# The Experience of the Application of Safeguards on Certain Iron or Steel products in Indonesia : Lesson for Thailand

จุฬาลงกรณ์มหาวิทยาลัย
CHULALONGKORN UNIVERSITY

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น.ส.ณัฐณิช สันติเมธวิรุฬ

วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
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ณัฐณิช สันติเมธวิรุฬ : ประสบการณ์การใช้มาตรการปกป้องสินค้าเหล็กในประเทศอินโดนีเซีย: บทเรียนสำหรับประเทศไทย. ( The Experience of the Application of Safeguards on Certain Iron or Steel products in Indonesia : Lesson for Thailand) อ.ที่ปรึกษาหลัก : ศ. ดร.ศักดา ธนิตกุล


เมื่อเปรียบเทียบกับการมาตรการทางการค้าอื่น ๆ ภายใต้องค์การการค้าโลก การใช้มาตรการป้องกันการนำเข้าสินค้าที่เพิ่มขึ้นโดยสมาชิกองค์การการค้าโลกค่อนข้างน้อยเนื่องจากข้อกำหนดของการป้องกันนั้นยากที่จะปฏิบัติตาม อย่างไรก็ตาม มีการเปลี่ยนแปลงแนวโน้มดังกล่าวเมื่อมีการเพิ่มจำนวนมาตรการป้องกันที่กำหนดโดยอินโดนีเซีย เนื่องจากอินโดนีเซียและไทยต่างเป็นผู้ผลิตเหล็กเคลือบสังกะสีชั้นนำของโลก จึงจะเป็นประโยชน์อย่างยิ่งในการศึกษาการใช้มาตรการปกป้องของอินโดนีเซียเพื่อคุ้มครองอุตสาหกรรมเหล็กเคลือบสังกะสีภายในประเทศ รายงานขององค์กรอุทธรณ์เกี่ยวกับการใช้มาตรการปกป้องของอินโดนีเซียแก่สินค้าเหล็กเคลือบสังกะสีได้ให้บทเรียนที่สำคัญแก่ประเทศไทยเกี่ยวกับการกำหนดมาตรการปกป้องที่คณะผู้พิจารณามีอำนาจโดยอิสระในการพิจารณากำหนดว่ามาตรการทางการค้าใดเป็นมาตรการปกป้อง โดยไม่จำต้องถือตามการพิจารณากำหนดมาตรการปกป้องโดยคณะกรรมการพิจารณามาตรการปกป้องภายในประเทศสมาชิก บทเรียนนี้มีนัยสำคัญที่นำไปสู่การเปลี่ยนแปลงต่อวิธีที่หน่วยงานที่เกี่ยวข้องภายในประเทศไทยจะใช้มาตรการปกป้องในอนาคต เพื่อคุ้มครองผู้ผลิตภายในประเทศอย่างเหมาะสมและหลีกเลี่ยงข้อพิพาททางการค้าในอนาคต

วิทยานิพนธ์ฉบับนี้ได้นำเสนอข้อเท็จจริงและประเด็นข้อพิพาทในคดีพิพาทเกี่ยวการอินโดนีเซียใช้มาตรการปกป้องสินค้านำเข้าที่เพิ่มขึ้นแก่สินค้าเหล็กเคลือบสังกะสี รวมทั้งได้มีการวิเคราะห์ถึงเหตุผลและผลที่เกิดขึ้นจากการที่อินโดนีเซียใช้มาตรการเพิ่มอากรแก่สินค้าเหล็กเคลือบสังกะสีซึ่งเป็นสินค้าที่ไม่ผูกพันในตารางข้อผูกพัน คดีพิพาทดังกล่าวได้ให้บทเรียนสำคัญเกี่ยวกับทิศทางในการตัดสินข้อพิพาทขององค์กรระงับข้อพิพาทภายใต้องค์การการค้าโลก สุดท้ายนี้ วิทยานิพนธ์ฉบับนี้ได้นำเสนอข้อเสนอแนะแก่ประเทศไทยในใช้มาตรการทางการค้าเพื่อคุ้มครองอุตสาหกรรมเหล็กภายในประเทศต่อไป


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# # 6186352934 : MAJOR BUSINESS LAW
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Nattanit Santimetvirul : The Experience of the Application of Safeguards on Certain Iron or Steel products in Indonesia : Lesson for Thailand. Advisor: Prof. SAKDA THANITCUL, Ph.D.

In comparison to other trade remedies under WTO, the number of safeguard measures imposed by WTO members has been relatively low as the requirements of safeguard is difficult to fulfill. However, there is change to such trend as there has been an increase in number of safeguard measures imposed by Indonesia. The Appellate Body Report on Indonesia — Safeguard on Certain Iron or Steel Products has provided important lesson to Thailand concerning on the determination of safeguard measure which has not been clearly mentioned in the WTO cases. The importance of safeguard characterization has been emphasized. This dispute has given an significant takeaway that the panel is free to perform objective and independent assessment on the characterization of safeguard measure despite the determination of safeguard measures by domestic authorities.

This thesis will address the facts and issues arising in Indonesia — Safeguard on Certain Iron or Steel Products. The underlying reasons and effects resulting from the imposition of specific duty on the imports of galvalume which is unbound product under the Schedule of Concessions will also be examined. More importantly, Indonesia — Safeguard on Certain Iron or Steel Products has given significant implication on the determination of safeguard measure, which will consequently reflect the way the WTO Dispute Settlement Body will handle the application of safeguard measure in the future. Ultimately, this thesis will provide recommendation for Thailand in protecting domestic steel industry.

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# Chapter I Introduction

## 1.1 Background and statement of the problem

Comparing to other trade remedies like anti-dumping and countervailing duty, safeguard measures applied by WTO members have been deficient since it is difficult for the Members to meet all the requirements of safeguard under Article XIX of GATT 1994 and the Agreement on Safeguards. Therefore, most countries applied other kinds of trade remedies in order to protect their domestic industries. Thailand has always been aware of applying the safeguard measure. However, there has been a recent change in the trend of the application of safeguard measures. Since 2010, Indonesia has initiated a considerable number of safeguard measures, including the application of safeguard measures on steel imports. Indonesia is one of the world's top ten steel importers, so the decision of Indonesia's competent authorities to launch safeguard measures on steel imports signifies various implications that should be thoroughly examined. Indonesia and Thailand share many similar characteristics. Both are countries in ASEAN with a similar level of economic development. Galvalume, which is the subject of the dispute, can be used in automobiles production. Manufacturing automobiles is one

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of the critical incomes of both countries, so they are counterparts in the steel sector. As steel contributes an integral part in manufacturing automobiles, the application of safeguard measures on steel imports by Indonesia had a significant effect on domestic automobiles industries. It will be useful to examine the underlying reasons and effects resulting from launching safeguard measures. More importantly, the Appellate Body report on Indonesia — Safeguard on Certain Iron or Steel Products has given significant implication on the determination of safeguard measure, which will consequently reflect the way the Appellate Body will handle the application of safeguard measure in the future. Therefore, the analysis of the application of safeguard measures on steel imports by Indonesia can provide Thailand with lessons to guide Thailand in the direction of launching safeguard measures in the steel sector in the future.

## 1.2 Thesis Objectives

1. To understand and analyze the requirements of safeguard measure under GATT 1947, GATT 1994 and WTO Agreement of Safeguards

2. To study the case study of the application of safeguard measures on imports of galvalume in Indonesia

3. To examine the implications arising from Indonesia — Safeguard on Certain Iron or Steel Products

3. To examine the reasons and consequences of the application of safeguard measure

4. To recommend and guide Thailand on the application of safeguard measure on the Steel sector in the future

**1.3 Thesis Hypothesis**

The Appellate Body's decision of Indonesia — Safeguard on Certain Iron or Steel Products has provided significant implication on the characterization of safeguard measures as the panel can perform objective and independent assessment despite the determination of safeguard measures by domestic authorities. It is recommended that Thailand learn from this implication on the determination of safeguard measures in order to apply in seeking remedy for the Thai steel sector in the future.

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## 1.4 Thesis Scopes

1. The scope of the thesis will systematically examine the requirements of safeguard measures under GATT 1994 and the Agreement on Safeguards in order to discuss and address the critical legal issues arising from the use of safeguard measures.

2. The scope of this thesis will be restricted to a dispute concerning the use of safeguard measures on Certain Steel or Iron Products by Indonesia.

3. The scope of this thesis will focus on the legal issues related to the use of safeguard measures.

## 1.5 Thesis Methodology

Qualitative and documentary methods are applied to this thesis by gathering information from various reliable resources consisting of GATT 1947, GATT 1994 and the Agreement on Safeguards, legal handbooks, journal articles and online databases such as Westlaw, LexisNexis, and HeinOnline. Also, this thesis involves a detailed analysis of Indonesia - Safeguard on certain iron or steel products, which acts as a model and lesson for Thailand concerning the application of safeguard measures on the steel sector.

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## 1.6 Benefits of the Thesis

1. To understand the requirements and conditions of safeguard measures as stipulated in GATT 1994 and The Agreement on Safeguards

2. To draw lessons from the application of safeguard measures on steel products by Indonesia for the application of such measures by Thailand in the future.

3. To provide recommendations for Thailand concerning the application of safeguard measures on the steel sector.

# Chapter II Safeguard Measures

## 2.1 Background and history of the safeguard measure

The main objective of the World Trade Organization is to facilitate free trade. However, Members cannot adhere to trade liberalization in all situations.[1] Therefore, there are some exceptions to trade liberalization.[2] One of the exceptions is safeguard measure. A safeguard measure is established to provide economic emergency exceptions.[3] WTO Members can use safeguard measures as a safety valve to restrict trade in situations where there is an increased import causing severe injury to the domestic producers of like-products or directly competitive products.[4] Unlike anti-dumping and countervailing measures, safeguard is independent of unfair trade practice. The safeguard measure retaliates increased imports, so a different standard is used in the application of safeguard measures.

