In Australia's view, the key concern is the same, regardless of whether the doctrine is applied to product scope or source: that is, to ensure any safeguard measures applied are justified by the findings of the preceding investigation.[4]

3. The product scope has fundamental legal implications for the results of an investigation.[5] Any discrepancy in the scope of the product as investigated and the scope of the product subject to the safeguard measure must be adequately explained by the investigating authority, including to demonstrate non-attribution of injury caused by products excluded at the application of measures phase.[6]

4. Australia does not consider Article 5.1 of the Agreement on Safeguards to be a relevant legal basis for a decision not to apply safeguard measures to a sub-set of products, which themselves meet the requirements to apply safeguards. In Australia's view, Article 5.1 does not deal with *whether* to apply safeguard measures, but rather *how* Members must calibrate safeguard measures to ensure they are not applied beyond the extent necessary to prevent or remedy the serious injury found and to facilitate adjustment.[7]

5. Nonetheless, Australia considers that it would be possible for an investigating authority to choose *not* to apply safeguard measures to a subset of products, even where all relevant requirements have been met. There is nothing in the Agreement on Safeguards that requires an investigating authority to impose a safeguard measure. However, this does not nullify the investigating authority's obligation to ensure that any safeguard measures it *does* apply are justified by the results of the preceding investigation.

III. THREAT OF SERIOUS INJURY

6. While Article 2.1 of the Safeguards Agreement only requires a Member to make a finding of increased imports absolute *or* relative to domestic production in order to apply a safeguards measure, Article 4.2(a) requires that the Member first evaluate, *inter alia*, "the rate and amount of the increase in imports of the product concerned in absolute *and* relative terms".

---

[1] See Appellate Body Reports, *Argentina – Footwear (EC)*, paras. 93-94; *US – Line Pipe*, paras. 80-81; *Korea – Dairy*, para. 86.

[2] Appellate Body Reports, *US – Line Pipe*; *US – Steel Safeguards*; *US – Wheat Gluten*; *Argentina – Footwear (EC)*; and Panel Report, *Dominican Republic – Safeguard Measures*.

[3] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and Vietnam's First Written Submission, para. 5.115.

[4] Or as the Panel recalled in *US – Steel Safeguards* at para. 10.595, "the requirement of parallelism… is that the competent authorities must establish explicitly that imports covered by the safeguard measure satisfy the conditions for its application".

[5] For example, the like or directly competitive products at issue; the relevant domestic industry; whether imports have increased; whether the domestic industry has suffered serious injury or threat thereof; whether the imports at issue have caused the serious injury or threat thereof; and whether the unforeseen developments can be shown to have caused such injury.

[6] See Appellate Body Report, *US – Steel Safeguards*, paras. 450-452, 472.

[7] Article 5.1 thus disciplines, for example, the quantum of safeguard duties or the level of quantitative restrictions applied to ensure they do not exceed what is necessary.

7. Australia agrees with the complainants that it would render inutile the requirement in Article 4.2(a) to examine the "share of the domestic market taken by increased imports" if the Article 4.2(a) requirement to examine increased imports in "relative terms" could be satisfied by simply examining imports relative to domestic consumption. Article 4.2(a) is "unambiguous that at a minimum each of the factors listed, in addition to all other factors that are 'relevant', must be considered."[8]

8. Article 4.2(a) mandates what an investigating authority must *evaluate* in its safeguards investigation, while Article 2.1 deals with the necessary *threshold to apply* safeguard measures once a determination has been made.

IV. NOTIFICATIONS

9. In Australia's view, any deficiencies in the timing of notifications should properly be dealt with under Article 12.1 of the Agreement on Safeguards, not Article 12.2.

10. The Appellate Body in *US – Wheat Gluten* established that, whereas Article 12.1 deals with *when* notifications must be made, Article 12.2 clarifies *what* information must be included in notifications under Article 12.1(b) and 12.1(c).[9] While the two articles are explicitly related,[10] a Member may breach one provision and not the other.

[8] Panel Report, *Argentina – Footwear (EC)*, para. 8.206. See also Panel Reports, *Korea – Dairy*, para. 7.55; *US – Wheat Gluten*, para. 8.39.

[9] Appellate Body Report, *US – Wheat Gluten*, para. 123.

[10] Article 12.2 refers to Articles 12.1(b) and 12.1(c).

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. The European Union intervenes in this case (concerning a safeguard measure by Indonesia on imports of certain flat-rolled products of iron or non-alloy steel) because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Agreement on Safeguards and the General Agreement on Tariffs and Trade (the GATT 1994). This executive summary integrates comments made by the European Union in the Third Party Hearing on 6 October and in its reply to the written questions by the Panel of 20 October 2016.

