REPORT OF THE APPELLATE BODY RELEASED, INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

On 15 August 2018, the Report of the Appellate Body in *Indonesia – Safeguard on Certain Iron or Steel Products* (DS490) was released. This dispute concerned a specific duty applied by Indonesia on imports of galvalume following an investigation initiated and conducted under Indonesia's domestic safeguards legislation by Indonesia's competent authority (Komite Pengamanan Perdagangan Indonesia, or KPPI). The Appellate Body made the following findings and conclusions:

1. Whether Indonesia's Notice of Appeal and appellant's submission complied with the Working Procedures for Appellate Review

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

2. Whether the Panel erred in finding that Indonesia's specific duty on imports of galvalume is not a safeguard measure
    a. Whether the Panel erred under Article 6.2, 7.1, or 11 of the DSU
        i. Article 11 of the DSU requires panels to examine, as part of their "objective assessment of the matter", whether the provisions of the covered agreements invoked by complainants as the basis for their claims are applicable and relevant to the case at hand. The Agreement on Safeguards applies to the "measures provided for in Article XIX of GATT 1994". A panel's assessment of claims brought under that agreement may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. A panel is not precluded from determining the applicability of a particular covered agreement in cases where the issue has not been raised by the parties. Indeed, the duty to conduct an "objective assessment of the matter" may, at times, require a panel to depart from the positions taken by the parties and determine for itself whether a measure falls within the scope of a particular provision or covered agreement. Moreover, the description of a measure proffered by a party and the label given to it under municipal law are not dispositive of the proper legal characterization of that measure under the covered agreements.
        ii. The complainants in this dispute claimed that Indonesia's specific duty on imports of galvalume was inconsistent with Article XIX of the GATT 1994 and certain substantive provisions of the Agreement on Safeguards. Therefore, the Appellate Body considered

that it was the Panel's duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constituted a safeguard measure in order to determine the applicability of the substantive provisions relied upon by the complainants as the basis for their claims.

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

b. Whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994

i. In order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination of whether a measure is a safeguard measure, a panel should evaluate and give due consideration, where relevant, to the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, none of these is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

ii. Having reviewed the design, structure, and expected operation of the measure at issue, together with all the relevant facts and arguments on record, the Appellate Body found that this measure did not present the constituent features of a safeguard measure for purposes of the applicability of the WTO safeguard disciplines. The imposition of the specific duty on galvalume may have sought to prevent or remedy serious injury to Indonesia's industry, but it did not suspend any GATT obligation or withdraw or modify any GATT concession. While the exemption of 120 countries from the scope of application of the specific duty may arguably be seen as suspending Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994, it had not been shown to be designed to

prevent or remedy serious injury to Indonesia's domestic industry. Rather, that exemption appeared to constitute an ancillary aspect of the measure, which was aimed at according S&D treatment to developing countries with de minimis shares in imports of galvalume as contemplated under Article 9.1 of the Agreement on Safeguards. The disciplines of Article 9.1 set out conditions for the WTO consistent application of safeguard measures, and do not speak to the question of whether a measure constitutes a safeguard measure for purposes of the applicability of the WTO safeguard disciplines. Hence, it found that the measure at issue, considered in light of those of its aspects most central to the issue of legal characterization, did not constitute one of the "measures provided for in Article XIX of GATT 1994".

iii. Accordingly, it upheld the Panel's overall conclusion that the measure at issue did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Having upheld the Panel's conclusion, there was no legal basis for the Appellate Body to rule on the complainants' request for completion of the legal analysis with respect to their claims under Article XIX of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards.

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

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

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

Provisions ruled upon: Articles 6.2, 7.1, or 11 of the DSU, Articles 1 and 9.1 of the Agreement on Safeguards and Articles I:1 and XIX of GATT 1994.