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[1] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge. United Kingdom: Cambridge University Press, 2017).
[2] Ibid.
[3] Ibid.
[4] Ibid.

## 2.2 Safeguard measure under GATT 1947

Article XIX of the GATT is known as the escape clause or Safeguard provision.[5] The underlying reason behind this name is because GATT signatory can use this Article to escape from GATT obligations that lead to serious injury to domestic producers of like-product or competitive products that the volume of imports is increasing.[6] The use of safeguard measures should be on a non-discriminatory basis. In applying for safeguard relief, such measures can be in the form of tariffs or auctioned quotas.[7]

The frequency of the use of safeguard measures has been shallow before the existence of the WTO Agreement on Safeguards.[8] The reason behind such infrequent use of safeguard is that some WTO members prefer to guard their domestic industries through grey area measures instead of safeguard measures.[9] For instance, the governments used bilateral negotiations that lay outside from the scope of GATT 1994 to

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[5] Robert Howse M.J. Trebilcock, Antonia Eliason, *The Regulation of International Trade* (Routledge, 2012).
[6] Ibid.
[7] Ibid.
[8] Ernst-Ulrich Petersmann, *Grey Area Trade Policy and the Rule of Law*. Kluwer Law International, 2007.
[9] World Trade Organization, "Understanding the Wto: The Agreements," https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.html.

persuade the exporting countries to lower the volume of exports voluntarily or to agree to other methods of sharing markets.[10]

## 2.3 Safeguard measure under GATT 1994 and WTO Agreement of Safeguards

After encountering several problems arising from the use of safeguard measures, there was a reform of the safeguard regime under Uruguay Round to tackle the problems arising from the previous use.[11] Many countries often use Grey-area measures such as VERs, VRAs, and OMAs instead of safeguard measures; hence it was necessary to clarify and reinforce the disciplines of safeguard measures in order to eliminate grey-area measures.[12] The challenge occurred during Uruguay Round was to find the balance between two objectives which are to promote the use of safeguard measure instead of grey-area measures and to maintain trade liberalization which is the main objective of WTO.[13]

As a result of the negotiation, the Agreement on Safeguards has created a significant improvement in addressing the problems under GATT 1947 by providing specific disciplines, requiring all safeguard

[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.

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measures to comply with Article XIX of the GATT 1994 and prohibiting grey-area measures.[14] This Agreement sets time limits or so-called "sunset clause" on all safeguard actions.[15] According to this Agreement, Members must not seek, take, or maintain any voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or the import side.[16] In applying safeguard measures, there are various disciplines that the member countries have to follow. Firstly, the Uruguay round provides relaxation on the principle of non-discrimination in order to avoid the act of side-sweeping by the exports, which do not focus mainly on the specific injury requirement.

Moreover, the concept of the injury has been remodeled to be more suitable for domestic producers who apply for the use of safeguard measures.[17] If the domestic producers can prove that there is an increase increase in the volume of imports which cause serious injury to the workers or communities and there is no other way to prevent the loss, the producers are qualified for the imposition of safeguard measures.[18]For the manner of using aforementioned measures, an administrative manner

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[14] Ibid. Footnote 1
[15] Ibid. Footnote 8
[16] Ibid. Footnote 8
[17] Ibid. Footnote 1
[18] Ibid. Footnote 1

should be used instead of a politically-driven manner.[19] In addressing the problem of a grey area measures, this Agreement brings the grey area measures within its purview and prohibiting further such measures.[20]

### 2.4 Relationship between Article XIX of GATT 1994 and the Agreement on Safeguards

Concerning the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards, the Appellate Body in Korea-Dairy ruled that safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both Article XIX of the GATT 1994 and the Agreement on Safeguards[21]. According to Article 1, the actual objective of the Agreement on Safeguards is to establish rules for the application of safeguard measures which means that the measure applied must conform with the provisions applied in accordance to this Agreement.[22] It can be implied that any safeguard action must be consistent with the provisions of Article XIX of the GATT 1994 and the provisions of the Agreements on Safeguards.[23] Therefore, any safeguard

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[19] Ibid. Footnote 1
[20] Appellate Body Report, Korea — Dairy, para.77
[21] Ibid.
[22] Ibid.
[23] Ibid.

measure imposed after the entry into force of the WTO Agreement must comply with provisions of both the Agreement on Safeguards and Article XIX of the GATT 1994.

Regarding the previous dispute brought to the dispute settlement body of WTO, the Agreement of Safeguards does not have any implication of making the requirements of Article XIX under GATT 1994 to be no longer used.[24] This dispute has given the interpretation of Article XIX of GATT 1994 is applied together with the Agreement on Safeguards. The Panel in Argentina - Footwear (EC) concluded that safeguard investigations and safeguard measures that are imposed after the entry into the force of the WTO agreements must satisfy the requirement of Article XIX of GATT 1994.[25] However, the Appellate Body reversed this conclusion by the panel.[26] The Appellate Body ruled that the precise nature of the relationship between Article XIX of the GATT 1994 and the Agreement on Safeguards within the WTO Agreement is described in Articles 1 and 11.1(a) of the Agreement on Safeguards.[27] It is vital to examine Article 1 along with Article 11 of the

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[24] "Appellate Body Report, Argentina - Footwear (Ec)."para. 83
[25] Ibid., Footnote 5
[26] Ibid., Footnote 25
[27] Ibid., Footnote 25, para.82

Agreement on Safeguards to find out the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards.

**Article 1 of the Agreement on Safeguards**

"This Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994."[28]

**Article 11 of the Agreement on Safeguards**

"Prohibition and Elimination of Certain Measures

1. (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement."[29]

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It can be implied that the purpose of Article 1 is to establish the discplines in applying safeguard measures which are found in Article XIX of GATT 1994."[30] The interpretation of this Article is that there is no wording that implied the incorporation of the requirement in Article

[28] *Agreement on Safeguards*. Article 1
[29] Ibid. Article 11
[30] Ibid., Footnote 25

XIX of the GATT 1994. To elaborate, the presence of Article 1 and Article 11.1(a) of the Agreement on Safeguards does not subsume requirement found in Article XIX of the GATT 1994.[31] Article XIX of the GATT 1994 continues in full force and effect and establishes particular prerequisites for the imposition of safeguard measures.[32] Neither of these provisions states that any safeguard action taken after the entry into force of the WTO Agreement need only conform with the provisions of the Agreement on Safeguards.[33]

Moreover, the Panel in Argentina - Footwear (EC) ruled that safeguard measures that meet the requirements of the Agreement on Safeguards wil automatically satisfy the requirements of Article XIX of GATT 1994.[34] The reason behind this conclusion by the panel is the clause "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions " was expressly omitted in Article 2.1 of the Agreement on Safeguards.[35] Therefore, being able to meet the requirements of the Agreement on Safeguards means automatically meet

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[31] Ibid., Footnote 25
[32] Ibid., Footnote 25
[33] Ibid., Footnote 25
[34] Panel Report, Argentina – Footwear (EC), para. 8.289.
[35] Ibid., Footnote 25, para. 8.58.

the requirements for Article XIX of GATT 1994 as well. Nonetheless, The Appellate Body rejects this conclusion made by the panel.

Several reasons are supporting the rejection of the Appellate Body's rejection of this conclusion.

First, if the Uruguay Round negotiators had the intention of omitting this clause, they would have written clearly in the Agreement on Safeguards. Since there is no clause denying the application of Article XIX of GATT 1994 stated in the Agreement on Safeguards, it cannot be interpreted that the clause " If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions " has no meaning.[36]

The second reason justifying the relationship between Article XIX of GATT 1994 and the Agreement on Safeguards is that the failure provides meaning and legal effect to all the relevant terms of the WTO Agreement is contrary to the principle of effectiveness in the interpretation of treaties.[37]

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[36] Ibid., Footnote 25, para. 87.
[37] Ibid., Footnote 25, para. 88.

The third reason supporting the Appellate Body's conclusion on this issue is that the conclusion given by the panel is contradictory to the ordinary meaning of Article 1 and Article 11.1(a) of the Agreement on Safeguards.[38] According to the Appellate Body in Argentina - Footwear, the Uruguay Round negotiators did not intend to entirely replace Article XIX of the GATT 1994 with Agreement on Safeguards.[39] Focusing on the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards, the actual intention of negotiators was that the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards would apply cumulatively except a conflict between specific provisions.[40] There is no conflict between provisions of GATT 1994 and the Agreement on Safeguards.[41] Therefore, in order to give meaning to all the applicable provisions relating to safeguard measures, provisions of Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994 should be applied in a cumulative basis.[42]

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The Appellate Body explicitly rejected the idea that those requirements of GATT Article XIX, which are not reflected in the

[38] Ibid., Footnote 25, para. 89.
[39] Ibid., Footnote 25, para. 89.
[40] Ibid., Footnote 25, para. 89.
[41] Ibid., Footnote 25, para. 89.
[42] Ibid., Footnote 25, para. 90.

Safeguards Agreement could have been superseded by the requirements of the latter and stressed that all of the relevant provisions of the Safeguards Agreement and GATT Article XIX must be given meaning and effect.[43] The Appellate Body then reiterated this conclusion in the US - Lamb that Article 1 and Article11.1(a) of the Agreement on Safeguards express the full and continuing applicability of Article XIX of the GATT 1994 which has been clarified and reinforced by the Agreement on Safeguards.[44]

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[43] Panel Report, Us — Lamb. para.7.11.
[44] Appellate Body Report, Us — Lamb. para.70.

