World Trade Organization
Appeal Proceedings

INDONESIA — SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

(DS490/DS496)
(AB-2017-6)

European Union
Third Participant Written Submission

Geneva, 19 October 2017

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US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, p. 2539
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I. EXECUTIVE SUMMARY[1]

A. Characterisation of the measure at issue

1. The European Union considers that the Panel was right to consider on its own motion whether the measure at issue constituted a safeguard measure. A panel's obligation to "make an objective assessment of the matter" pursuant to Article 11 comprises the assessment of the applicability of the covered Agreement. The applicability of the provisions which the complainant alleges to be breached is an important part of its *prima facie* case. Thus, where a panel has doubts about this element, it should examine it on its own motion, regardless of whether or not the parties have raised arguments about it. The fact that an issue is not disputed between the parties does not preclude the panel from examining it and coming to an interpretation which differs from the concurring view of the parties, in line with the general principle *jura novit curia*. The issue is to be distinguished from the question whether a panel can address *claims* which have not been made by the complainant, which it cannot.

2. However, where a panel intends to deviate fundamentally from qualifications shared by both parties, it is obliged to give parties ample opportunity to present their views on that question before the issue is actually adjudicated. This flows from the fundamental principle of due process, which includes the right to be heard, i.e. for parties to have an adequate opportunity to pursue their claims, make out their defences, and establish the facts.

B. The characterisation of the measure on substance

3. To understand what a safeguard measure is, it is required a harmonious reading of the Agreement on Safeguards and Article XIX of GATT 1994.

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

4. The European Union notes that there are two defining features of a safeguard measure: "suspend the obligation" and "withdraw or modify the concession". The other conditions in Article XIX, whilst not *sine qua non*, may nevertheless serve as confirming hallmarks: increased quantities; like/competitive product; injury; causation.

C. The stand-alone MFN violation

5. A panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing; subsequent submissions cannot cure a defect in a panel request. In the present case, the European Union considers that in the circumstances of the case, the co-complainants' panel requests (although being very broad and general on their face) can only be understood as setting out the case as a case against a safeguard measure.

6. Under this premise, the violation of Article I:1 of GATT 1994 can logically only have been consequential to an alleged wrongful application of Article 9.1 of Safeguards Agreement (due to the application of the exclusion to six EU Member States). This alleged breach is fundamentally different in nature from the breach ultimately found by the Panel, namely a breach of Article I:1 due to the exclusion of 118 developing countries, given the non-applicability of Article 9.1 of Safeguards Agreement. The fact that the panel requests did not, as they should have, spell out clearly how or why the measure was supposed to have violated the provisions it allegedly breaches, cannot be relied on to subsequently broaden the scope of the case in order to include claims which were not included in the beginning.

II. INTRODUCTION

7. The European Union makes this third participant written submission 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, more specifically the Agreement on Safeguards, the General Agreement on Tariffs and Trade (the GATT 1994) and the Understanding on Rules and Procedures governing the Settlement of Disputes (DSU).

8. We first address Indonesia's claims that the Panel was not allowed to look into the qualification of the measure as safeguard measure, then the actual qualification of the measure on substance. Finally we will comment on Indonesia's claims that the Panel exceeded its terms of reference by addressing the MFN claim as a stand-alone violation.

III. CHARACTERISATION OF THE MEASURE AT ISSUE AS PART OF THE PANEL'S "OBJECTIVE ASSESSMENT"

A. Panel' findings

9. The Panel started its analysis by examining whether the specific duty on imports of galvalume constituted a "safeguard measure" within the meaning of Article 1 of the Safeguards Agreement. It noted that neither Party disputed the characterisation. On the contrary, the Parties concurred that it should be characterised as safeguard measure. Nevertheless the Panel considered that it was obliged to "examine this issue for ourselves" "in discharging our duty to undertake 'an objective assessment of the matter'"[2].

B. Arguments of the Participants

10. Indonesia posits[3] that the approach by the Panel is in violation of Article 11 of DSU. Indonesia contests the case-law cited by the Panel in this regard: contrary to

[2] Panel Report, para. 7.10.
[3] Indonesia's appellant submission, Section IV.

the present case, the applicability of the relevant Agreement in those cases was disputed amongst the Participants. Indonesia also submits that none of the prior panel reports on safeguards (except one where the respondent claimed that the measure was not a safeguard measure) had started its analysis by looking into the characterisation of the measure.