2. Regarding the co-complainants claim that Indonesia did not provide a reasoned and adequate explanation on how **unforeseen developments** resulted in the increase in imports that allegedly caused serious injury, the European Union considers that the global financial crisis in 2008 to which Indonesia referred qualifies as an unforeseen development. However, investigating authorities must not only show the existence of unforeseen developments; they must also establish a logical connection between the unforeseen developments and the increased imports of the *specific product* on which the safeguard measure is imposed. This is particularly important where the alleged unforeseen developments are macroeconomic events having effects across a number of industries.

3. On the question of **how recent the data** used by the investigating authority must be, the European Union referred in its written submission to a number of cases where the Appellate Body and previous panels have dealt with the question. The European Union pointed out that the investigation period must be "the recent past", but that there can be no strict numerical rule which would apply in each and every case. The question whether the data used is recent enough should be decided on a case-by-case basis, taking into account the actual availability of data (normally, import statistics are available within three to four months; this time span might be longer where aggregated data is used) and allowing for a reasonable delay for processing the data and drawing conclusions. The acceptable length of this delay will vary in each case, depending, *inter alia*, on the complexity of the case, the nature of the industry concerned and the technical capacity of the country imposing the measures, particularly in the case of developing countries. Where investigations take longer, the investigating authorities should consider updating the data in the course of the investigation, to the extent feasible. The European Union also highlighted the possibility for the defendant to justify longer time lapses if it encounters practical difficulties in using more recent data or in updating information. Such justification can be provided *ex post*, during the panel proceedings.

4. With respect to the **threat of serious injury**, while Article 4.2(a) is not as explicit as Article 2.1 with regard to the evaluation of the increased imports relative to domestic production, the European Union considers that Article 2.1 provides for helpful context in understanding the obligation in Article 4.2(a). Accordingly, taking into account the contextual reference to domestic production in Article 2.1, as well as the fact that another factor in Article 4.2(a) is linked to domestic consumption (the share of the domestic market taken by increased imports), the European Union considers that an interpretation giving meaning to each of the treaty terms supports the proposition that the reference to the increase in imports in relative terms in Article 4.2(a) is to be understood as relative to domestic production. The increase in imports of the product concerned in relative terms is a relevant factor and it is informed by the overarching requirement in Article 4.2(a) (all factors to be evaluated must be *relevant*, in the sense of "heaving a bearing on the situation of that industry").

5. The European Union also recalls that the analysis of all relevant factors under Article 4.2(a) is a distinct step from the establishment of a causal link between the increased imports of the product concerned and serious injury or thereat thereof, even if the two aspects of the evaluation are related.

6. With respect to **the causal link**, the European Union agrees that it is up to the complainants to meet their burden of proof with regard to the alleged violations. While interconnected, different provisions in the Agreement on Safeguards contain multiple obligations and a violation of a certain provision does not necessarily result in a violation of other provisions.

7. The concept of **parallelism** as developed in the existing case-law is not applicable to the present case, but a similar concept may be relevant in the present proceedings. While in previous cases the application of the safeguard measure was narrowed down by excluding certain trade partners, in the present case the application of the safeguard measure is also narrowed down, but with respect to the product scope.

8. The European Union considers that a panel would need to ascertain whether there is a gap between the product scope of a safeguard investigation and the product scope of the application of safeguard measures and whether there is an explicit explanation that the imports of the product(s) covered by the measure threaten to cause serious injury to the domestic industry.

9. The European Union is mindful of the differences between the Anti-Dumping Agreement and the Agreement on Safeguards. The case-law under one agreement can not be automatically transposed to the other agreement, due to the complexities and particularities of each agreement. Furthermore, in *Mexico – Steel Pipes and Tubes* there was a widening of the product scope, as opposed to the present case, where the product scope is narrowed down.

10. On its own terms Article 2.1 of the Agreement on safeguards speaks of the application of a measure to "a product", which is later on referred as "such product …being imported" in such quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. The second reference can be understood as a reference to the investigation.

11. Article 2.1 may be contextually informed by Article 5.1 of the Agreement on Safeguards. Article 5.1 refers to the *application* of safeguard measures "only to the extent necessary" to prevent or remedy serious injury. The European Union disagrees with Indonesia, which seems to suggest that the narrowing down of the product scope is a political decision (subject to the National Interest Consideration) which may not benefit from a panel's scrutiny in WTO proceedings.