TOPICS OF INTEREST: (1) The interpretation and application of of the Working Procedures for Appellate Review, including: **(i)** The requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the nature of the appeal and the allegations of errors by the panel. If a particular claim of error is not raised by the appellant in the Notice of Appeal, then that claim is not properly within the scope of the appeal, and the Appellate Body will not make findings thereon, **(ii)** The issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal, **(iii)** Pursuant to Rule 21(2)(b)(i), while both the Notice of Appeal and the appellant's submission must set out the allegations of errors, the appellant's submission must be more specific, in that it must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies; **(2)** The interpretation and application of Article 6.2 of the DSU, including: **(i)** A claim, for the purposes of Article 6.2, refers to an allegation that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. The identification of the treaty provisions claimed to have been violated by the respondent is necessary if the legal basis of the complaint is to be presented, **(ii)** By contrast, Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the applicability of a given covered agreement. These provisions are not directly part of the legal basis of the complaint, for they are not claimed to have been violated by the respondent. Instead, the fact that a panel request contains claims of violation under the substantive provisions of a covered agreement logically presupposes that the complainant considers that such provisions are applicable and relevant to the case at hand; **(3)** The interpretation and application of Article 11 of the DSU, including: **(i)** A panel is under a duty to examine, as part of its "objective assessment" under Article 11 of the DSU, whether the provisions of the covered agreements invoked by a complainant as the basis for its claims are "applicable" and "relevant" to the case at hand, **(ii)** Where a measure is not subject to the disciplines of a given covered agreement, a panel would commit legal error if it were to make a finding on the measure's consistency with that agreement, **(iii)** The examination regarding the "applicability" of certain provisions logically precedes the assessment of a measure's "conformity" with such provisions; **(4)** The interpretation and application of Article XIX of the GATT1994, including: (i) The Agreement on Safeguards

applies to the measures provided for in Article XIX of GATT 1994, (ii) A panel's assessment of claims brought under the Agreement on Safeguards may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994, (iii) To the extent that the applicability of the Agreement on Safeguards is uncontested, it may well be unnecessary for a panel to include detailed reasoning in this regard in its report. However, a panel is not precluded from determining the applicability of a particular covered agreement in cases where the issue has not been raised by the parties. Indeed, the duty to conduct an objective assessment of the matter may, at times, require a panel to depart from positions taken by the parties, (iv) the description of a measure proffered by a party and the label given to it under municipal law are not dispositive of the proper legal characterization of a measure under the covered agreements. Rather, a panel must assess that legal characterization for purposes of the applicability of the relevant agreement on the basis of the content and substance of the measure itself; **(5)** The interpretation and application of Article 1 of the Agreement on Safeguards, including: **(i)** Article 1 of the Agreement on Safeguards specifies that safeguard measures are measures provided for in Article XIX of GATT 1994. The action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession. Absent such a suspension, withdrawal, or modification, a measure could not be characterized as a safeguard measure, **(ii)** Article XIX:1(a) does not expressly define the scope of measures that fall under the WTO safeguard disciplines and that determination must be made on a case-by-case basis, **(iii)** It is important to distinguish between the features that determine whether a measure can be properly characterized as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994, **(iv)** The "necessity" requirement under Article 5.1 of the Agreement on Safeguards does not relate to the legal characterization of a measure for purposes of the applicability of the WTO safeguard disciplines, but rather pertains to a safeguard measure's conformity with those disciplines, **(v)** In order for a measure to constitute a safeguard measure, the suspension of a GATT obligation or the withdrawal or modification of a tariff concession entailed by that measure must be designed to pursue the objective of preventing or remedying serious injury to the Member's domestic industry. This suggests that the range of GATT obligations that may relevantly be suspended for purposes of Article XIX is limited to obligations whose suspension has a demonstrable link to the prevention or remediation of serious injury.

TradeLawGuide Commentary

A. Whether Indonesia's Notice of Appeal and appellant's submission complied with the Working Procedures for Appellate Review

Indonesia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei), and Viet Nam (the Complainants) each submitted that Indonesia's appeal of the Panel's findings did not sufficiently identify the alleged errors by the Panel. According to the complainants, this lack of clarity prejudiced their ability to make a proper defence against Indonesia's claims on appeal.