11. Vietnam[4] "sees certain merits in Indonesia's general proposition that in ruling on the threshold issue [of whether the measure is a safeguard measure], the Panel failed to observe the requirements of Article 11 of the DSU". This question is a question of critical importance not only for the Parties to the dispute but for the other Members, who were however excluded from the debate as the Panel only raised this fundamental issue at a very late stage[5]. This is of particular concern as the previous Panel Report in *Dominican Republic – Safeguard Measures*, from which the Panel deviated, had created expectations on legal interpretation among WTO Members[6].

12. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TPKM) indicates that it has decided not to address this issue, because it takes the position that the specific duty is a safeguard measure[7].

C. Observations of the European Union

1. Ex officio assessment of the applicability of a covered Agreement

13. The European Union considers that the Panel was in principle right in examining on its own motion whether the measure at issue qualified as a safeguard measure. Article 11 of DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", which embraces all aspects of a panel's examination of the matter, both factual and legal. This comprises an objective assessment of the applicability of the covered agreements, where the panel is

4 Vietnam's appellee submission, Section 5.
5 Vietnam's appellee submission, para. 5.9.
6 Vietnam's appellee submission, paras. 5.13-5.14.
7 TPKM's appellee submission, para. 1.2.

required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand[8]. The touchstone of this obligation is that a panel's assessment must be "objective"[9]. In this context, panels are expected, in the same manner as with regard to their assessment of the facts, to provide reasoned and adequate explanations and coherent reasoning when assessing the applicability of the covered agreements[10].

14. As the Panel rightly pointed out, the Appellate Body has highlighted on several occasions that the fundamental structure and logic of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement[11]. The Appellate Body has found such an obligation, for instance, for Article II:1 of GATS, because it "states expressly that it applies only to 'any measure covered by this Agreement'"[12].

15. In a similar manner, Article 1 of Safeguards Agreement states that it "establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994". The Safeguards Agreement therefore makes it very clear in Article 1 that the application of its substantive obligations to a given measure is conditioned by the characterisation of this measure as a safeguard measure. Thus, panels are in principle first required to assess the applicability of the Agreement to the measure at issue before looking into the consistency of the measure with its substantive obligations.

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8 Appellate Body Report, *Colombia – Textiles*, para. 5.17.

9 Appellate Body Report, *Colombia – Textiles*, para. 5.17.

10 Appellate Body Report, *Colombia – Textiles*, para. 5.18.

11 Appellate Body Reports, *China – Auto Parts*, para. 139; and *Canada – Autos*, para. 151. See also Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.58, applying this case-law to the Safeguards Agreement.

12 Appellate Body Report, *Canada – Autos*, para. 152 ("Article II:1 of the GATS states expressly that it applies only to "any measure covered by this Agreement". This explicit reference to the scope of the GATS confirms that the measure at issue must be found to be a measure "affecting trade in services" within the meaning of Article I:1, and thus covered by the GATS, *before* any further examination of consistency with Article II can logically be made. We find, therefore, that the Panel should have inquired, as a threshold question, into whether the measure is within the scope of the GATS by examining whether the import duty exemption is a measure "affecting trade in services" within the meaning of Article I. In failing to do so, the Panel erred in its interpretative approach.")

16. A panel should carry out this examination whenever the applicability appears doubtful to it. The fact that several safeguards cases have been decided without the panels having explicitly assessed the applicability of the Agreement to the measures at issue does not put this into question – in those cases, the panels simply did not have doubts about the applicability and thus did not see a need to address the question.

17. It is true that none of the Participants has contested the applicability of the Agreement to the measure at issue in the present case. However, in the European Union's view, this does not dispense the Panel from assessing the question, where the applicability is objectively doubtful. On the contrary, the *objective* assessment cannot be made dependent on the *subjective* views and arguments put forward by the parties.

18. The present case is not the first time when parties argue that a panel's interpretation of a relevant Agreement should be limited to the arguments raised by the parties. The Appellate Body and previous panels have rightly rejected this position at several occasions, stressing that a panel must be allowed to reach issues of interpretation that parties have not raised, if it finds this to be necessary to resolve the dispute that is before it[13]. The applicability to the measure at issue of the Agreement which the challenged measure is alleged to have breached is a fundamental element of the *prima facie* case that a complainant must make, and must, as such, be looked into by the panel seeking to satisfy itself that the complainant has established a *prima facie* case[14].