12. The European Union can imagine an example where the product under investigation is composed of two models: model A and model B. In a scenario where an investigating authority collects cumulative data with regard to models A and B without differentiating between the two models with respect to serious injury and causation, and subsequently receives a request from the domestic industry concerning the narrowing down of the application of the safeguard measure, from models A and B to only model A, that investigating authority will need to re-do the investigation in such a way so as to collect relevant data with respect to that particular model. To the contrary, in a scenario where an investigating authority collects data and conducts the investigation with respect to model A, model B, and models A and B cumulatively, separating in each case the serious injury and causal link, respectively, that investigating authority may be able, under Article 5.1, to lawfully apply a safeguard measure with respect to, say, only model A, without breaching its obligations under Article 4.2.

13. On the co-complainants' claims under **Article I:1 of the GATT 1994**, the European Union takes the point of view that an exclusion pursuant to and compliant with Article 9.1 of the Safeguards Agreement can not constitute a violation of the most-favoured nation principle under the GATT 1994. Article 9.1 does not only allow the exclusion of certain developing countries; it even mandates it. In that sense, it is a justified deviation from MFN in the safeguard context. Article XIX of the GATT 1994 empowers contracting parties to suspend GATT obligations, including Article I:1, if its conditions (as clarified and reinforced by the Safeguards Agreement) are fulfilled. In that sense, Article I:1 and Article XIX of the GATT 1994, and the provisions of the Safeguards Agreement are an inseparable package of rights and disciplines.

14. According to the General interpretative note to Annex 1A, the ultimately relevant standard for safeguard measures is the one set by the Safeguards Agreement. The latter prevails in case of conflict, but should also more generally inform the way in which Article I:1 of the GATT 1994 is applied to safeguard measures. Article I:1 should be interpreted harmoniously with the relevant

provisions of the Safeguards Agreement. A particularity of the MFN standard for safeguards, as it is clear in both Article 2.2 and Article 9.1 of the Safeguards Agreement, is that it only applies between supplying countries. As the Appellate Body has pointed out in *US – Line Pipe*, Article 9.1 (in the same way as Article 2.2) is a provision on the *application* of measures. Thus, the European Union considers that the obligation to exempt developing countries with *de minimis* imports only applies if and when they are actually exporters of the product concerned to the country taking the measure, and not in a purely abstract, "preventive" manner. Therefore, in the European Union's view, the exclusion of six of its Member States, none of which currently exports, or has in the last 10 years exported the product at stake to Indonesia, is not an issue that is directly connected to the particular fact pattern at issue in this case – that is, the real world trade dispute that the Panel is called upon to adjudicate.

15. With regard to the **notification requirement** under Article 12 of the Agreement on Safeguards, the European Union acknowledges that in *US – Wheat Gluten* the Appellate Body found - for a safeguard measure in the form of a quota - that neither Article 12.1(c) nor Article 12.2 of the Agreement on Safeguards, considered in isolation, required that the relevant information must be disclosed in notifications made prior to the entry into force of the measure. However, equally on the basis of the Appellate Body Report in *US – Wheat Gluten*, as well as other cases, the European Union considers that when all of the relevant obligations (in particular Article 12.3 of the Agreement on Safeguards and Article XIX:2 of the GATT 1994) are considered, the importing Member must submit all mandatory information prior to the entry into force of the measure.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1 INTRODUCTION

1. The Government of Japan intervenes in this dispute because of its systemic interest in ensuring the objective and consistent interpretation of the Agreement on Safeguards and the GATT 1994.

2 THE REQUIREMENT OF IMPORTS HAVING INCREASED AS A RESULT OF THE UNFORESEEN DEVELOPMENTS AND THE EFFECT OF THE OBLIGATIONS INCURRED UNDER THE GATT 1994

2. The two elements of the first clause of Article XIX:1(a) of the GATT 1994, namely the "unforeseen developments" and the "effect of the GATT obligations", constitute circumstances that must be demonstrated as a matter of fact, distinct from the conditions established under the second clause.

3. With regard to the "unforeseen developments", Japan first notes that they refer to events or developments that were "unexpected".

4. Second, with respect to the point in time where given developments were unforeseen, any factual demonstration of "unforeseen developments" by the authorities must relate to developments that were "unexpected" at the time the Member incurred the relevant GATT obligation. The fact that a development occurred after the obligation has been incurred does not mean *per se* that such development was unforeseen or unexpected at that time. It is therefore necessary that in their published report the authorities assess and explain why the development which they have identified was unforeseen at the time the relevant obligation was negotiated. In the absence of such explanation, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled. In the present case, it does not appear to be any discussion in the Final Disclosure Report as to why the 2008 financial crisis should be regarded as "unforeseen".