# Chapter III Indonesia — Safeguards on Certain Iron or Steel Products

## 3.1 Facts

On 1 June 2015, Viet Nam requested consultations with Indonesia regarding a safeguard measure imposed by Indonesia on imports of certain flat-rolled iron or steel products.[45] Chinese Taipei then requested to join the consultation with Indonesia. On 17 September 2015, Vietnam requested the establishment of a panel to investigate the measure applied by the respondent, Indonesia.[46] The measure at issue is the specific duty applied by Indonesia on imports of galvalume.[47] The domestic galvalume producers, PT Sunrise Steel and PT NS BlueScope, petitioned to Indonesia's competent authority. The specific duty was imposed following an investigation initiated and conducted under Indonesia's domestic safeguards legislation by Indonesia's competent authority (Komite Pengamanan Perdagangan Indonesia, or KPPI).[48]

The specific duty was imposed for a period of three years, according to Regulation No. 137.1/PMK.011/2014 of the Minister of

[45] Request for the Establishment of a Panel by Viet Nam, WT/DS496/3.
[46] Request for the Establishment of a Panel by Chinese Taipei, WT/DS490/2.
[47] Ibid.
[48] Ibid.

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Finance of the Republic of Indonesia, which entered into force on 22 July 2014.[49] Indonesia applies the specific duty to imports of galvalume from all countries except for 120 allegedly developing countries listed in Indonesia's notification to the WTO Committee on Safeguards under Article 9.1 of the Agreement on Safeguards.[50]Indonesia has no binding tariff obligation concerning galvalume inscribed into its Schedule of Concessions for the purpose of Article II of the GATT 1994.

At the time of the request for consultations, the duty rate applied by Indonesia on imports of galvalume on a most-favored-nation (MFN) basis was 12.5%. This MFN-rate was increased to 20% in May 2015. Indonesia applies duty rates ranging from 0% to 12.5% on imports of galvalume from its trading partners under four separate regional trade agreements (RTAs) – the Association of Southeast Asian Nations (ASEAN)-China Free Trade Agreement (12.5%), the ASEAN-Korea Free Trade Agreement (10%), the ASEAN Trade in Goods Agreement (0%) and the Indonesia-Japan Economic Partnership Agreement (12.5%). The tariff rate on galvalume importing from Vietnam is 0% because of preferential

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[49] Regulation of the Minister of Finance of the Republic of Indonesia No. 137.1/Pmk.011/2014 on Imposition of Safeguarding Duty against the Import of Flat-Rolled Products of Iron or Non-Alloy Steel.
[50] Committee on Safeguards, "Notification under Articles 9, 12.1(B), and 12.1(C) of the Agreement on Safeguards ".

trade agreements. The specific duty that is at issue in this proceeding is applied in addition to the existing MFN and preferential duty rates. The complainants in this dispute are Vietnam and Chinese Taipei. These two countries are the top two leading suppliers of galvalume in Indonesia.

### 3.2 Claims by complainants

The complainants, Vietnam and Chinese Taipei, requested the panel to assess the following issues.[51]

The first claim is for the panel to find that the specific duty applied by Indonesia constitutes a safeguard measure as stated in the definition found in Article 1 of the Agreement on Safeguards. Nonetheless, the application of the specific duty at issue by Indonesia is inconsistent with the obligations under Article I:1 of the GATT 1994 because it is applied in a discriminate manner among sources of imports of galvalume from member countries.[52]

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The second claim is that Indonesia applied the safeguard measure inconsistently with the requirements of the application of safeguard measures as follows. The complainants claimed that KPPI, which is Indonesian authorities failed to demonstrate the existence of unforeseen

[51] Panel Report, Indonesia — Safeguard on Certain Iron or Steel Products, para. 3.1
[52] Ibid.

development, the effect of GATT obligations and the logical connection between these elements and increased imports under Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards.[53] Moreover, the complainants also claimed that the determination of increased imports by KPPI was not recent enough to be considered increased imports under Article XIX:1(a) of the GATT 1994 and Articles 2.1 and 3.1 of the Agreement on Safeguards.[54] The complainants also alleged that KPPI failed to provide a reasoned and adequate explanation of how the facts support the determination of threat of serious injury, including the evaluation of all relevant serious injury indicators under Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(a), and 4.2(c) of the Agreement on Safeguards.[55]A threat of injury proven by KPPI did not justify the definition of " threat of injury " under Article 4.1(b) of the Agreement on Safeguards.[56]KPPI also failed to determine a causal link between increased imports and serious injury and to conduct a non-attribution analysis under Article XIX:1(a) of the GATT 1994 and Articles 2.1, 3.1, 4.2(b), and 4.2(c) of the Agreement on

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[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.

Safeguards.[57]KPPI failed to observe the required "parallelism" by applying the specific duty to a product that is different from the product that was the subject of its investigation without reasoned and adequate explanation under Articles 2.1, 3.1, 4.2(a), and 4.2(b) of the Agreement on Safeguards. KPPI excluded from the application of the specific duty products originating in the countries listed in the Annex to Regulation No. 137.1/PMK.011/2014, and not according that exemption immediately and unconditionally to like products originating in the territory of some Members, including the complainants which are contradictory to the general most-favored-nation Treatment under Article I:1 of the GATT 1994.[58]Indonesia failed to provide "all pertinent information" in the notifications of the finding of threat of serious injury and the proposal to impose a safeguard measure to the WTO Committee on Safeguards under Article 12.2 of the Agreement on Safeguards.[59] Indonesia failed to provide a reasonable opportunity to hold prior consultations under Article XIX:2 of the GATT 1994 and Article 12.3 of the Agreement on Safeguards.[60]

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[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.

The third claim is that Indonesia fails to perform the obligation of providing MFN treatment under Article I:1 of the GATT 1994 because Indonesia applies specific duty in a discriminate manner among sources of the imports of galvalume.[61] To elaborate, the complainants claims that Indonesia applied specific duty at issue to imports of galvalume from all countries except for 120 allegedly developing countries stated in the list in Regulation 137.1/PMK.011/2014, which Indonesia had already notified to the WTO Committee on Safeguards under Article 9.1 of the Agreement on Safeguard.[62] Although within the list of 120 allegedly developing excluded from the application of the specific duty, there are six allegedly developed excluded from the application of the specific duty, which meant that the specific duty was applied in a discriminatory manner inconsistent with Article I:1 which could not be justified by Article 9.1.

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It can also be argued that providing exclusion of galvalume originating in these 120 countries from the scope of the specific duty means giving an advantage, favor, or privilege provided in connection with the application of customs duties for 120 countries. Thus, Indonesia failed to accord immediately and unconditionally to like products

[61] Ibid., Footnote 52.
[62] Ibid., Footnote 52.

originating from all WTO Members.[63] This means Indonesia violated MFN-treatment obligation. Indonesia excluded 120 allegedly developing country Members from the application of the specific duty in order to afford S&D treatment following the requirements of Article 9.1 of the Agreement on Safeguards. The parties argued that Indonesia's discriminatory application of the specific duty for this purpose suspended Indonesia's MFN obligations under Article I:1 because: (i) Indonesia was legally required by Article 9.1 of the Agreement on Safeguards to apply the specific duty in a discriminatory manner that would otherwise be inconsistent with Article I:1 of the GATT 1994; and (ii) Indonesia included six allegedly developed countries in the 120 allegedly developing countries excluded from the application of the specific duty, which meant that the specific duty was applied in a discriminatory manner inconsistent with Article I:1 which could not be justified by Article 9.1.

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[63] Ibid., Footnote 52.

### 3.3 Counterclaims by the respondent

The respondent, Indonesia, requested the panel to find that the specific duty applied by Indonesia is a safeguard measure within the definition of Article 1 of the Agreement on Safeguards, and Indonesia consistently adopted and applied safeguard measure under its obligations under the GATT 1994 and the Agreement on Safeguards.

In response to the claim concerning failure to comply with MFN treatment obligation, Indonesia argues that Article XIX authorizes the discriminatory application on galvalume: 1 (a) of the GATT and legally required the terms of Article 9.1 of the Agreement on Safeguards.[64] Indonesia submits that the specific duty at issue suspended Indonesia's obligation to provide MFN treatment under Article I:1 of the GATT 1994 because it is applied on a discriminatory basis in order to comply with the unique and differential treatment (S&D) requirements of Article 9.1 of the Agreement on Safeguards.[65]This is the only justification from Indonesia to justify the exclusion of imports of galvalume from 120 countries. Indonesia did not respond to the claim of Article I:1 by the complainants as a stand-alone measure.[66] Therefore, if the panel finds that

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[64] Ibid., Footnote 52. para. 3.2.
[65] Ibid., Footnote 52. para. 3.2.
[66] Ibid., Footnote 52. para. 3.2.

the measure at issue imposed by Indonesia is not safeguard measure within the meaning of Article I:1 of the GAT, Indonesia's justification for the failure to comply with MFN treatment will also be denied.

### 3.4 Legal Issues

After considering the claims of the complainants and respondent, several issues arising from this case require assessment.

The first issue that needs to be assessed is whether the specific duty on imports of galvalume constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.[67]This issue is to determine whether the determinations of the competent authority in Indonesia regarding the application of specific duty are consistent with Article XIX:1(a) of the GATT 1994.[68]

The second issue is whether the specific duty applied by Indonesia is consistent with the requirements of the application of safeguard measure under GATT 1994 the Agreement on Safeguards.

The third issue is whether the imposition of the specific duty on imports of galvalume from all countries except for 120 countries listed in

[67] Ibid. Footnote 52, para. 7.3.
[68] Ibid. Footnote 52, para. 7.5.

Regulation 137.1/PMK.011/2014 by Indonesia suspended the obligation to provide MFN-treatment under Article I:1 of the GATT 1994.[69]

**3.5 The Decision of the Panel**

For the first issue concerning whether the specific duty applied by Indonesia is in consistent with Article 1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, the panel ruled that the specific duty applied by Indonesia was not a safeguard measure within the meaning of Article1 of the Agreement on Safeguards. The underlying reasons behind this conclusion are related to Article 1 of the Agreement on Safeguards specifies that the rules for the application of safeguard measures shall be understood to mean those measures provided for in Article XIX of GATT 1994.[70] According to Article XIX of GATT 1994, the measures that are considered to be safeguard measures must suspend a GATT obligation 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

[69] Ibid. Footnote 52, para. 7.21.
[70] Ibid., Footnote 52, para. 7.12.

