galvalume originating in all but the 120 countries listed in Regulation 137 is inconsistent with Indonesia's obligation to accord MFN-treatment under Article I:1 of the GATT 1994.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions:

6.1 Whether Indonesia's Notice of Appeal and appellant's submission comply with the Working Procedures for Appellate Review

6.2. We consider that Indonesia's Notice of Appeal identifies 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, as we see it, the complainants' objection under Rule 21(2)(b)(i) is not pertinent to the scope of appellate review. Accordingly, we decline the complainants' request that we "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".

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

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

6.3. 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.

6.4. The complainants in this dispute claimed that Indonesia's specific duty on imports of galvalume is inconsistent with Article XIX of the GATT 1994 and certain substantive provisions of the Agreement on Safeguards. Therefore, it was the Panel's duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constitutes a safeguard measure in order to determine the applicability of the substantive provisions relied upon by the complainants as the basis for their claims.

6.5. We, therefore, find 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 constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

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

6.6. 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.

6.7. Having reviewed the design, structure, and expected operation of the measure at issue, together with all the relevant facts and arguments on record, we find that this measure does 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 does 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 has not been shown to be designed to prevent or remedy serious injury to Indonesia's domestic industry. Rather, that exemption appears to constitute an ancillary aspect of the measure, which is 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, we find that the measure at issue, considered in light of those of its aspects most central to the issue of legal characterization, does not constitute one of the "measures provided for in Article XIX of GATT 1994".

6.8. Accordingly, we uphold the Panel's overall conclusion, in paragraphs 7.10 and 8.1.a of its Report, that the measure at issue does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Having upheld the Panel's conclusion, there is no legal basis for us 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.

6.3 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

6.9. We consider 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 identify it as a measure that is alleged to be causing the violation of an obligation contained in a covered agreement. We further note that the language used in the panel requests plainly connects 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 our view, the additional language in the panel requests in the nature of factual background or legal argument concerning the characterization of the measure does not narrow the claims raised under Article I:1 of the GATT 1994. We further find that the complainants' submissions to the Panel confirm that their claims of inconsistency with Article I:1 of the GATT 1994 encompass alleged discrimination between countries exempted from the scope of application of the specific duty and countries to which such an exemption does not apply (including the complainants themselves). In light of the foregoing, the formulations used in the panel requests in this dispute are sufficient in our view to articulate a claim against the specific duty as a stand-alone measure (i.e. as a non-safeguard measure).

6.10. Accordingly, we find 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 does not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994, we uphold the Panel's finding in paragraphs 7.44 and 8.1.b of its Report that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation 137 is inconsistent with Indonesia's obligation to accord MFN treatment under Article I:1 of the GATT 1994.

6.4 Recommendation

6.11. The Appellate Body recommends that the DSB request Indonesia to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Article I:1 of the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 10th day of July 2018 by:

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Hong Zhao
Presiding Member

_____

Shree Baboo Chekitan Servansing
Member

_____

Peter Van den Bossche
Member