5. Third, as regards the type of facts or events that may constitute "unforeseen developments", Japan considers that these are events that modify the competitive relationship between imported and domestic products to the detriment of the latter. This understanding is supported by the text of Article XIX:1(a), its broader context as well as the case law including the Working Party Report in "Hatters' Fur" case.

6. Fourth, Japan emphasises that the authorities must provide a "reasoned and adequate explanation" of how the facts support their determination of "unforeseen developments". Such "reasoned and adequate explanation" must be explicit in the sense that it must be clear and unambiguous and does not merely imply or suggest an explanation. Japan notes that the term "unforeseen development" is only used once in Section C.5 of the Final Disclosure Report in relation to increase in imports. This does not amount to a determination of "unforeseen developments" within the meaning of Article XIX:1(a) of the GATT 1994 as an increase in imports and the unforeseen developments must necessarily be two distinct elements.

7. Furthermore, Article XIX:1(a) of the GATT 1994 requires a demonstration of a "logical connection" between the unforeseen developments and the increase in imports causing (or threatening to cause) serious injury. Importantly, what must be demonstrated is a logical connection not simply between the unforeseen developments and any type of increase in imports but between the unforeseen developments and the increase in imports which causes or threatens serious injury. In Japan's view, this is indicated in the text. Indeed, the term "unforeseen developments" in the text of Article XIX:1(a) is grammatically linked not only to "such increased quantities" but also to "under such conditions as to cause or threaten serious injury".

8. When examining these terms, it is important to emphasise that an increase in imports is not equivalent to serious injury or threat thereof nor does the former necessarily result in the latter. Serious injury of domestic producers or threat thereof is caused when domestic products are replaced by imported products or when the domestic products' prices are affected by imported products. These market phenomena together with the increase in imports arise only when there is a change in the competitive relationship between the imported and domestic products to the detriment of the latter.

9. Therefore, the "logical connection" will be demonstrated when the unforeseen developments have modified the competitive relationship between the imported and domestic products to the detriment of the latter, leading to an increase in imports causing, or threatening to cause, serious injury to the domestic industry.

10. While some events clearly change the competitive relationship between the imported and domestic products to the detriment of the latter thereby resulting in the increased imports and serious injury of domestic producers in a relevant market, other do not. In the latter scenario, the authorities carry a particular burden to explain the logical relationship between the unforeseen developments at hand and the increased imports causing or threatening serious injury.

11. Japan considers that Indonesia did not show a "logical connection" between the unforeseen developments and the increase in imports because it failed to explain the change in the conditions of competition between the domestic and imported products resulting in the increase in imports causing or threatening serious injury.

12. With regard to the effect of the GATT 1994 obligations, Japan underlines that, in order to satisfy this requirement, a Member must establish that the increase in imports occurred "as a result" of the effect of GATT 1994 obligations. More specifically, it must be explained how these GATT obligations had the effect of preventing that Member from taking WTO-consistent measures, such as an increase in import duties within the bound tariff rate and on an MFN basis, in order to prevent or remedy the change generated by the "unforeseen developments" in the competitive relationship between the domestic and imported products. Indeed, if the change generated by such unforeseen developments could be offset by a tariff increase, no tariff concession would need to be withdrawn to remedy the situation and thus safeguard measure would not be warranted.

3 THE CONDITIONS FOR THE APPLICATION OF SAFEGUARD MEASURES

3.1 The proper scope of the "domestic industry" in Article 4.1(c)

13. Pursuant to Article 2.1 of the Agreement on Safeguards, safeguard measures may be applied only if the product is being imported […] as to cause or threaten to cause serious injury to the domestic industry. Article 4.1(c), in turn, defines domestic industry as either "the producers as a whole" or "those whose collective output […] constitutes a major proportion", without providing any specific numerical threshold. In addressing the link between the phrase "major proportion" and the question of data coverage, the panel in *US – Lamb* made clear that a national authority is under an obligation to collect sufficiently representative information so as to ensure the representativeness of the data used for its final determination.

14. In the present case, Indonesia only evaluated serious injury factors of two domestic companies (mentioned as "petitioners") who only produced 77% of the total domestic production. While Japan does not take position as to whether the data examined by Indonesia are sufficiently representative, Japan would like to draw the Panel's attention to this issue because it may distort the overall analysis of threat of serious injury and causation.

3.2 The causation analysis

15. Article 2.1 of the Agreement on Safeguards provides that the product must be imported in such increased quantities and "under such conditions" as to cause or threaten to cause serious injury to the domestic industry. The phrase "under such conditions" indicates the need to "analyse the *conditions of competition* between the imported product and the domestic like or directly

competitive products *in the importing country's market*".[1] In other words, "for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are *such* that the increased imports can and do cause or threaten to cause serious injury".[2] Thus, in Japan's view, in the causation analysis, it is essential to examine the competitive relationship between the imported and domestic products in the domestic market of the importing country, including how the alleged increased imports substituted domestic products.