Rule 20(2)(d) of the Working Procedures

Rule 20(2)(d) provides that a Notice of Appeal shall include a brief statement of the nature of the appeal, including identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel. The Appellate Body explained that the requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel. It cautioned that if a particular claim of error is not raised by the appellant in the Notice of Appeal, then that claim is not properly within the scope of the appeal, and the Appellate Body will not make findings thereon.

The Appellate Body understood Indonesia's appeal to encompass allegations of error concerning: (i) the Panel's finding that the measure at issue was not a safeguard measure; (ii) the scope of the Panel's terms of reference concerning the characterization of the measure at issue; (iii) the scope of the Panel's terms of reference concerning the claim against the specific duty as a "stand-alone measure"; and (iv) the Panel's objective assessment under Article 11 of the DSU of the characterization of the measure at issue.

The Appellate Body considered that these grounds of appeal were discernible in Indonesia's Notice of Appeal and thus it did not consider that Indonesia failed to set out a brief statement of the nature of the appeal or to provide an identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel, as required under Rule 20(2)(d)(i). Moreover, inasmuch as Indonesia's appeal concerned the scope of the Panel's terms of reference, it recalled that the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims are not raised in the Notice of Appeal.

Rule 21(2)(b)(i) of the Working Procedures

Rule 21(2)(b)(i) provides that while both the Notice of Appeal and the appellant's submission must set out the allegations of errors, the appellant's submission must be more specific, in that it must be precise as to the grounds of appeal, the legal arguments which support it, and the provisions of the covered agreements and other legal sources upon which the appellant relies. The Appellate Body considered that Indonesia's appellant's submission set out more specific legal argumentation in support of the grounds of appeal identified by Indonesia in its Notice of Appeal. In particular, Indonesia's appellant's submission contained three sections of arguments corresponding to the three sections of the Notice of Appeal described above.

The Appellate Body recognized that there was a certain degree of overlap in some of the arguments advanced by Indonesia in its appellant's submission, particularly as to the scope of the Panel's terms of reference concerning the Panel's finding under Article I:1 of the GATT 1994. However, in its view, this alone did not amount to a failure to comply with Rule 21 of the Working Procedures. Instead, it considered that the specific criticisms raised by the complainants related more to the merit and substance of Indonesia's legal arguments, rather than to the procedural adequacy or admissibility of its appeal. In

raising their procedural objection, it appeared to the Appellate Body that the complainants were taking issue with the lack of clarity in Indonesia's appeal regarding: (i) the *reasons* why reversal of the Panel's finding that the measure at issue was not a safeguard measure would automatically require reversal of the Panel's finding under Article I:1 of the GATT 1994; and (ii) the specific legal elements of Article 6.2 of the DSU according to which the Panel is alleged to have exceeded its terms of reference. While criticisms of such a nature may be relevant to the substantiation of an appellant's allegations of errors, the Appellate Body did not consider that such criticisms spoke to the proper demarcation of the limits of appellate review.

Thus, the Appellate Body considered that Indonesia's Notice of Appeal identified the alleged errors in the issues of law covered in the Panel Report and legal interpretations developed by the Panel, as required under Rule 20(2)(d). It also considered that the complainants' objection under Rule 21(2)(b)(i) was not pertinent to the scope of appellate review but rather related to the merits and substance of Indonesia's legal arguments. Accordingly, it declined the complainants' request that it reject the above aspects of Indonesia's appeal.

B. Whether the Panel erred in finding that Indonesia's specific duty on imports of galvalume was not a safeguard measure

Each participant in these proceedings appealed the Panel's finding that Indonesia's specific duty on imports of galvalume was not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. They each alleged that the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX. Indonesia further contended that, by making that finding, the Panel: (i) exceeded its terms of reference under Articles 6.2 and 7.1 of the DSU; and (ii) failed to conduct an objective assessment of the matter under Article 11 of the DSU.