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threaten serious injury to domestic producers of like or directly competitive products"[71] For the interpretation of this Article, applying any measures that suspend, withdraws or modifies a GATT obligation does not mean that such measures will be considered as a safeguard measure. Such measures will have to be applied temporarily to the extent and for such a time as may be necessary to prevent to remedy the serious injury.[72] In determining whether the country has an obligation concerning galvalume, which is the product at issue, it is crucial to consider Indonesia's Schedule of Concessions. Indonesia did not have a binding tariff obligation for galvalume in the country's WTO Schedule of Concessions, so Indonesia can impose any amount of duty deemed appropriate on the imports of galvalume at any time for any period.[73] After the imposition of the specific duty on the imports of galvalume, Indonesia raised the most-favored-nation(MFN) duty rate from 12.5% to 20%.[74] in May 2015, which was the time of the request for consultations. Indonesia's obligations under Article II of the GATT 1994 did not impede the application of the specific duty on imports of galvalume. It can be implied that the specific duty applied by Indonesia did not suspend,

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[71] Ibid., Footnote 52, para. 7.13.
[72] Ibid., Footnote 52, para. 7.14.
[73] Ibid., Footnote 52, para. 7.18.
[74] Ibid., Footnote 52, para. 2.5.

withdraw, or modify Indonesia's obligations under Article II of the GATT 1994.

With regards to the issue concerning whether the specific duty applied by Indonesia is in consistent with the requirements of the application of safeguard measure under GATT 1994 the Agreement on Safeguards, the panel dismissed the entire claims submitted by the complainants relating the failure to comply with the requirements of the application of safeguard measure.[75] The reason behind the panel's dismissal of the claims relating to the failure to follow the requirements of safeguard measures is that the requirements for the application of safeguard measure will only be applied when the measure at issue is safeguard measure. When the panel found that the specific duty applied by Indonesia was not a safeguard measure under the meaning of Article 1 of the Agreement on Safeguards, there is no legal basis to support the complainants; s claims under the Agreement on Safeguards and the GATT 1994 for the specific duty as a safeguard measure.[76] Therefore, the panel does not need to examine the requirements needed for the application of the safeguard measure.

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[75] Ibid., Footnote 52, para. 8.2.
[76] Ibid. Footnote 52, para. 8.2.

For the issue concerning Indonesia's obligation of MFN-treatment, the relevant Article to MFN-treatment is Article I:1. Article I:1 of the GATT 1994 states that " With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. "[77] For this provision, the panel concluded that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation No. 137.1/PMK.011/2014 is inconsistent with Indonesia's obligation to afford MFN-treatment under Article I:1 of the GATT 1994.[78]

It is crucial to note that the understanding that the Members are not allowed to impose any kind of measures on imports for which their tariffs

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[77] *Gatt 1994*. Article I:1

[78] Ibid., Footnote 52, para. 8.1.

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are unbound is incorrect. According to the Panel, the Members may impose a safeguard measure in the form of an appropriate form of quota. Imposing quota on certain products will suspend the obligations under Article XI of GATT 1994.[79] If the measure at issue suspends a GATT obligation or withdraw or modify a GATT concession, it constitutes a safeguard measure so the determination on whether such measure is inconsistent with the Agreement on Safeguards and GATT 1994 must be made.

**3.6 The Process of The Appellate review**

The process of dispute settlement does not end at the panel. A process of review is available for the members who are not satisfied with the ruling of the panel. Under Article 16.4 of WTO Agreement, within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is

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[79] Ibid., Footnote 52, para. 7.41.

without prejudice to the right of Members to express their views on a panel report.[80] As a result, the Members who are not satisfied with the Panel Report can appeal to the Appellate Body. According to Article 17.1 of Dispute Settlement Understanding, a standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation.[81] Such rotation shall be determined in the working procedures of the Appellate Body. Appellate Body Report is the final resolution to a dispute between the parties to that dispute.[82] Without any further mechanism in appealing the Appellate Body Report, the involved parties must adopt the resolution, as stated in the Appellate Body Report.

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### 3.7 The Decision of Appellate Body

There are many issues found in the Appellate Body Report that should be taken into consideration in order to find out the implications of the dispute.

[80] *Dispute Settlement Understanding.* Article 16.4
[81] Ibid. Article 17.1
[82] Appellate Body Report, Ec — Bed Linen, para. 93.

Concerning whether the specific duty imposed by Indonesia constitutes a safeguard measure, the Appellate Body upheld the panel's decision to independently assess the legal characterization of the measure irrespective of the parties' views on the matter. According to the Appellate Body, it is essential to consider that features that determine whether a measure can be appropriately characterized as safeguard measure are different from the conditions that are required so that the measure is consistent with the Agreement on Safeguards and the GATT1994.[83] Therefore, the factors relating to the legal characterization of a measure for purposes of determining the applicability under the Agreement of Safeguards should be put aside from the analysis of the features of a safeguard measure.[84] Even though it is required under Article 5.1 and 7.1 of the Agreement on Safeguards that safeguard measures shall be applied " only to the extent " and " only for such period of time " as may be " necessary to prevent or remedy serious injury and to facilitate adjustment," this requirement has nothing to do with the legal characterization of a safeguard measure.[85] The measure at issue must be considered as a safeguard measure before the requirements are further

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[83] Appellate Body Report, Indonesia — Safeguard on Certain Iron or Steel Products, para. 5.57.
[84] Ibid.
[85] Ibid., Footnote 85, para. 5.59.

examined. The requirements of safeguard measure are relevant to the conformity of safeguard measure under WTO disciplines. It is essential to separate these two concepts apart from each other so they will not be conflated as the same concept. Thus, Appellate Body did not consider these requirements in determining whether the measure imposed by Indonesia constitutes safeguard measure in the meaning of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994.[86]

In the appeal to the Appellate Body, Indonesia attempted to present that the characterization of safeguard measure by the panel is incorrect by claiming that the word "shall be free" in Article XIX:1(a) implies that Indonesia has the discretion to or not to the suspend the MFN obligation whenever Indonesian authorities deemed that it was appropriate to impose such measure, so the measure at issue is considered as a safeguard measure.[87]

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Instead, the Appellate Body ruled that constituent features of the measure must be shown in order to constitute safeguard measure.[88] The measure that lacks such features cannot be characterized as a safeguard measure.[89] There are two main features for the measure at issue to be

[86] Ibid., Footnote 85, para. 5.59.
[87] Ibid., Footnote 85, para. 5.42.
[88] Ibid., Footnote 85, para. 5.6.
[89] Ibid., Footnote 85, para. 6.6.

considered as a safeguard measure.[90] Primarily, the measure at issue must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession.[91] 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.[92] The part of Article XIX: 1(a) stipulates that " to prevent or remedy such injury " shows that the imposition of measure must suspend a GATT obligation or the withdraw or modify a GATT concession for a specific objective which is to prevent or remedy serious injury to the Member's domestic industry.[93] It could be inferred that suspension, withdrawal, or modification of a GATT obligation alone is not sufficient.[94] The measure at issue must suspend, withdraw, or modify with the purpose of preventing or remedying injury.[95] The Appellate Body ruled that a panel must assess the design, structure, and expected operation of the measure in order to determine the presence of these constituent features.[96] After a revision of the design, structure, and expected operation of the measure at issue, together with all the relevant

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[90] Ibid., Footnote 85, para. 5.6.
[91] Ibid., Footnote 85, para. 5.6.
[92] Ibid., Footnote 85, para. 5.6.
[93] Ibid., Footnote 85, para. 5.56.
[94] Ibid., Footnote 85, para. 5.56.
[95] Ibid., Footnote 85, para. 5.56.
[96] Ibid., Footnote 85, para. 5.6.

facts and arguments on presented by the parties in dispute, the Appellate Body found that the imposition of the specific duty on galvalume may seek to prevent or remedy serious injury to Indonesia's steel industry. However, it does not suspend any GATT obligation or withdraw or modify any GATT concession as galvalume is unbound product under Schedule of Concessions of Indonesia.[97] There was no obligation for Indonesia to impose the specific duty within the rate that is bound under the Schedule of Concessions. Therefore, the imposition of duty on galvalume by Indonesia does not present the constituent features of a safeguard measure for purposes of the applicability of the WTO safeguard disciplines, so it was not subject to the disciplines found in the Agreement on Safeguards.[98] As the measure at issue was not qualified as a safeguard measure from the plain reading, the Appellate Body thus refused to examine the issues concerning the requirements of a safeguard measure.

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For the issue concerning whether Indonesia violates the obligation to afford MFN-treatment under Article I:1 of the GATT 1994, the panel regarded the measure in dispute as a stand-alone measure, not a safeguard measure. Although the measure imposed by Indonesia stays out of the

[97] Ibid., Footnote 85, para. 6.7.
[98] Ibid., Footnote 85, para. 6.7.

scope of the Agreement on Safeguard, such measure is still subject to MFN-treatment which is the general rule under GATT 1994. According to the panel requests by the claimants which are Indonesia and Chinese Taipei, the claimants asserted that the imposition of duty on the imports of products except for 120 countries in the list is a violation of MFN-treatment obligation. The panel ruled that Indonesia failed to follow MFN-treatment and suggested that Indonesia bring the measure into conformity with the MFN-treatment. This issue was then appealed to the Appellate Body. The Appellate Body agreed with the panel's decision that the imposition of duty on the imports of galvalume from all countries exempting for 120 countries in list violates MFN-treatment under Article I:1 of GATT 1994 to treat all WTO members in a non-discriminatory basis because the application of duty exempted galvalume originating from some WTO Members from the scope of application of the specific duty while not exempting others.