16. Japan notes that in the Final Disclosure Report, there is no analysis of the conditions of competition on the domestic market explaining how the increased imports caused or threatened to cause serious injury to the domestic industry. Thereby, Indonesia has failed to fulfill the requirement provided for in Articles 2.1 and 4.2(b) of the Agreement on Safeguards.

4 THE REQUIREMENT OF "PARALLELISM" BETWEEN THE PRODUCT SUBJECT TO INVESTIGATION AND THE PRODUCT TO WHICH THE SAFEGUARD MEASURE IS APPLIED

17. The principle of parallelism is derived from a parallel language of Articles 2.1 and 2.2 of the Agreement on Safeguards which requires that the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2. While the existing case law has exclusively addressed the principle of "parallelism" as a geographical issue, Japan submits that the need for coherence and consistency which underlies the principle of parallelism should be applicable to all situations in which the scope of a safeguard measure excludes imports which were included in the scope of the investigation.

18. The identification of the investigated product has many legal implications for the conduct and outcome of the safeguard investigation. As a result, if the product scope on which the findings of the investigation are based does not correspond to the product scope of the safeguard measure that is applied, the whole investigation would be rendered unreliable.

19. Further, Japan is of the view that the requirements of Article 2.1 and Article 5.1 of the Agreement on Safeguards must be applied cumulatively and thus, while an investigating authority may rely upon Article 5.1 to justify the application of a safeguard measure to a narrower group of products than those subject to the underlying investigation, it must at the same time ensure that such narrower group of products – on its own – satisfies the conditions for the application of a safeguard measure set out in Article 2.1 of the Agreement on Safeguards.

20. Japan considers that there could be situations in which the product covered at the initiation of an investigation or during the course of the investigation is not exactly the same as the product to which the safeguard measure applies given that the scope of the product is modified after the investigation has been initiated. What matters is that the product with respect to which the assessment pursuant to Articles 2.1 and 4.2 of the Agreement on Safeguards is made and the product subject to the safeguard measure are the same.

5 REQUIREMENT THAT THE RELEVANT INFORMATION MUST BE DISCLOSED IN NOTIFICATIONS MADE PRIOR TO THE ENTRY INTO FORCE OF THE RELEVANT SAFEGUARD MEASURE

21. A notification made after the entry into force of the measure would not, by definition, be a notification made by a Member proposing to apply a safeguard measure because the measure is already in force. Therefore, the notification made under Article 12.1(c) of the Agreement on Safeguard would not comply with the requirements under Article 12.2 of the Agreement on Safeguards when it is made after the entry into force of the measure.

6 CONCLUSION

22. Japan would like to thank the Panel for considering its views and hopes that its comments will be useful for the Panel's analysis.

[1] Panel Report, *Argentina – Footwear (EC)*, para. 8.250.
[2] Ibid.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. BASIC REQUIREMENTS OF IMPOSITION OF SAFEGUARD MEASURES

1. Ukraine observes the importance to consider the matter raised under the dispute in context of the synthesis of Article XIX of the GATT 1994 and the relevant provisions of the Agreement on Safeguards reaffirming this position with conclusions of the Appellate Body[1] stating that "any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994" and that "Articles 1 and 11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the Agreement on Safeguards"[2].

2. While the Article XIX:1 of the GATT 1994 establishes general provisions regarding the imposition of an emergency action the Article 2.1 of the Agreement on Safeguards provides more specific requirements in order to apply a safeguard measure.

II. REQUIREMENTS TO PROVIDE ADEQUATE OPPORTUNITY TO HOLD CONSULTATIONS PRIOR TO THE IMPOSITION OF THE MEASURE

3. Ukraine notices that for the purpose of the conformity of imposition of a safeguard measure with the provisions of WTO Agreements not only requirements set forth in the Article XIX:1 of the GATT 1994 and in the Article 2.1 of the Agreement on Safeguards must be complied but also the contracting party has to fulfil the requirements provided in Article XIX:2 and Article 12 thereof in order of a safeguard measure to correspond with the GATT 1994.

4. The mentioned position concerning the necessity of compliance of a safeguard measure with the requirements set forth in Article 12 of the Agreement on Safeguards regarding the notification and the requirements of providing adequate opportunity for prior consultations before imposing a safeguard measure is reiterated by the Appellate Body concluded its general point regarding the object and purpose of the notification requirements and stated that it is better served if it includes all the elements of information specified in Articles 12.2 and 4.2 of the Agreement on Safeguards. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3 of the Agreement on Safeguards, than they would otherwise be if the notification did not include all such elements.