19. The fact that an issue is not disputed between the parties does not preclude the panel from examining this issue objectively and coming to an interpretation which

[13] Appellate Body Reports, *EC – Hormones*, para. 156 ("A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of DSU, if in its reasoning it had to restrict itself to arguments presented by the parties to the dispute."); *Chile – Price Band System*, paras. 166-168; *US – Certain EC Products*, para. 123; see also Panel Report, *Australia — Automotive Leather II (Article 21.5 — US)*, para. 6.19 ("That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute.")

[14] See also Panel Report, *US — Shrimp (Ecuador)*, paras. 7.9 and 7.11.

differs from the concurring view of the parties[15]. On the contrary, according to the Appellate Body, panels should not defer to legal qualifications made by a party to the dispute but carry out their own independent assessment regarding the qualifications of measures at stake[16].

20. The European Union recalls that the Appellate Body has previously held that the characterisation of a measure under a Member's municipal law is not dispositive. In *US — Large Civil Aircraft (2nd complaint)* the Appellate Body stated that:

> The US legislative and regulatory framework indicates that procurement contracts are the instruments used when the US Government intends to make a purchase. The label given to an instrument under municipal law, however, is not dispositive and cannot be the end of our analysis […].[17] (footnotes omitted)

21. Similarly, in *Canada — Renewable Energy / Canada — Feed-in Tariff Program* the Appellate Body confirmed that:

> Finally, Japan suggests that the Panel erred by assuming that, if a measure is characterized in a particular manner under domestic law (e.g. as a government purchase), it can never be characterized in a different manner under WTO law. We understand Japan to be arguing that the Panel erred in finding that the characterization of a measure under domestic law is dispositive of its legal characterization under WTO law. Japan is correct in arguing that the manner in which municipal law characterizes a measure is not determinative for its characterization under the covered agreements.[18] (footnotes omitted)

22. As any other Court, WTO panels (and the Appellate Body) have the duty to ascertain and apply the law to the circumstances of the case, independently of the views and arguments proffered by the parties, *jura novit curia*[19]. The assessment whether something is a "safeguard measure" is, in the same way as the assessment whether something is a "measure" at all, a legal characterisation and not just a factual one[20], which a panel can and must thus do on its own motion.

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15 Panel Reports, *US — Shrimp (Ecuador)*, paras. 7.9 and 7.11; *US — Shrimp (Thailand)*, para. 7.21.
16 Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 1128.
17 Appellate Body Report, *US — Large Civil Aircraft (2nd complaint)*, para. 593.
18 Appellate Body Report, *Canada — Renewable Energy / Canada — Feed-in Tariff Program*, para. 5.127.
19 Appellate Body Report, *EC — Tariff Preferences*, para. 105.
20 See Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, para. 188.

23. Finally, the European Union would like to stress that the issue here is different from the question whether a panel can on its own motion address *claims* that have not been made by the complainant (to which the answer is "no", as explained below). A panel can only address *claims* that have been put before it by the complainant. Only to the extent a claim is properly before the panel can it look into this claim. However, when then looking into the claim, the panel is not bound by the *arguments* put forward by the parties, but can and must examine fully whether the complainant has made its *prima facie* case regarding this claim. In doing so, as set out above, the panel is allowed, and even obliged, to develop its own legal reasoning to support its own findings and conclusions on the matter under its consideration[21]. This is exactly the case here: the co-complainants have placed before the Panel claims under the Safeguards Agreement, and in order to assess whether they have made a *prima facie* case under this Agreement, the Panel must examine its applicability.

2. Protection of due process rights

24. This being said, the European Union considers that where a panel intends to deviate fundamentally from qualifications shared by both parties, it is obliged to give parties ample opportunity to present their views on that question, before the issue is actually adjudicated.

[21] Appellate Body Reports, *Chile – Price Band System*, paras 166-168; *EC – Hormones*, para. 156; *US – Certain EC Products*, para. 123.

25. The Appellate Body has pointed out that

> Due process is a fundamental principle of WTO dispute settlement. It informs and finds reflection in the provisions of the DSU. In conducting an objective assessment of a matter, a panel is "bound to ensure that due process is respected". Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.[22] (footnotes omitted, emphasis added)

26. The opportunity for a party to be heard and comment on claims made against it is a fundamental tenet of due process[23]. In the European Union's view, this is not only true with regard to claims and arguments brought up by the other party, but also regarding issues that arise from interpretative decisions of the panel. Where, like in the present case, a panel envisages an interpretative decision which impacts fundamentally on the parameters of the case, this due process objective would be completely undermined if parties were not at least given an appropriate opportunity to comment and defend their case under those new parameters.