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In the appellant's submission by Indonesia, Indonesia contended that the panel made a mistake in making the decision the measure at issue was not consistent with the obligation to afford MFN-treatment as 120 countries in the list that are exempted from the imposition of duty were

developing countries.[99] The justification raised by Indonesia for the discriminatory application of safeguard measure is that the sole purpose is to impose the safeguard measure only to major exporting countries which contributed the most to the threat of serious injury among Indonesia's domestic producers.[100] Indonesia further contended that the application of import duty in a discriminate manner by Indonesia is in accordance with the Special and Differential Treatment(S&D) that exempts developing countries from the same disciplines with more developed countries as stipulated in Article 9.1 of the Agreement on Safeguards.[101] As the rationale for the application of duty on the imports of galvalume except for 120 countries is under the obligation to provide Special and Differential Treatment(S&D), Indonesia claimed that Indonesia did not oblige to afford MFN obligations under Article I:1 of the GATT 1994.[102]

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The panel rejected Indonesia's claim that the exemption of 120 countries from the scope of application of specific duties is in accordance with Article 9.1. There are several reasons behind the panel's rejection. Primarily, since the panel found that the measure at issue is not a

[99] Ibid., Footnote 85, para. 5.41.
[100] Ibid., Footnote 85, para. 5.67
[101] Ibid., Footnote 52, para. 7.43.
[102] Ibid., Footnote 85, para. 7.43.

safeguard measure, Article 9.1 will not be applied.[103] Moreover, the exemption of 120 countries from the scope of application of the duty is not "necessary to remedy or prevent serious injury"[104] so the measure applied by Indonesia did not fulfil the fundamental objective of Article XIX:1(a).[105]

The third issue is whether the panel made an error in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994**.** On appeal, all the parties in dispute which are Indonesia, Chinese Taipei, and Viet Nam all challenged the panel's finding that the specific duty applied by Indonesia on imports of galvalume is not a safeguard measure subject to the WTO safeguard disciplines. All three participants submitted that the panel erred in its interpretation and application of the Agreement on Safeguards and Article XIX of the GATT 1994. Besides, Indonesia claimed that the panel exceeded its of Article 1 of the terms of reference and failed to carry out an objective assessment of the matter before it. For this issue, The Appellate Body upheld the panel's overall conclusion that the measure at issue does not constitute a safeguard measure within the meaning of

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[103] Ibid., Footnote 85, para. 7.25.
[104] Ibid., Footnote 85, para. 7.22.
[105] Ibid., Footnote 85, para. 7.28.

Article 1 of the Agreement on Safeguards. Since the Appellate Body upheld the panel’s decision, there is no legal basis for ruling 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.[106]

[106] Ibid., Footnote 85, para. 6.8.

## Chapter IV Analysis on Indonesia — Safeguard on Certain Iron or Steel Products

In analyzing the dispute, the provisions under the Agreement on Safeguards and the GATT 1994 must be taken into consideration. There are two opposing opinions on whether the measure at issue applied by Indonesia constitutes a safeguard measure or not. In this dispute, the Panel and the Appellate Body did not rule on the issue
whether the imposition of the measure at issue is consistent with the requirements in GATT 1994 together with the Agreement on Safeguards or not as both the Panel and the Appellate Body both agreed that measure imposed by Indonesia did not constitute a safeguard measure from the beginning. Nonetheless, both parties in the dispute did not foresee that the panel and the Appellate Body would reject their claims by independently ruling that the measure was not safeguard measures. As seen in the panel and the Appellate Body, the claims by both parties mainly focus on whether the imposition of the measure at issue is consistent with components under GATT1994 and The Agreement on Safeguards.

In this part, there will be an explanation on the importance of characterization of a measure whether the measure at issue that Indonesia imposed on imports of galvalume by Indonesia constitutes a safeguard measure or not. This is a significant issue that should be taken into

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consideration in international disutes. If the measure at issue is found to be safeguard measure, the application of such measure will fall under the requirements stated GATT 1994 and the Agreement on Safeguards or not. Moreover, the imposition of duty that was regarded as safeguard measure must comply with the MFN-treatment obligation as well. The opinion of the panel is that measure at issue does not constitute a safeguard measure under the Agreement on Safeguards and the GATT 1994. Consequently, the Panel and the Appellate Body refused to rule on the claims relating to whether Indonesia fulfills the requirement of a safeguard measure.

On the other hand, both opposing parties, which are the claimants and respondent, agreed that the measure at issue falls within the definition of a safeguard measure. Therefore, the Agreement on Safeguards and the GATT 1994 must be applied to this case, meaning that the panel should rule on the compliance of safeguard requirements, instead of plainly regarded the measure as a stand-alone measure and rejected the other claims concerning safeguard measures.

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**4.1 The characterization of safeguard measure**

This dispute has given the significance of characterization of safeguard measure. The criteria of safeguard measure are found in the plain reading of Article XIX of GATT 1994. According to this Article, WTO members have the right measures as necessary to suspend the obligation in whole or in part. In order to determine whether the measure at issue suspends the obligation, the scope of obligations that must be suspended to constitute a safeguard measure. The panel interpreted the obligation as the obligation under the Schedule of Concessions. This can be implied that the imposition of duty on the imports of galvalume will constitute a safeguard measure when the products at issue are bound under the Schedule of Concessions. On the other hand, if the products are not bound under the Schedule of Concessions, there is no obligation to suspend. The imposition of duty on products that are unbound does not suspend the obligation, so the measure does not constitute a safeguard measure. As the measure is not considered as a safeguard measure from the beginning, there is no need to further consider the requirements of safeguard measure as the Agreement on Safeguards does not apply in the case. The measure that stays out of the scope of safeguards is not subject to the four requirements of safeguard, but it stills need to follow MFN obligation.

According to the facts in Indonesia — Safeguard on Certain Iron or Steel Products, galvalume is not bound under the Schedule of Concessions of

Indonesia. The imposition of duty on the imports of galvalume does not suspend the obligation, so it is not considered as a safeguard measure. Therefore, there is no need to examine the requirements of safeguard.

Previously, there was a dispute concerning whether Article 9.1 of the Agreement on Safeguards suspended the obligation of Article I:1 GATT 1994 or not. According to the Dominican Republic — Safeguard measures on Imports of Polypropylene Bags and Tubular Fabrics, the panel ruled that the application of duty except for developing countries under Article 9.1 suspended GATT obligation, so the measure imposed by the Dominican Republic constituted a safeguard measure.[107] However, such interpretation was clearly rejected by the panel in Indonesia — Safeguard on Certain Iron or Steel Products. The panel ruled that application in a discriminatory basis of a safeguard measure to afford Special and Different Treatment according to Article 9.1 does not suspension the WTO Member's obligations under Article I:1 under the meaning of Article XIX:1(a) of the GATT 1994, so the measure at issue was not a safeguard measure.[108]

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[107] Panel Report, Dominican Republic — Safeguard measures on Imports of Polypropylene Bags and Tubular Fabrics, para. 7.385
[108] Ibid., Footnote 52, para. 7.30

In addition, the Appellate Body in this dispute affirms the right of the panel to characterize whether the measure at issue is a safeguard measure or not despite the concurring view that the measure at issue is safeguard measure. Although the parties in dispute do not raise the issue on whether the measure at issue constitutes a safeguard measure or not, the WTO panel has the right to examine the issue. In this dispute, the claimants and respondent were all agreed that the measure imposed by Indonesia was a safeguard measure. In the appeal to the Appellate Body, Indonesia claimed that the panel exceeded the term of reference by examining whether the measure at issue was not a safeguard measure as such an issue was not found in the panel's request of the complainants.[109] The Appellate Body ruled that

panel is 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.[110] The panel's jurisdiction to determine the applicability of the Agreement on Safeguard does not limit to the issues raised by the parties. The panel is free to carry out an objective and independent assessment in characterizing the measure at issue. The characterization of safeguard measure by domestic

[109] Ibid., Footnote 85, para. 4.1.
[110] Ibid., Footnote 85, para. 5.33.

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authorities under domestic law is dispositive. The final decision on whether the measure at issue constitutes a safeguard measure relies on the panel. Even though claimants and respondent in Indonesia — Safeguard on Certain Iron or Steel Products claimed that the specific duty imposed on the imports of galvalume constituted a safeguard measure, the panel had the right to perform an objective and independent assessment to provide a proper legal characterization of such measure. The panel ruled that the measure was not a safeguard measure under Article 1 of the Agreement on Safeguards, so it did not subject to the discipline of the Agreement on Safeguards.

**4.2 Analysis on the requirements of the safeguard measure**

Most disputes that are brought to WTO Dispute Settlement Body mainly concern the consistency of the application of safeguard measures. Comparing with other trade remedies like countervailing measures and anti-dumping measures, the imposition of safeguard measures by WTO members is relatively low, mainly because of the difficulty to fulfill all four requirements of applying safeguard measures. The main problem of the requirements of safeguard measure is that the requirements are challenging to fulfill. Accordingly, there have always been disputes concerning the fulfilment of four requirements as there is a high possibility that the WTO members that impose safeguard

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measures are unable to follow all the requirements of safeguard measures under Article 19 of GATT 1994 and the Agreement on Safeguards. There are four requirements of safeguard measure as follows.

**4.2.1 Unforeseen development**

According to the jurisprudence ruled by the Appellate Body in Korea - Dairy (2000), unforeseen development is defined as unexpected developments.[111] A causal relationship between unforeseen development and the measure taken by the competent authorities must be proved.[112] It must be noted that unforeseen development and increased imports are two elements that are independent of each other.[113] Therefore, the factual proof of the increase in imports does not show the existence of unforeseen development.[114] In finding the causation, the competent authorities must be able to show that the unforeseen developments have resulted in increased imports for the specific products, not for a broad range of products.[115] The competent authorities must demonstrate this causal link through a reasoned and adequate explanation.[116] The explanation given by the competent authorities is the critical factor in determining whether Indonesia complies with unforeseen development or not.