III. REQUIREMENTS OF DETERMINING AND NOTIFYING ALL RELEVANT INFORMATION CONCERNING SERIOUS INJURY OR THREAT THEREOF

5. According to the Article 4.1 (b) of the Agreement on Safeguards for the purposes of this agreement "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2 of the same Article. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.

6. Thereby Ukraine would like to accent on the importance of abidance of the provisions of Article 12.1 (b) of the Agreement on Safeguards, in particular with the aim to hold a meaningful prior consultations, stating that a Member shall immediately notify the Committee on Safeguards upon making a finding of serious injury or threat thereof caused by increased imports.

7. The requirements for the abovementioned notification are set forth in Article 12.2 of the Agreement on Safeguards which determines that a Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information,

[1] Appellate Body Report, *Argentina – Footwear (EC)*, para.84.
[2] Appellate Body Report, *US – Lamb*, para. 70.

which shall include *inter alia* evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization.

8. The object and purpose of the notification requirements are mentioned in *Korea – Dairy*[3] by the Appellate Body concluded its general point that it is better served if the notification includes all the elements of information specified in Articles 12.2 and 4.2 of the Agreement on Safeguards. In this way, exporting Members with a substantial interest in the product subject to a safeguard measure will be in a better position to engage in meaningful consultations, as envisaged by Article 12.3 of the Agreement on Safeguards, than they would otherwise be if the notification did not include all such elements.

[3] Appellate Body Report, *Korea – Dairy*, para. 111.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. INTRODUCTION

1. The United States will address certain issues of systemic concern regarding the interpretation and application of Articles 2.1, 4.2, 5.1, 9.1, 12.1, and 12.2 of the *Agreement on Safeguards* ("Safeguards Agreement"), as well as Articles I:1 and XIX:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. THE SAFEGUARDS AGREEMENT AND ARTICLE I:1 OF GATT 1994

2. Considering that the WTO Agreement is a single undertaking, a breach of Article I cannot be established without taking into account other relevant articles. Here, a possible Article I claim cannot be examined without considering Article XIX of the GATT 1994, as well as relevant provisions of the Safeguards Agreement.

3. Article XIX recognizes that a Member may suspend certain obligations under the GATT 1994 "to the extent necessary" to prevent injury. Whether this will result in the same treatment for like products from all Members may depend on the facts of the particular case. In any event, Article XIX does not state that Article I MFN obligations may not be suspended.

4. Turning now to the Safeguards Agreement, its Preamble states that the Agreement is intended "to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products)." Accordingly, if the Safeguards Agreement states that different treatment is to be provided for like products of different Members, this serves as a clarification – to the extent any ambiguity existed before – that Article I does not preclude such differential treatment.

5. The Safeguards Agreement first states a general MFN principle: Article 2.2 provides that "[s]afeguard measures shall be applied to a product being imported irrespective of its source." Article 9.1 then provides a more specific rule for a particular situation. Under Article 9.1, differential treatment is not only allowed, but it is *required***.** Accordingly, when the conditions in Article 9.1 apply, the Safeguards Agreement clarifies that a Member following the obligation set out in Article 9 is acting in accordance with the GATT 1994, including Article I. On the other hand, if a Member provides differential treatment for products of different Members in a manner not provided for in Article 9, the Member may be acting inconsistently with its MFN obligations under Article 2.2 of the Safeguards Agreement, as well as under Article I of the GATT 1994.

6. As a final matter, the United States notes that it does not perceive any conflict between Article I of the GATT 1994 and the Safeguards Agreement. However, in the event of conflict, the Safeguards Agreement would prevail. The General Interpretive Note to Annex 1A to the WTO Agreement makes clear that if there is a conflict between a provision of GATT 1994 and "a provision of another agreement in Annex 1A to the Agreement Establishing the Word Trade Organization" – which includes the Safeguards Agreement – then the latter "shall prevail to the extent of the conflict."

III. EXAMINATION OF CONTEMPORANEITY REQUIREMENTS FOR ESTABLISHING INCREASED IMPORTS UNDER ARTICLES 2.1 AND 4.2 OF THE SAFEGUARDS AGREEMENT AND ARTICLE XIX:1 OF GATT 1994

7. Whether or not increased imports data relied upon in support of a safeguard measure is sufficiently contemporaneous must be decided on a case by case basis, taking account of the facts of the particular situation and of the reasoning used by the authority. Articles XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2 of the Safeguards Agreement require competent authorities to establish that an increase in imports has caused or threatened to cause serious injury to a

domestic industry. The Safeguards Agreement does not, however, set out absolute standards for how recent, sudden, or significant an increase in imports must be in order to show that the increase caused or threatened to cause serious injury. This analysis is not a "mathematical or technical determination."