27. The Appellate Body has also stressed that due process concerns arise in particular when the case takes new turns late in the proceedings[24], and that panels, as part of their duties under Article 11 of DSU to "make an objective assessment of the matter", must safeguard parties' due process rights, by ensuring that they get an opportunity to duly comment on issues arising at late stages of the proceedings[25]. Again, the European Union considers that this principle should apply not only where new issues arise as a consequence of late submissions by one of the parties, but also (one could even say *a fortiori*) where interpretative decisions by a panel bring up new issues at a late stage in the proceedings.

28. The European Union does not comment on whether in the present case, the Panel provided sufficient opportunities to the Parties to comment on the fundamental

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22 Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 147; *US – Large Civil Aircraft (2nd complaint)*, para. 1136.
23 Appellate Body Report, *Australia – Salmon*, para. 278.
24 Appellate Body Report, *US – Gambling*, para. 271.
25 Appellate Body Report, *US – Gambling*, para. 273.

issue of whether the measure at issue constitutes a safeguard measure. As far as the European Union can guess from the Panel Report and the Participants' submissions, the issue only came up after the first hearing and was subsequently discussed by the Parties in responses to Panel questions, and in comments to responses. As the European Union was not involved in the proceedings at that point in time any more, it cannot judge whether those opportunities were sufficient to allow the Parties to discuss the matter in the required depth.

29. Finally, the European Union agrees with Vietnam that shifting the discussion on such crucial points to a late stage of proceedings is highly prejudicial to third party rights, as third parties are (and have been, in the present case) entirely precluded from participating in the discussion on this issue. This should be avoided in future cases.

IV. THE CHARACTERISATION OF THE MEASURE ON SUBSTANCE

A. The Panel's findings

30. By corroborating the provisions of Article 1 of Agreement on Safeguards and of Article XIX:1(a) of GATT 1994 the Panel found that:

> [T]he "measures provided for" in Article XIX:1(a) are measures that *suspend a GATT obligation* and/or *withdraw or modify a GATT concession*, in situations where, as a result of a Member's WTO commitments and developments that were "unforeseen" at the time that it undertook those commitments, a product "is being imported" into a Member's territory in "such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products".[26]

31. The Panel went on and determined that:

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

[26] Panel Report, para. 7.13.

> where all of the conditions for the imposition of a safeguard measure are satisfied.[27]

32. Then the Panel did not find it useful for the positive resolution of the dispute to assess whether the GATT obligation an importing Member chooses to suspend had always to be the same obligation that results in increased imports.[28]

33. After setting out this interpretative framework, the Panel noted that Indonesia has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions, meaning that Indonesia was free to impose any amount of duty it deems appropriate on imports of galvalume.[29]

34. The Panel also dismissed Indonesia's argument according to which the specific duty at issue suspended Indonesia's obligation to provide MFN-treatment under Article I:1 of GATT 1994, as it was applied on a discriminatory basis (the 120 countries listed in Regulation 137 were exempted).[30]

35. Finally, after finding that Regulation 137 is not a safeguard measure, the Panel dismissed all the complainants' claims under the Agreement on Safeguards and Article XIX of GATT 1994.

B. Arguments of the Participants

36. Indonesia considers in its appeal that the Panel erred in its finding that Regulation 137.1 is not a safeguard measure. Indonesia submits that the term "the obligation" in the last part of Article XIX:1(a) of the GATT 1994 shall not only limited to Article II or Article XI of GATT 1994, but also to include other GATT obligations such as the MFN obligation, as the suspension of MFN obligation in the application of the safeguard measure is fact necessary to prevent or remedy serious injury. In other words, to impose safeguard measure against imports from certain developing countries having import share less than 3 per cent would not be

27 Panel Report, para. 7.15.
28 Panel Report, paras. 7.16 – 7.17.
29 Panel Report, para. 7.18.
30 Panel Report, paras. 7.21 – 7.32.

necessary since such imports in the first place are deemed not to contribute to the serious injury or threat thereof suffered by the domestic industry.[31]