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[111] Ibid., Footnote 21, para. 84.
[112] Ibid., Footnote 25, para. 92.
[113] Ibid., Footnote 85, para. 7.24.
[114] Ibid., Footnote 85, para. 2.4.
[115] Appellate Body Report, US - Steel Safeguards, para. 319.
[116] Ibid., para. 273.

According to Regulation No. 137.1/PMK.011/2014 of the Minister of Finance of the Republic of Indonesia, the competent authorities in Indonesia can prove that the growing imports of galvalume which are defined as flat-rolled products of iron or non-alloy steel, of a width of 600 mm or more, clad, plated, or coated with aluminium-zinc alloys, containing by weight less than 0.6% of carbon, with a thickness not exceeding 0.7mm, under HS code 7210.61.11.00. Such an increase was an unexpected development occurring in the steel industry. There was an unforeseen development that led to increased imports of galvalume which is a specific product. Thus, it meets the unforeseen development requirement of the safeguard measure.

**4.2.2 Increased imports**

For the term " increased imports ", there is no single definition of what constitutes an increased imports as it requires an examination of several factors that will together signify increased imports of products. Consequently, the analysis of various factors must be conducted.[117] It is difficult to find out the baseline level for the existence of increased imports because the drafter did not want to limit the concept by using a clear definition.[118] In Argentina - Safeguard Measures on Imports of Footwear, the Appellate Body laid out certain requirements in determining increased imports that

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[117] Alan O. Sykes, "The Safeguards Mess: A Critique of WTO Jurisprudence," May 2003, 6-7
[118] Ibid.

are composed of four elements which are recent increase, sudden increase, sharp increase, and significant increase. Simply any increase in imports cannot be determined as increased imports.[119] There is no clear standard to how sudden, recent, and significant the increased imports should be.[120] Nevertheless, there has been some jurisprudence from past disputes providing specific standards to determine increased imports. For sharp and significant increase, the rate of increase and the amount of increase will be taken into consideration.[121]

In initiating safeguard investigation for the importation of galvalume in Indonesia, Komite Pengamanan Perdagangan Indonesia or KPPI stated that the import of steel at issue into Indonesia has increased from 79,279 tons in 2008 to 251,315 tons in 2012.[122] KPPI's determination of increased imports was based on official import volume data from the Indonesian Statistics Bureau.[123] This represents an increase of approximately 217 percent during the entire investigation period. Thus, the rate of increase and amount of increase in this investigation demonstrates that there was a sharp and significant increase in the

[119] Ibid.
[120] Ibid.
[121] *Agreement on Safeguards.* Article 4.2(a)
[122] Oene Marseille, Emir Nurmansyah, "Indonesia: Import tariff changes," https://www.iflr.com/Article/3374492/Indonesia-Import-tariff-changes.html
[123] Ibid.

amount of galvalume imported into Indonesia. Additionally, it only took four years for such an increase.

In order to demonstrate a sudden and recent increase, the investigation period must be in the recent past, and the data must not only derive from the most recent time, but the entire period of investigation must be assessed.[124] It is not appropriate to examine the safeguard investigation that ends for a certain amount of time before the safeguard determination is made.[125] On 19 December 2012, Indonesia initiated the safeguards investigation.[126] The increased imports were based on import volume data from five years of investigation ending on 31 December 2012.[127] The KPPI then concluded the investigation approximately 15 months later on 31 March 2014.[128] The period between the end of the period of investigation and the date of the substantive determination in the galvalume investigation was only 15 months. The specific duty was imposed by the Minister pursuant to Regulation 137.1/PMK.011/2014 on 22 July 2014, which was four months later, approximately 19 months.[129]

[124] Ibid., Footnote 45, para. 138.
[125] Ibid., Footnote 25, para. 129.
[126] Committee on Safeguards WTO, "Notification under Article 12.1(a) of the Agreement on Safeguards on the Initiation of an Investigation and the Reasons for It, G/Sg/N/6/Idn/22, (Exhibit Tpkm/Vnm-2)." p.1.
[127] Ibid., Footnote 85, para. 7.65
[128] Ibid., Footnote 85, para. 7.65
[129] Ibid., Footnote 45, para. 84.

In Ukraine – Passenger Cars, the panel found that a 16-month time gap between the end of the POI and the date of the substantive determination by the competent authorities was sufficient to establish that the increased imports were recent enough. The time-gap between the end of the POI and the date of the substantive determination in the galvalume investigation was only 15 months, which was smaller than the time-gap accepted in Ukraine – Passenger Cars. Hence, the increased imports of galvalume in this dispute should be recent enough.

**4.2.3 Serious injury or threat of serious injury**

There must be an existence of a serious injury or the threat to serious injury in the domestic industry, producing like or directly competitive products.[130] According to Article 4.1(a) of the Agreement on Safeguards, serious injury is defined as significant impairment in the position of a domestic industry. For the relationship between serious injury and a threat to serious injury, serious injury is placed beyond the level of threat as it includes the concept of threat and exceeds the presence of a threat. There are two criteria used in defining the domestic

[130] Ibid., Footnote 1

industry, which is products at issue and the number and the representative nature of the producers of products.[131] The products at issue mean the products that are like or directly competitive to the imported products.[132] Although the definition of like or directly competitive products is not clearly written in the Agreement on Safeguards, the Appellate Body in the US - Lamb has set out the factors that are used to determine the nature and extent of competitive relationship of the products.[133] These factors include physical characteristics of the product, end-use, consumer habits and preferences regarding the products' customs classification of the products.[134] The subject product in this dispute is a flat-rolled product of iron or non-alloy steel, of a width of 600 mm or more, plated or coated with aluminium-zinc alloys, containing by weight less than 0.6% of carbon, with a thickness not exceeding 0.7 mm, which falls under HS code 7210.61.11.00. The product at issue has the same nature with the products that Indonesia applied safeguard measure as it falls within the same category under Harmonized Commodity Description and Coding System (HS code), which is the classification of commodities. Hence, there is no dispute that, in this case, the "like product" is galvalume.

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[131] Ibid., Footnote 45, para. 84.
[132] Ibid., Footnote 45, para. 84.
[133] Ibid., Footnote 1
[134] Ibid., Footnote 1

Indonesian produced like products which are flat-rolled products of iron or non-alloy steel under HS code 7210.61.11.00. The term directly competitive products is not at issue in this dispute.

In determining whether the domestic producers suffered from serious injury or not, there must be an evaluation of injury factors. These factors include the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports and changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[135] It must be noted that these factors are not exhaustive. The evaluation of these factors stated in Article 4.2(a) of the Agreement on Safeguards is viewed as a minimum standard. The competent authorities can evaluate other factors to show serious injury to domestic producers. According to the Final Disclosure Report, the trend in the share of domestic consumption held by Indonesia's domestic producers fell by 4% throughout the investigation.

Meanwhile, the trend in the share of domestic consumption held by imports grew up by 6% over the same period of investigation.[136]

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[135] *Agreement on Safeguards*. Article 4.2(a)
[136] Ibid., Footnote 52, para. 7.80.

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Throughout the investigation, the market share held by imports increased in all years except for the market portion from 2008 to 2009.[137] Besides examining all relevant injury factors, the competent authorities must give a reasoned and adequate explanation that supports the facts that there is a serious injury to the domestic producers.[138] The competent authorities of Indonesia had given a reasoned and adequate explanation of how all of the various injury factors supported KPPI's overall conclusion that the increased imports of galvalume threatened to cause serious injury to the domestic industry.

Not only can safeguard measure be applied in the case where there is serious injury, but it can also be applied in a situation where there is a threat of serious injury. The difference between " serious injury "and a "threat of serious injury" is not in terms of the degree or significance of injury itself but rather whether the injury is already occurring or will occur soon.[139]The definition of a threat of injury is an imminent serious injury.[140] " Imminent " in this context means that the anticipated serious injury must be on the verge of occurring.[141] For the clarification of "

[137] Ibid., Footnote 52, para. 7.80.
[138] Ibid., Footnote 85, para. 1.5.
[139] Ibid., Footnote 52, para. 7.73.
[140] *Agreement on Safeguards*. Article 4.1(b)
[141] Ibid., Footnote 52, para. 125.

clearly ", it is the situation when there is a high degree of likelihood that the threat will turn into serious injury very shortly.[142]

According to Indonesian authorities, KPPI's injury finding stated that Indonesia was suffering from the threat of serious injury.[143] Although there was no explicit finding that serious injury was clearly imminent, it was clear based on KPPI's findings that serious injury was on the verge of occurring. Accordingly, there was a threat to serious injury arising to Indonesia's galvalume domestic market.

### 4.2.4 Causation

In determining causation, a genuine and substantial relationship between increased imports and serious injury to the domestic industry must exist.[144] However, increased imports may not be the only cause that leads to serious injury. Instead, other factors can contribute to causing a situation of serious injury.[145] Accordingly, the test of causation must be divided into various parts. The first part is the demonstration of the causal link between increased imports and serious injury. The second part is

[142] Ibid., Footnote 45, para. 125.
[143] Ibid., Footnote 52, para. 7.71.
[144] Appellate Body Report, US – Wheat Gluten, para. 66
[145] Ibid., para. 70.

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related to the non-attribution elements that lead to injurious effects on the domestic industry.[146] Serious injury caused by increased imports of the products at issue must be distinguished from the injurious effect caused by non-attribution elements.[147] In this manner, the final determination of the causal link will be based on the genuine relationship between increased imports and serious injury.[148] If the competent authorities are unable to demonstrate both the threshold of increased imports and the existence of serious injury or threat of serious injury, the causal link requirement is not being met.[149] The measure at issue will not constitute a safeguard measure.