8. Based on a review of the record of this dispute, it does not appear that the evidence Indonesia relied upon was sufficiently close in time to the imposition of the safeguard, considering it ended 17 months prior to when the period of investigation closed. The record does not appear to include any explanation as to why more recent information was not sought or obtained. Nor does the record appear to explain how or whether this 17-month gap in data affected Indonesia's analysis in concluding that the product in question "is being imported" under such conditions as to threaten to cause serious injury.

9. Article 4.1(b) defines "threat of serious injury" to mean "serious injury that is *clearly imminent*." Without such explanation, Indonesia provides no basis for evaluating whether the safeguard measure reasonably addressed the condition of the domestic industry at the time it was imposed, or whether the measure was even necessary to prevent serious injury.

IV. OBSERVATIONS REGARDING FINANCIAL CRISES AND THEIR IMPACT ON THE ANALYSIS OF INCREASED IMPORTS UNDER ARTICLE XIX:1 OF GATT 1994

10. The parties, as well as certain third parties, have presented arguments as to whether Indonesia sufficiently explained how the financial crisis was an "unforeseen development," and how it led to increased imports in Indonesia. An examination of issues involving a financial crisis does not require the development of any special types of rules under the Safeguards Agreement. Rather, in justifying the imposition of a safeguard measure based in whole or in part on a financial crisis, a competent authority needs to satisfy the requirements of Article XIX:1 of GATT 1994. This inquiry will, necessarily, depend on the unique facts and circumstances accompanying each particular financial crisis, whether big or small, and a Member's decision to impose a safeguard measure on that basis, whether in whole or in part.

11. Accordingly, the United States would not agree with the contention that some sort of heightened standard would apply in examining issues involving the significance of a financial crisis.

EXECUTIVE SUMMARY OF RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOR THE THIRD PARTIES

QUESTION I: THREAT OF SERIOUS INJURY

1. Article 2.1's express statement that an authority may apply a safeguard only if a product is being imported in increased quantities in absolute terms or *relative to domestic production* necessarily informs the interpretation of Article 4.2(a)'s reference to increased imports in "relative terms." Article 2.1 is clear that one of the possible preconditions for the imposition of a safeguard is an increase in imports *relative to domestic production*.

2. Article 4.2(a) discusses the factors to be considered by competent authorities in their investigation when evaluating whether "increased imports have caused or are threatening to cause serious injury to a domestic industry{,}" consistent with Article 2.1. Article 4.2(a) requires competent authorities to evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry." The Article then goes on to specify the factors to be considered – including the "rate and amount of the increase in imports of the product concerned in *absolute and relative terms*."

3. Note that Article 4.2 connects "absolute" and "relative terms" with "and," as opposed to the "or" used in Article 2.1. This difference reflects the differing roles of the two articles: Article 2.1 specifies the conditions for imposing a safeguard, while Article 4.2 specifies the factors that must be examined by an authority. Thus, Article 4.2 requires an authority to examine both absolute and relative increases; while Article 2.1 provides that either one of these two types of increases will meet this increased quantity condition.

4. The context of Article 2 – with its requirement for increases in absolute terms or relative to domestic production – indicates that Article 4.2(a)'s reference to increases in imports "in absolute

and relative terms" is a reference to these same numerical comparisons. That is, when Article 4.2(a) mentions increased imports in "relative terms" as a factor that competent authorities must consider in their investigation, this is a reference to the increase relative to domestic production as specified in Article 2.1.

5. Further, the structure and plain text of Article 4.2(a) indicate that its reference to increased imports in "relative terms" as a factor to be considered by competent authorities concerns *domestic production*, as opposed to domestic consumption or market share. In particular, the very next factor listed in Article 4.2(a), following its reference to increases in imports in relative terms, concerns "the share of the domestic market taken by increased imports." Market share is normally evaluated in terms of domestic consumption. If the "relative terms" in the prior clause were to mean relative to domestic consumption, then there would be no purpose to inclusion of a subsequent clause requiring an examination of domestic market share.

6. Moreover, the factors permissible for competent authorities to consider under Article 4.2(a), beyond those enumerated in the article, will depend on the particular facts and circumstances in the investigation at issue, including the impact on the domestic industry at issue. The Appellate Body stressed in *US – Wheat Gluten* that competent authorities must, where necessary, "undertake additional investigative steps . . . in order to fulfill their obligation to evaluate all relevant factors."