37. Finally, Indonesia contends that even assuming *arguendo* that Regulation 137.1 does not result in the suspension of any obligation under the GATT 1994, that measure can still be characterized as a safeguard measure within the meaning of Article XIX, because of the use of the words "shall be free" in the last sentence of Article XIX:1(a) of GATT 1994, which implies that a Member has the discretion to or not to suspend a WTO concession or obligation when imposing a safeguard measure.[32]

38. TPKM submits that the Panel erred in finding that "necessary to prevent or remedy serious injury" is relevant in defining a safeguard measure. TPKM maintains that the questions of whether a measure is a safeguard measure and whether the measure fulfils the requirements of Article XIX of GATT 1994 or Article 1 of Agreement on Safeguards are distinct. It considers that the Panel erred in its definition of a "safeguard measure", because the issue of whether a safeguard measure is *necessary* or not should have no effect on whether the measure is a safeguard measure in the first place.[33]

39. TPKM equally considers that the Panel's interpretation frustrates the object and purpose of the Agreement on Safeguards, in particular the purpose to re-establish multilateral control over safeguards. It points to the example of a Member whose tariff is "unbound" with respect to a product, but which may impose a safeguard measure in the form of an import quota, thus suspending its obligations under Article XI of GATT 1994.[34] According to TPKM, this example shows that the Panel's interpretation is tantamount to encouraging WTO members to impose more restrictive measures in order to have them qualify as safeguard measures.[35]

40. Vietnam alleges that a "safeguard measure" for the purposes of Article XIX and the Agreement on Safeguards is a "suspension" of GATT obligations, or a

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31 Indonesia's appellant submission, especially paras. 30 – 34.
32 Indonesia's appellant submission, para. 39.
33 TPKM's other appellant submission, paras. 13 – 19.
34 Panel Report, *Indonesia – Iron or Steel Products*, para. 7.41.
35 TPKM's other appellant submission, paras. 20 – 25.

"withdrawal" or "modification" of GATT concessions, which is taken with a view to preventing or remedying serious injury to the domestic industry or threat thereof, and facilitating the adjustment of the domestic industry.[36] Vietnam considers that the Panel's finding that the discriminatory application of a safeguard measure in accordance with Article 9.1 does not constitute a "suspension" of Article I:1 is in clear contradiction with the Panel's own finding that Indonesia's specific duty is inconsistent with the MFN obligation under Article I:1.[37]

C. Observations of the European Union

41. The European Union starts by recalling its observations under the previous sub-section: a Member's characterisation of a measure is *not dispositive*, as the characterisation of a measure as a safeguard by a Member is not self-determining but rather objective.

42. With these considerations in mind, the European Union will now determine which are the defining features of a safeguard measure under the Agreement on Safeguards and under the GATT 1994.

43. In this respect, Article 1 of Agreement on Safeguards provides that the Agreement "establishes rules for the application of safeguard measures". The second part of the single sentence in Article 1 goes on to provide that a safeguard measure means a measure "provided for in Article XIX". Similarly, the recitals of the Agreement refer to the need to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX".[38]

44. Article XIX:1(a) of GATT 1994 reads as follows:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a [Member] under this Agreement, including tariff concessions, any product is being imported into the territory of that [Member] in such increased quantities and under such conditions as to cause or threaten serious injury to

[36] Vietnam's other appellant submission, paras. 3.11 – 3.23.
[37] Vietnam's other appellant submission, paras. 3.57.
[38] The European Union agrees that Article XIX of GATT 1994 and the Agreement on Safeguards should be interpreted harmoniously, as they constitute an integrated package of rights and disciplines. See Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.66.

> domestic producers in that territory of like or directly competitive products, the [Member] shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

45. To understand what a safeguard measure is, we must discount the conditions (increased quantities; like/competitive product; injury; causation). Otherwise, by simply not complying with one of the conditions, an importing Member could take its measures completely outside the scope of the Agreement on Safeguards. Thus, the European Union notes that there are two defining features standing out: "suspend the obligation" and "withdraw or modify the concession".

46. As per the title of Article XIX of GATT 1994, a safeguard measure must relate to "imports of particular products". The European Union considers that this has two implications: *first*, it must apply to "imports of particular products" and *second*, it must be in some sense a response to "imports of particular products".

47. Also according to the very title of Article XIX a safeguard measures involves "action", that meaning that it cannot be an omission.