1. The Panel's findings

Both sides maintained before the panel that Indonesia's specific duty on imports of galvalume constituted a safeguard measure to which the disciplines of the Agreement on Safeguards applied within the meaning of Article 1 of the Agreement on Safeguards. Recalling its duty under Article 11 of the DSU to undertake an objective assessment of the matter, including an objective assessment of the applicability of the covered agreements invoked in this dispute, the Panel had determined that it would have to examine this issue for itself, rather than simply proceeding on the basis of the parties' concurring positions.

In the Panel's view, a safeguard measure could be deemed to exist only if the suspension or withdrawal related to a GATT obligation or concession that a Member found it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury. It considered that Indonesia had no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions and was, therefore, free to impose any amount of duty it deems appropriate on that product, including the specific duty at issue in these proceedings. In light of this finding, the panel determined that

Indonesia's specific duty on imports of galvalume did not suspend, withdraw, or modify Indonesia's obligations within the meaning of Article II of the GATT 1994. It also found that the measure did not suspend any other obligation incurred by Indonesia under the GATT 1994.

In light of this, the Panel found that the measure at issue did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

2. Whether the Panel erred under Article 6.2, 7.1, or 11 of the DSU

In determining whether the Panel exceeded its terms of reference or failed to carry out an objective assessment of the matter, the Appellate Body examined the extent to which the Panel had a duty to carry out an independent assessment of the applicability of the Agreement on Safeguards in order to subsequently rule on the claims raised by the complainants.

The Appellate Body recalled its previous guidance that a claim, for the purposes of Article 6.2, refers to an allegation that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. The identification of the treaty provisions claimed to have been violated by the respondent is necessary if the legal basis of the complaint is to be presented. By contrast, Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the applicability of a given covered agreement. These provisions are not directly part of the "legal basis of the complaint", for they are not claimed to have been violated by the respondent.

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

The Agreement on Safeguards applies to the measures provided for in Article XIX of GATT 1994. A panel's assessment of claims brought under the Agreement on Safeguards may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. As the Appellate Body has consistently stated, nothing in the DSU limits the faculty of a panel freely to develop its own legal reasoning to support its own findings and conclusions on the matter under its consideration. Indeed, the duty to conduct an objective assessment of the matter may, at times, require a panel to depart from positions taken by the parties.

In light of the above, the Appellate Body considered that a panel was not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute. It therefore found that the Panel did not err under Article 6.2, 7.1, or 11 of the DSU in carrying out its own assessment of whether the measure at issue constituted a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

3. Whether the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994

Each of the three participants claimed that the Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 in finding that Indonesia's specific duty on imports of galvalume was not a safeguard measure. Indonesia submitted that, in determining whether a measure qualified as a safeguard measure, it was relevant to consider among other things, the objective and the context of that measure. Specifically, a measure taken with the objective to prevent or remedy serious or threat of serious injury to the domestic industry as a result of an unforeseen development constituted a safeguard measure. Indonesia contended that, in finding that the measure at issue was not a safeguard measure, the Panel improperly disregarded the stated "nature and objective" of the measure. Indonesia also considered that the Panel erroneously considered that the suspension of Article I:1 of the GATT 1994 could not be invoked to justify the imposition of a safeguard measure.

According to Chinese Taipei, Article XIX:1(a) did not provide any definition of what constitutes a safeguard measure, but merely lays down certain criteria and conditions under which a WTO Member may legally impose such a measure. Chinese Taipei argued that the term "safeguard measure" should be interpreted broadly so as to encompass all measures taken against serious injury arising from increased imports without any limitation to the particular type of measure. On this basis, Chinese Taipei took issue with the Panel's finding that where a measure is not *necessary* to remedy or prevent serious injury, then such measure is not a safeguard.