With regards to the Final Disclosure Report, there was a coincidence between the increased market share of imports and the decreased market share held by domestic galvalume producers. The first part of the causation test was met as there was a causal relationship between increased imports of galvalume and a threat of serious injury to domestic producers in Indonesia. KPPI examines the surge in imports causing a treat of serious injury in Section F. Another part of the causation test is to examine non-attribution factors that lead to the

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[146] Ibid., para. 215
[147] Ibid., para. 69.
[148] Ibid., para. 67
[149] Ibid., Footnote 25, para. 145.

injurious effects in the domestic market. KPPI examined other factors found in Section D of the Final Disclosure Report. There are three other factors under Section D. The first factor is the evolution of the domestic industry's production capacity throughout the investigation in relation to national consumption.[150] The second factor is the evolution of the petitioners' sales throughout the investigation.[151] The third other factor discussed in Section D is the fact that the domestic producers produced galvalume in accordance with standardization based on SNI and International Organization for Standardization (ISO).[152] All in all, KPPI did not find any other factors causing serious injury to the galvalume domestic industry other than the increased imports of galvalume. As a result, it can be concluded that there was a causal link between increased imports of galvalume and a threat of serious injury to the domestic industry in Indonesia.

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[150] Final Disclosure Report, Indonesia — Safeguard on Certain Iron or Steel Products
[151] Ibid., Footnote 85, para. 7.93.
[152] Ibid., Footnote 85, para. 7.94

## 4.3 Indonesia's rationale of the application of specific duty by Indonesia

It is vital to examine the rationale behind the decision of Indonesian domestic authority to impose a specific duty on galvalume instead of using other measures that will result in a decrease in imports of galvalume. As Indonesia has no obligation relating galvalume under the Schedule of Concessions, Indonesia could possibly increase the unbound duty to the level that Indonesia thought it would be appropriate.[153] Indonesia claimed that the reason that Indonesia could not increase tariffs because of Free Trade Agreements with other countries. Indonesia had tariff obligations under the ASEAN Trade in Goods (0%), which prevented it from increasing tariff rate on galvalume.[154] The application of the preferential tariffs under Indonesia FTAs in accordance with Article XXIV of the GATT 1994 was the obstacle to Indonesia's ability to increase tariffs. For this claim, the panel ruled that Article XXIV of the GATT 1994 was not an obstacle to Indonesia's ability to increase tariffs on galvalume because this provision is wriiten with a permissive wording

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[153] Thomas J. Prusa and Edwin A. Vermulst, "EUI Working Papers RSCAS 2019/83 Robert Schuman Centre for Advanced Studies Global Governance Programme-372 Indonesia – Safeguard on Certain Iron or Steel Products", https://cadmus.eui.eu/bitstream/handle/1814/64550/RSCAS%202019_83.pdf?sequence=1

[154] Ibid., Footnote 85, para. 7.19

as it does not provide a positive obligation and does not impose any positive obligation on Indonesia. Concerning safeguard measure, Indonesia also raised the claim that the imposition of the specific duty on imports of galvalume from in countries including Regional Trade Agreement partners means that it suspends GATT obligation. Thus, the measure at issue is considered as a safeguard measure. The panel ruled that the obligation to impose a tariff of 0% on imports of galvalume from other ASEAN members is the obligation under the ASEAN Free Trade Agreement. It is not an obligation under the WTO Agreement. Thus, the imposition of specific duty on imports of galvalume did not suspend GATT obligation, so it did not constitute a safeguard measure.

However, if Indonesia increased the duty in the Schedule of Concession, Vietnam, which was the top exporter, would not be affected but instead got the advantage of such change in the duty as it would be applied for all countries. It can be seen that increasing duty in the Schedule of Concession would not deter the imports from top exporting countries. Therefore, the KPPI did not decide to increase the duty in the Schedule of Concessions. By considering the circumstances and actions of Indonesian authority, the actual objective of imposing such specific duty on galvalume is clearly to deter the imports from main exporting countries, which are Vietnam and Chinese Taipei.

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Another possible reason that Vietnam wanted the measure at issue to be considered as a safeguard measure is to reverse the Concessions between Indonesia and Vietnam that are both ASEAN members.[155] Prior to the imposition of a duty on galvalume, Vietnam offered concessions to Indonesia in exchange for tariff concessions on galvalume.[156] The problem then arose when there was a large number of imports on galvalume from Indonesia that greatly affected the domestic galvalume producers in Indonesia. Accordingly, Indonesia attempted to reverse the effects of the concession by the imposition of duty by justifying that such measure is safeguard measure.[157] It must be noted that Indonesia utilized such measure to reverse the effects of previously negotiated concessions.[158]

All in all, the requirements of safeguard measure are elaborated above in order to indicate the difficulty for the WTO members to apply the safeguard measures in compliance with the requirements. Such difficulty is a key reason that WTO members try to avoid applying safeguard measures as they acknowledged that it is likely that the

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[155] Ibid., Footnote 273.
[156] Ibid.
[157] Ibid.
[158] Ibid.

safeguard measures imposed by them do not meet the requirements of safeguard measures. The safeguard measures are subject to four requirements of safeguard measure and MFN-treatment. In the situation when the measure was not considered as a safeguard measure, the requirements of safeguard measure will not apply to the measure. The measure will only be subject to the general rule which is MFN-treatment. Consequently, it is easier to follow in comparison to the requirements of safeguard measures.

### 4.4 Vietnam's rationale for bringing the dispute before the panel

On the other hand, Vietnam, who was one of the claimants in Indonesia — Safeguard on Certain Iron or Steel Products, also claimed that the measure imposed by Indonesia on the imports of galvalume is a safeguard measure that is subject to the Agreement on Safeguards. In fact, Vietnam and Indonesia are members of ASEAN. There was another alternative way in settlement of disputes available in the ASEAN Trade in Goods Agreement (ATIGA). The conditions of settling the dispute are more straightforward than bringing the dispute to the WTO panel. Thus, it is essential to find out the reasons why Vietnam decided to bring the

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dispute to the WTO panel instead of using the dispute settlement body in the ASEAN Trade in Goods Agreement (ATIGA).

## 4.5 Implications of Indonesia — Safeguard on Certain Iron or Steel Products

After considering the facts and issues in this dispute, there are many implications relating to safeguard measures that should be noted as the outcome of this dispute resulted in essential lessons on the use of safeguard measures and other disputes in the future.

### 4.5.1 The determination of safeguard measure

This dispute is unlike other disputes that focus on the scope of application of Article XIX of the GATT 1994 and the Agreement on Safeguards.[159] Instead, this dispute heavily concerns the definition of safeguard measure.[160] The Appellate Body emphasized the distinction between the applicability of the Agreement on Safeguards and the conformity of the safeguard measures with the requirements of the

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[159] Matthias Oesch, "The Jurisprudence of WTO Dispute Resolution," 8 April, 2012, https://www.wti.org/research/publications/400/the-jurisprudence-of-wto-dispute-resolution-2011/

[160] Ibid.

Agreement on Safeguards and GATT 1994.[161] The panel found that the measure at issue was not a safeguard measure because it did not suspend or GATT obligation or withdraw or modify GATT concession. Despite upholding the ruling that the measure imposed by Indonesia was not regarded as safeguard measure, the Appellate Body noted that the panel's reasoning was problematic as it mixed up the concept of safeguard characterization with the conformity of safeguard measures. The features of a safeguard measure should not be conflated with the conformity of safeguard measures. Whether the measure imposed by Indonesia suspends GATT obligation or withdraw or modify GATT concession is not relevant to the legal characterization of a safeguard measure. In carrying out an independent and objective assessment of safeguard characterization, the panel must identify all the aspects of the measure that are related and recognize the aspects that are most central to the measure at issue.

The decision by the Appellate Body has implications on the dispute on duties on aluminium and steel in the United States. On 8 March 2018, the United States imposed import tariffs of 25% on particular steel and 10% on aluminium product from most countries with the exception of the

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[161] Ibid.

United dates trading partners that applied for exemptions. The United States claimed that the action was aimed to protect
both industries from unfairly traded imports that the Commerce Department has determined to pose a threat to US national security. This action by the United States posed concerns to many WTO members, especially The European Union. The European Commission stated that The European Union would retaliate through countermeasures. Investigations are focused on the effect of imports on national security. WTO Members filed complaints against such duties, arguing that such duties were safeguard measures and that the application of such measures was not consistent with the Agreement on Safeguards. The United States argued that national security was the exception to the general rules under Article XXI of the GATT 1994. This dispute is similar to Indonesia's case in the fact that Indonesia also imposed the duty on the imports to protect the domestic producers. Although the WTO members provided the justification that the reason for the application of trade measure is for national security, the panel and Appellate Body are not bound by such claims. WTO Dispute Settlement Body is free to perform an objective assessment on the issue.

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### 4.5.2 The Panel and Appellate Body's Independent Assessment

The Appellate Body Report of Indonesia - Safeguard on Certain Iron or Steel Products suggested that the characterization of domestic authorities is not dispositive. The panel must conduct an objective and independent assessment in determining whether the measure at issue constitutes a safeguard measure and whether the Agreement on Safeguards applies. This significant implication has a great influence on the economy because the characterization of measure by the panel will determine retaliation measures that WTO members are allowed to impose. All in all, the Panel and the Appellate Body must conduct an objective and independent assessment on the measure at issue despite the safeguard determination by domestic authorities.