48. Equally, as there is a sense of urgency in the very nature of a safeguards measure, in principle it will not qualify a measure that has been previously in place for a very long time. Indeed, it has to be some element of "emergency" in the action. This translates in terms of the temporal relationship between the "imports of particular products" that trigger the safeguard and the "imports of particular products" to which the safeguard is applied.

49. The other conditions in Article XIX, whilst not *sine qua non*, may nevertheless serve as confirming hallmarks: increased quantities; like/competitive product; injury; causation.

50. The European Union disagrees with Indonesia's proposition that assuming *arguendo* that a measure at issue does not result in the suspension of any obligation under the GATT 1994, that measure can still be characterized as a safeguard measure within the meaning of Article XIX.[39] The phrase “shall be free”

[39] Indonesia's appellant submission, para. 39.

in the last sentence of Article XIX:1(a) of GATT 1994 does not imply that a Member has the discretion to or not to suspend a WTO concession or obligation when imposing a safeguard measure, but simply means that such an action can be taken in exceptional circumstances.

51. Without taking at this stage a position on the facts of this case, the European Union hopes that it provided helpful elements of analysis to the Appellate Body.

V. INDONESIA'S CLAIM THAT THE STAND-ALONE MFN VIOLATION WAS OUTSIDE THE PANEL'S TERMS OF REFERENCE

A. Panel's findings

52. After finding that the measure at issue did not constitute a safeguard measure and the Safeguards Agreement did therefore not apply, the Panel examined an alleged inconsistency of this measure with Article I:1 of GATT 1994[40]. It highlighted that "although the complainants pursue this claim primarily as part of their complaint against the specific duty *as a safeguard measure*, they also make the same claim on the basis of the same arguments against the specific duty *as a stand-alone measure*."[41] (footnotes omitted, emphasis original) The Panel also stressed that "Indonesia has not contested the complainants' Article I:1 claim against the specific duty as a stand-alone measure"[42].

B. Arguments of the Participants

53. Indonesia[43] claims that the findings regarding the compliance of the measure as a stand-alone measure were outside the Panel's terms of reference, because in the Panel requests, the co-complainants explicitly identified the measure at issue as "the specific duty imposed as a safeguard measure". The Panel was wrong in relying on later submissions of the co-complainants to find that they had also made

40 Panel Report, Section 7.4.
41 Panel Report, para. 7.42.
42 Panel Report, para. 7.43.
43 Indonesia's appellant submission, paras. 70ff.

the MFN claim on a stand-alone basis, i.e., in case the measure at issue is not a safeguard measure.

54. Vietnam and TPKM posit that Indonesia's appeal in this point does not conform with the requirements of rules 20(2)(d) and 21(2)(b)(i) of the Appellate Body's Working Procedures[44]. On substance, the co-complainants consider that the stand-alone claim was not outside the Panel's terms of reference[45]. They allege that their claims included an inconsistency with Article I:1 of GATT 1994 in case the measure at issue would not qualify as a safeguard measure, referring in particular to their response to Panel question no. 51[46] and to the words "in any event" at the beginning of the description of the claim[47]. Thus, not the co-complainants claim, but only Indonesia's defence was dependent on the characterisation of the measure as a safeguard measure[48]. The legal characterisation of a measure would have to be distinguished from the claims and not be relevant for the scope of the terms of reference; it would be part of the arguments to sustain the claim (which can be developed at later stages of the proceedings), but not the claim itself[49].

C. Observations of the European Union

55. The European Union would first of all like to point to the fundamental importance of the panel request for defining the scope of a dispute and establishing a panel's jurisdiction, which is delimited by the identification of the specific measures at issue, and the summary of the legal basis of the complaint (the claims), in the panel request. Together these elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1[50]; so that, if either of them is not properly identified, the matter is not within the panel's terms of reference[51].

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44 Vietnam's appellee submission, Section 3.1.; TPKM's appellee submission, Section 3.1.
45 Vietnam's appellee submission, Section 3.2; TPKM's appellee submission, Section 3.2.
46 Vietnam's appellee submission, paras. 3.2 (and footnote 22) and 3.33.
47 TPKM's appellee submission, para. 3.13.
48 Vietnam's appellee submission, para. 3.4.
49 Vietnam's appellee submission, paras. 3.21-3.24; TPKM's appellee submission, paras. 3.20-3.23.
50 Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107.
51 Appellate Body Report, *Australia – Apples*, para. 416.