According to Viet Nam, a safeguard measure is a “suspension” of GATT obligations, or a “withdrawal” or “modification” of GATT concessions, which is taken with a view to preventing or remedying serious injury to the domestic industry or threat thereof, and facilitating the adjustment of the domestic industry. Viet Nam posits that the fact that a measure was taken pursuant to the procedures provided for under Article XIX and the Agreement on Safeguards and was notified as a safeguard measure to the Committee on Safeguards provides strong evidentiary support for a finding that the measure at issue is a safeguard measure that seeks to prevent or remedy serious injury.

Article 1 of the Agreement on Safeguards specifies that safeguard measures are measures provided for in Article XIX of GATT 1994. The action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession.

Absent such a suspension, withdrawal, or modification, the Appellate Body failed to see how a measure could be characterized as a safeguard measure. Further, Article XIX:1(a) indicates that the measures provided for are those that suspend a GATT obligation or withdraw or modify a tariff concession in order to prevent or remedy serious injury to a Member's domestic industry caused or threatened by imports subject to a GATT obligation or tariff concession.

The Appellate Body recalled that in order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard measure. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product. In order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

For the Panel, one of the defining features of safeguard measures is the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied. The Appellate Body found this approach by the Panel to be problematic.

First, the Appellate Body considered that the Panel appeared to have considered that, in order to qualify as a safeguard measure, a measure must operate to the extent and for such a time as may be necessary to prevent or remedy injury. It recalled that the issue of whether a measure is applied to the extent and for such time as may be necessary to prevent or remedy serious injury is not relevant to determining whether that measure is a safeguard measure for purposes of the applicability of the Agreement on Safeguards. Instead, it relates to the separate question of whether a safeguard measure is in conformity with the procedural and substantive requirements of the Agreement on Safeguards. Second, it considered the Panel to have suggested that in determining whether a measure is a safeguard measure, it is relevant to consider whether it was adopted in a situation where all of the conditions for the imposition of a safeguard measure are satisfied. However, it recalled that an assessment of whether the conditions for

the imposition of a safeguard measure have been met is pertinent to the question of whether a WTO Member has applied a safeguard measure in a WTO-consistent manner.

In light of the above, the Appellate Body considered that the Panel conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards.

The Appellate Body next examined the Panel's application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994 to the measure at issue in these proceedings. The Panel had found that this measure did not constitute a safeguard measure on three grounds. First, it found that, since Indonesia had no tariff binding on galvalume in its WTO Schedule of Concessions, the measure at issue did not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994. Second, the Panel dismissed Indonesia's argument that the measure at issue suspended the GATT exception under Article XXIV of the GATT 1994. In particular, the Panel observed that Indonesia's tariff commitments vis-à-vis its RTA partners were obligations assumed under the respective RTAs, not the WTO Agreement, such that there was no basis to assert that the measure at issue suspended the GATT exception under Article XXIV". Third, the Panel rejected Indonesia's assertion that the exemption of 120 countries from the scope of application of the specific duty, which Indonesia considered to be mandated by Article 9.1, resulted in a discriminatory application of the measure at issue that suspended Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994, the Panel was required to ascertain whether the suspension, withdrawal, or modification of a GATT obligation or concession entailed by the measure at issue was designed to prevent or remedy serious injury.

In the Appellate Body’s view, the imposition of the duty on imports of galvalume from some, and not all, Members resulted in the discriminatory application of the measure at issue, as it departed from the obligation to immediately and unconditionally accord any advantage, favour, privilege or immunity to like products originating in all WTO Members. However, it noted that neither Regulation 137 nor the Final Disclosure Report indicated that the exemption was designed to pursue the specific objective of preventing or remedying serious injury. Before the Panel, Indonesia confirmed that the exemption was neither intended nor designed for that purpose.

The Appellate Body observed that neither the Regulation of the Minister of Finance of the Republic of Indonesia on Imposition of a Safeguard Duty against the Import of Flat-Rolled Products of Iron or Non-Alloy Steel (Regulation 137) nor the Final Disclosure Report referred to the objective of targeting the major contributors to the threat of serious injury. Instead, those instruments expressly indicated that the exemption of 120 countries from the scope of application of the specific duty pursued the objective of complying with the disciplines of Article 9.1 of the Agreement on Safeguards.