QUESTION II: PARALLELISM

7. Regarding Article 5.1, the first and last sentences of that Article do not preclude the application of a safeguard measure on a range of models of the investigated product that is narrower than the range of models for which investigating authorities made a finding of serious injury. The first sentence of Article 5.1 establishes the maximum permissible extent, or ceiling, for the application of a safeguard measure. It allows Members to apply safeguards "*only* to the extent necessary to prevent or remedy serious injury" caused by increased imports and to "facilitate adjustment" of the domestic industry. The first sentence of Article 5.1 does not contain any requirement to apply a safeguard to every model included in the investigation of serious injury.

8. The last sentence of Article 5.1 – "Members should choose measures most suitable for the achievement of these objectives" – accords Members discretion on choosing the appropriate safeguard measure. First, it is expressed in terms of "should," not "shall," which means that the sentence does not impose an obligation enforceable in dispute settlement. Second, by using the phrase "suitable" to achievement of objectives, the sentence leaves to a Member's discretion what particular measures may or may not be "suitable" in the particular circumstances.

9. Turning to "the principle of 'parallelism,'" the United States cautions that the application and enforcement of abstract principles not set out in the WTO Agreement would be fundamentally at odds with the customary rules of interpretation of public international law. To the extent that "parallelism" has any role in evaluating the consistency of a measure with obligations under the Safeguards Agreement, it is only if that term is used as a shorthand for a specific obligation, or set of obligations, expressly stated in the text of the agreement.

10. Here, the United States understands that "parallelism" is shorthand for the proposition that if imports from all geographic sources are considered in determining that increased imports are causing serious injury, while imports from a specific number of those sources are then excluded from the application of the safeguard measure, that could result in a measure that is inconsistent with the obligations in Article 2 of the Safeguards Agreement. The Appellate Body in *US – Wheat Gluten* found that such a gap between the two could only be justified if the investigating authorities establish that imports from countries covered by the safeguard measure satisfied the conditions for the application of the safeguard under Articles 2.1 and 4.2.

11. The present circumstances, by contrast, do not involve the exclusion of certain geographic sources and, therefore, do not implicate the Article 2.2 issue addressed in *Wheat Gluten*. Rather, the present dispute involves a Member's conclusion that applying the safeguard measure to all of the models of the imported product covered by the competent authorities' finding of serious injury was not necessary. This separate evaluation does not call into question the identity of the product or the conclusion that the product caused serious injury within the meaning of Article 2.1, and it

complies with the Article 2.2 obligation to apply any safeguard measure "to a product being imported irrespective of its source."

12. As is the case with Article 5.1, Article 2.1 does not require a Member to apply a safeguard measure to *every* model included in the Member's investigation of serious injury. The plain text of Article 2.1 states that a Member "*may* apply a safeguard measure" based on the conditions listed in the Article; it does not state that the Member must apply the safeguard measure to every model within the scope of products explicitly subject to the Member's injury investigation. In other words, Article 2.1 does not prevent a Member from choosing to narrow the scope of application of a safeguard measure.

QUESTION III: NOTIFICATIONS

13. Regarding notifications, Article 12 does not necessarily require that information be disclosed prior to entry into force of a safeguard measure. Rather, Article 12 provides that certain notifications must be made "immediately" upon three different events. Depending on the circumstances, this could result in notifications being made before or after entry into force.

14. Article 12.1 addresses timing, requiring Members to "immediately notify the Committee on Safeguards upon: (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it; (b) making a finding of serious injury or threat thereof caused by increased imports; and (c) taking a decision to apply or extend a safeguard measure."

15. Article 12.2 enumerates certain information to be provided in the notices under Article 12.1(b) and (c): "evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalization." According to the Appellate Body in *US – Wheat Gluten*, Article 12.2 is concerned with the *content* of Article 12.1 notices, and not whether those notices are *timely*. By contrast, Article 12.1 concerns the timeliness of notices based on an "immediate" standard – which the Appellate Body in *US – Wheat Gluten* stated is focused on ensuring "the Committee on Safeguards and Members of the WTO have *sufficient* time to review the notification."

16. As to the content requirements of Article 12.2, the kind of information that must be provided in Article 12.1(b) and 12.1(c) notices will differ depending on the factual circumstances. Significantly, the Appellate Body in *US – Wheat Gluten* recognized that the adequacy of notices under Article 12 must be evaluated in the context of the information available to competent authorities at the time, the complexity of the notifications, the need for translations, and other factors. We further note that Article 3.2 imposes a blanket prohibition on disclosure of confidential information, which would apply even to information that might be considered "relevant" for purposes of Article 12.2.