56. The European Union agrees with Vietnam[52] that the measure at issue has been clearly identified in the co-complainants' panel requests[53], as the specific duty imposed by Regulation Number 137.1/PML.011/2014. How the co-complainants qualified this duty in legal terms ("as a safeguard measure") is irrelevant for its identification. On the contrary, the identification of the measure at issue should not be blurred with the alleged violation (the claims); the two elements are and must be distinct from each other[54]. Likewise, the requalification of the measure by the Panel is not relevant in this sense, as the measure at issue remains the same, regardless of its qualification.

57. The question is, however, less obvious with regard to the second limb of the panel request, the claims. As a preliminary, but very important point, the European Union would like to recall the standing case-law of the Appellate Body that "a party's submissions during panel proceedings cannot cure a defect in a panel request"[55], a principle which is "paramount in the assessment of a panel's jurisdiction". The Appellate Body has stressed that "although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request" and that "in every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing."[56]

58. To the European Union, the statements of the Panel in the last sentence of para. 7.42 and footnotes 78 and 79 of the Panel Report are problematic in this respect, as they seem to indicate that the Panel relied on later submissions by the co-complainants (instead of the panel request) in order to determine the scope and nature of their claims. The European Union would caution against such an approach, which is at odds with the fundamental functions of the precision requirements in Article 6.2 of DSU, which serve the due process objective of

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52 Vietnam's appellee submission, para. 3.27.

53 Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 18 September 2015, para. 1.5 point a.; Request for the Establishment of a Panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS490/2, 21 August 2015, Section I.B., point a.

54 Appellate Body Report, *Australia – Apples*, para. 417.

55 Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642, quoting Appellate Body Reports, *EC – Bananas III*, para. 143 and *US – Carbon Steel*, para. 127.

notifying the parties and third parties of the nature of a case[57]. If a panel makes findings on a claim that the complainant cannot be considered to have made in its panel request, it makes a finding on a matter *that is not before it* and in doing so, acts *ultra petita*[58] and deprives defendants of a fair right of response in violation of their due process rights[59], in breach of Article 11 of DSU[60]. There is a clear prohibition on panels to make the case for a complainant[61], and the European Union attached great importance to it.

59. If one looks at the MFN claim in the co-complainants' panel requests, the claim seems, on its face, to be very broad, so as to cover any MFN violation, regardless of whether or not the measure at stake can be qualified as safeguard measure. The MFN claim in the panel requests[62] does not refer to any provision of the Safeguards Agreement, it just states that the duty would be "inconsistent with Article I:1 of the GATT 1994 in that it applies to products originating only in certain countries".

60. However, to the European Union, it is clear from the facts before the Appellate Body that the co-complainants conceived their case as a case against a safeguard measure. Insofar, Indonesia rightly points to the explicit indication in the panel requests that frames all claims as claims against "the specific duty imposed as a safeguard measure"[63]. The Panel found otherwise[64] exclusively on the basis of submissions by the co-complainants that intervened much later in the process (comments on Indonesia's second written submission and response to Panel question no. 51). At the relevant point in time of the panel request (and still in the co-complainants' first written submission), claims against the measure at issue as a

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56 Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

57 Appellate Body Report, *US – Carbon Steel*, para. 126, quoting Appellate Body Report, *Brazil – Desiccated Coconut*, para. 186.

58 Appellate Body Report, *Chile – Price Band System*, para. 173.

59 Appellate Body Report, *Chile – Price Band System*, paras. 174, 176.

60 Appellate Body Report, *Chile – Price Band System*, paras. 172-177.

61 See, for instance, Appellate Body Reports, *Chile – Price Band System*, para. 168; *Japan – Agricultural Products II*, paras. 129-130.

62 Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 18 September 2015, para. 1.7 point a.vi; Request for the Establishment of a Panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS490/2, 21 August 2015, Section II.a., point 6.

63 Request for the Establishment of a Panel by Viet Nam, WT/DS496/3, 18 September 2015, para. 1.7 chapeau of point a.; Request for the Establishment of a Panel by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/DS490/2, 21 August 2015, chapeau of Section II.a.

non-safeguard measure were clearly not envisaged. Vietnam's argument that the panel request would have, from the beginning, included the latter, based on statement in later submissions (in particular the response to Panel question no. 51) does not appear plausible to the European Union.