Having reviewed the design, structure, and expected operation of the measure at issue, coupled with all the relevant facts and arguments on the record, the Appellate Body concluded that the measure did not present the constituent features of a safeguard measure for purposes of the applicability of the WTO

safeguard disciplines. The imposition of the specific duty on galvalume may seek to prevent or remedy serious injury to Indonesia's industry, but it did not suspend any GATT obligation or withdraw or modify any GATT concession.

Based on the foregoing, and despite its reservations on certain aspects of the Panel's interpretation of Article XIX:1(a) of the GATT 1994, the Appellate Body upheld the Panel's overall conclusion that the measure at issue did not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

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

Having upheld the Panel's finding that the measure at issue is not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Appellate Body addressed whether a claim of inconsistency with Article I:1 of the GATT 1994 with respect to Indonesia's specific duty on imports of galvalume "as a stand-alone measure" (i.e. not as a safeguard measure) was within the scope of the Panel's terms of reference. It first addressed whether the complainants' panel request was within the scope of the Panel's terms of reference. Chinese Taipei and Viet Nam emphasized that their panel requests described the measure at issue as "the *specific duty* imposed as a safeguard measure". In their view, the inclusion of the term "safeguard measure" in such description simply reflected how the measure was imposed by Indonesia, without conditioning the Article I:1 claim upon the legal characterization of the measure at issue.

The complainants argued that this provided a brief summary of the legal basis of their Article I:1 claim by connecting the specific duty to the provision they claim to have been infringed. On this basis, the complainants considered that the claim in their panel requests under Article I:1 of the GATT 1994 complied with the requirements of Article 6.2 of the DSU, and therefore the matter was properly within the Panel's terms of reference.

Beginning with the first requirement of Article 6.2, the Appellate Body noted that both Chinese Taipei's and Viet Nam's panel requests identified the "measures at issue" as including the specific duty imposed as a safeguard measure, as a result of the investigation initiated on 19 December 2012. In its view, this description and presentation of the specific duty as a "measure at issue" clearly identified it as a measure that was alleged to be causing the violation of an obligation contained in a covered agreement. In accordance with the conceptual distinction between measures and claims in a panel request, what is significant at this stage of the analysis under Article 6.2 is that *the specific duty* is clearly singled out in the panel requests as a measure at issue. Thus, the Appellate Body found that the complainants' panel requests met the requirement under Article 6.2 to identify the specific measures at issue with respect to the specific duty applied by Indonesia on imports of galvalume.

With respect to the second requirement of Article 6.2, the Appellate Body examined whether the language in the complainants' panel requests set out the "the legal basis of the complaint" under Article I:1 of the GATT 1994 in a manner "sufficient to present the problem clearly". It considered that, based on the complainants' panel requests, the legal basis for a finding of inconsistency with Article I:1 of the GATT 1994 was that the specific duty imposed by Indonesia applied to products originating only in certain countries. At the same time, both complainants set out a prefatory comment under the section of their panel requests concerning the legal basis of the complaint. In the particular paragraph setting out the legal basis for their complaint under Article I:1, both complainants referred clearly to "the specific duty imposed by Indonesia". This accorded with the complainants' identification of the specific duty as a measure at issue. Thus, as required by Article 6.2 of the DSU, the measure at issue had been clearly identified as the specific duty on galvalume.

In the Appellate Body's view, the formulations used in the panel requests, particularly in the paragraph setting out the legal basis of the complaint against the specific duty under Article I:1 of the GATT 1994, were sufficient to articulate a claim against the specific duty irrespective of its characterization as a non-safeguard measure.

Therefore, the Appellate Body found that the Panel did not err in concluding that the complainants properly raised a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure. As the Panel did not err in identifying the matter within its terms of reference, and given that Indonesia did not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994, the Appellate Body upheld the Panel's finding that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation 137 was inconsistent with Indonesia's obligation to accord MFN-treatment under Article I:1 of the GATT 1994.