61. The Appellate Body has stressed that

> "a defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence. Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[65]

> "The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement."[66]

> "All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly."[67]

62. The obligation to make claims in a clear and understandable manner which allows the defendant to know what case it has to answer, can not be met by only describing the measure at issue in a matter-of-factly manner and citing the provisions which it allegedly violates. On the contrary, the panel request must explain *how or why* the measure is supposed to have violated the provisions it allegedly breaches[68]. The requirement in Article 6.2 of DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" means that the request for establishment "must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed. Only by such connection between the measure(s) and the

64 Panel Report, para. 7.42, footnote 79.
65 Appellate Body Report, *Thailand — H-Beams*, para. 88.
66 Appellate Body Report, *Chile – Price Band System*, para. 164.
67 Appellate Body Report, *India – Patents*, para. 94.

relevant provision(s) can a respondent 'know what case it has to answer, and ... begin preparing its defence'"[69]. In this context, the characterisation of a measure can play a role. While the European Union agrees with Vietnam and TPKM that the legal characterisation of a measure is not *as such* part of the claims, it can, and will often, predetermine how the complainant frames its case, i.e., the required explanation how and why the measure violates specific provisions of a covered Agreement. It will thereby be relevant for the scope of the terms of reference, and insofar, be more than a mere argument to sustain the claims.

63. In the present case, it is doubtful whether the panel request met this requirement of explaining how or why the measure is supposed to have violated the provisions it allegedly breaches. As set out above, it was clear that the measure was attacked as a safeguard measure. Under this premise, it was also clear for everybody that Indonesia would have had to comply with Article 9.1 of Safeguards Agreement, and thus would have had to exclude developing countries meeting the conditions set out in Article 9.1 from the scope of the measure. The simple exclusion of developing countries meeting those criteria could thus, in the minds of both Parties to the dispute, not reasonably have been considered as a breach of Article I:1 of GATT 1994. On the contrary, what the co-complainants attacked in reality (without however stating so in the panel request), was a wrongful application of Article 9.1 of Safeguards Agreement, through the exclusion of certain countries that in the eyes of the co-complainants did not qualify as developing countries[70], with a somehow *consequential* breach of Article I:1 of GATT 1994. The Panel seems to partially acknowledge this when stating that this was the "primary" claim of the co-complainants[71]. However, as set out above, it is clear for the European Union that this was not only the "primary claim" but in fact the *only* claim relating to Article I:1 of GATT 1994.

64. For the European Union, the co-complainants' MFN claim in the panel requests can only be read as being based specifically on the exclusion of certain of the

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[68] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China),* para. 4.9 and citations therein.

[69] Appellate Body Report, *US — Oil Country Tubular Goods Sunset Reviews*, para. 162.

[70] See footnote 159 of TPKM's and Vietnam's first written submission.

[71] Panel Report, para. 7.42, last sentence.

European Union's Member States from the scope of the safeguard measure, as allegedly being inconsistent with Article 9.1 of Safeguards Agreement and *thereby* breaching Article I:1 of GATT 1994. Thus, in the European Union's view, the characterisation of the measure as a safeguard measure was part of the determining parameters of the claim made by the co-complainants, and not merely, as the co-complainants would have it, the basis for an affirmative defence put forward by the respondent, or a simple "argument" by the co-complainants.

65. The fact that this fundamental parameter of the claim was not made explicit in the panel request, contrary to what would have been a clear and forthcoming panel request, and still only implicit in the co-complainants first written submission[72], cannot be used afterwards to extend the scope of the proceedings to a claim which is different in nature, namely a general MFN claim based on the exclusion of all 118 countries considered as developing countries by Indonesia.

66. To sum up: the claim in the panel request was, in the European Union's understanding, conceived as a breach of Article I:1 of GATT 1994 because of the exclusion of 6 allegedly non-developing countries, which was alleged not to be covered by the - applicable - Article 9.1 of Safeguards Agreement. The claim that the Panel adjudicated was a breach of Article I:1 of GATT 1994 because of the exclusion of 118 developing countries, due to the inapplicability of Article 9.1 of Safeguards Agreement to the measure at issue. These two claims are fundamentally different in nature. As, in the European Union's view, the second one cannot be said to have been included in the co-complainants' panel request, the Panel's findings in that respect seem not to be covered by its terms of reference.

VI. CONCLUSIONS

67. The European Union considers that this case raises important systemic issues. The European Union requests the Appellate Body to carefully review the claims in light of the observations made in this submission.

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[72] See footnote 159 of the co-complainants first written submission in the Panel proceedings.