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Indonesia - Safeguard on Certain Iron or Steel Products also presents a significant fact that the Appellate Body dismissed the claims by both claimants and respondent that the measure at issue is safeguard measure. Although Indonesia had conducted an investigation under its national safeguard legislation and had notified the specific duty to the WTO Committee on Safeguards, the Appellate Body rejected the interpretation by Indonesia that the measure at issue constitutes a safeguard measure. Appellate Body further reaffirms that the panel must carry an independent and objective assessment to determine

the applicability of the Agreement on Safeguards regardless of whether the parties in dispute are raising the issue of applicability or not. In this dispute, despite the concurring view of the parties that the measure at issue constitutes a safeguard measure, legal characterization can be performed by the panel as the description of the measure at issue by a party and the label given to such measure under municipal law is not dispositive. There are two essential features used to examine the design, structure, and expected operation of a safeguard measure. The first feature is whether the measure withdraws a GATT obligation. The second feature is whether the measure is designed to prevent a threat of serious injury or remedy serious injury.

### 4.5.3 The reasons claimant and respondents regarded the measure at issue as safeguard measure

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Primarily, both claimants and respondent claimed before the panel that the measure at issue was a safeguard measure. Although WTO panel ruled that the specific duty imposed by Indonesia on galvalume is not a safeguard measure, both claimant and respondents in this dispute still claimed in the appeal to the Appellate body that the measure at issue was a safeguard measure. It is critical to examine the reasons that both

Indonesia and Vietnam insisted that the measure at issue was safeguard measure.

There are two main reasons that Vietnam attempted to insist that the specific duty imposed on the imports of galvalume constitutes a safeguard measure.

The first reason refers to the panel's decision that Indonesia brings the measure into conformity with MFN obligation under Article I:1 of GATT 1994. If the measure imposed by Indonesia constitutes a safeguard measure, the Agreement on Safeguards will apply to the case. Safeguard measures have been used widely for a certain period of time. Accordingly, the discipline of safeguard is definite and predictable because of the jurisprudence on various issues concerning the application of safeguard measures by WTO Dispute Settlement Body. From the view of Vietnam, it is easier for Vietnam to raise claims under the Agreement on Safeguards that the specific duty imposed by Indonesia is inconsistent with four requirements of the application of safeguard measure as there are various lessons from the disputes under WTO concerning the application of safeguard measures under GATT 1994 and the Agreement on Safeguards. Through following the route of safeguard measures, Vietnam authorities may view that the outcome of the dispute is more predictable. On the flip side, it is different in the situation when such duty

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imposed on galvalume is viewed as a stand-alone measure, not a safeguard measure. To elaborate, when the measure at issue does not constitute a safeguard measure, the Agreement on Safeguards does not apply to the measure that does not stay within the scope of safeguard disciplines. In this situation, Indonesia is not required to follow the four requirements of safeguards under Article XIX of GATT 1994 and the Agreement on Safeguards. The restriction that applies to stand-alone measure is the general rule which is MFN treatment. Indonesia will only have to comply with MFN obligation, which means there is less burden for Indonesia to apply such measure. Thus, it will be more beneficial for Vietnam if the measure at issue is a safeguard measure that stays within the scope of GATT 1994 and the Agreement on Safeguards.

The second reason is related to the market share of Vietnam, which is the leading exporter of galvalume in Indonesia. The imposition of any measure by Indonesian authority definitely has an impact on the Vietnam galvalume producers. However, Vietnam wants to ensure that the measure imposed by Indonesia will affect the volume of galvalume from Vietnam in the least possible way. If the panel regards the measure at issue as a safeguard measure, Vietnam can assure that Vietnam will still have possession of market share in Indonesia's galvalume imports as the products are allowed to enter Indonesia. In the situation when the

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measure imposed by Indonesia is recognized as a safeguard measure, Vietnam may not able to increase the volume of exports of the products to Indonesia, but the galvalume products from Vietnam can still gain the access into Indonesia's market.

It is interesting to find out the reason that Indonesia regarded the imposition of duty on an unbound product as a safeguard measure. From the perspective of Indonesia, Indonesian authority or KPPI recognized that the measure at issue was not subject to the Agreement on Safeguards. Before the dispute was brought to WTO, it can be assumed that KPPI, the Indonesian domestic authority that is responsible for the application of safeguard measure, acknowledged the criteria of safeguard measure. One of the critical features of safeguard measure is that the measure must suspend the obligation under the Schedule of Concessions. KPPI recognized that the imposition of specific duty on galvalume that is unbound under the Schedule of Commitments did not suspend the obligation as there was no obligation with respect to the Schedule of Commitments from the beginning. With such acknowledgement, Indonesia chose to impose tariffs on galvalume by taking the advantage that the product was not bound under the Schedule of Concessions. It can be viewed that Indonesia intentionally chose to impose tariffs on the products instead of quota because Indonesia knew that the imposition of

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specific duty on the product that is unbound under the Schedule of Concessions means that the measure did not constitute a safeguard measure. The KPPI imposed the measure with the purpose to avoid the four requirements of safeguard measures as it is generally recognized that it is difficult for the WTO members to follow all four requirements. Hence, KPPI saw the opportunity to apply the measure as it stays out of the scope of safeguards, so the imposition of duty on galvalume is not required to follow the requirements of safeguards. However, the outcome is not as expected by Indonesia. The panel ruled that the measure at issue is not a safeguard measure as Indonesia expected, but the panel further ruled that the application of specific duty except for 120 countries was inconsistent with MFN-treatment obligation. To elaborate, although the measure is not safeguard measure, the imposition of specific duty on the imports of galvalume is still the application of trade measure under WTO regime, so the general rule applies. MFN-treatment obligation is one of the primary obligations that WTO members must follow in applying any kind of trade remedies.

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## 4.6 Implications of Indonesia — Safeguard on Certain Iron or Steel Products

The Appellate Body's ruling on this dispute concerning galvalume has provided essential implications that should be carefully examined. It is critical to study the underlying reasons for the action by Indonesian domestic authority that imposed specific duty on galvalume which is unbound product. In retaliating the increasing volume of imports, there are many alternatives that Indonesia could select, such as imposing quantitative restriction on the imports of products but Indonesia chose not to follow the other routes. Apart from dispute settlement under WTO, Vietnam which is the claimant has the right to bring the dispute under the ASEAN regime as well, but Vietnam decided to bring the dispute to WTO. It is interesting to find out the reasons underlying the decision of the parties in this dispute.

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### 4.6.1 Rationale for seeking dispute settlement under WTO instead of ASEAN Dispute Settlement Mechanism

In seeking dispute settlement related to international trade, most countries usually rely on the WTO Dispute Settlement Mechanism as it has been long established with decent history, and it is accepted by most

countries worldwide. Nevertheless, as time passes by, many forms of international cooperation have been created. Many of which have their own dispute settlement mechanisms. In general, the members who belong to the cooperation are not obliged to seek trade remedy through the process provided within the cooperation. However, they are free to choose the way to settle the disputes either through the mechanism within their cooperation or through WTO Dispute Settlement Body. Indonesia is one of the member countries of the Association of Southeast Asian Nations (ASEAN). In order to pursue the goal of establishing a single market and production base with free flow of goods for ASEAN Economic Community, ASEAN Trade in Goods Agreement (ATIGA) acted as a comprehensive legal instrument for ASEAN members which are Indonesia, Brunei Darussalam, Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. This Agreement intends to encourage the free flow of goods in the region, which will result in fewer trade barriers between ASEAN members.[162] Indonesia claimed that the increased imports of galvalume in Indonesia caused serious injury to the domestic galvalume producers in Indonesia. The dispute concerns

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[162] Invest in ASEAN, "ASEAN Trade in Goods Agreement," http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html

the goods which are galvalume. The provisions under ASEAN Trade in Goods Agreement (ATIGA) include trade remedy measures in a very similar manner to GATT 1994. Article 86 in the chapter of trade remedy measures offers safeguard measures by stating that the Member state retains the rights and obligation of safeguard measures.[163]

Apart from safeguard measures provided in Article 86 of ASEAN Trade in Goods Agreement (ATIGA), Article 23 concerns temporary modification or suspension of concessions other than safeguard measure. The wording of this Article is broad, so it is relatively easy for the Association of Southeast Asian Nations (ASEAN) members to seek trade remedy through this Article. However, in practice, there is no empirical evidence suggesting that the Association of Southeast Asian Nations (ASEAN) members seeking remedy through this provision. To elaborate, the outcomes of applying temporary modification or suspension of concessions in accordance with Article 23 is unpredictable. Accordingly, there is no doubt why Indonesia did not seek trade remedy for domestic galvalume producers through this provision.

[163] *ASEAN Agreement on Trade in Goods,* Article 86

For dispute settlement mechanism, Article 89 provides that ASEAN Protocol on Enhanced Dispute Settlement Mechanism shall apply with any dispute arising from, or any difference between the Member States concerning the interpretation or application of this Agreement.[164] It can be seen that the ASEAN Protocol on Enhanced Dispute Settlement Mechanism is the primary mechanism in dealing with trade dispute resolution in ASEAN.

ASEAN has seen the success of dispute settlement bodies under the WTO. Thus, ASEAN viewed the WTO mechanism as a model in drafting the ASEAN Protocol on Enhanced Dispute Settlement Mechanism which includes the establishment of the panel and the Appellate Body in dealing with trade disputes. This protocol offers an alternative dispute settlement procedure apart from the main resolutions through consultation between member states, good offices, conciliation, or mediation.[165] It also provides a timeframe and provisions to ensure that the ASEAN members will adopt the panel and appellate reports. Despite

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[164] *The Asean Protocol on Enhanced Dispute Settlement Mechanism*. Article 89

[165] Rungnapa Adisornmongkon, "The Dispute Settlement Mechanism of ASEAN, Does it work? ", https://asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism

the similar model of dispute settlement mechanisms under WTO and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, ASEAN members do not select the solution under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism. The key reason is that the members do not fully trust the effectiveness of such mechanism.[166]

Taking the fact that Indonesia is a member of ASEAN into consideration, it is interesting to find out the rationale behind Indonesia's to seek trade remedy as safeguard measures under WTO rather than safeguard measures under ATIGA. In fact, the imposition of safeguard measures under ATIGA is less complicated when comparing to the imposition of safeguard measures under GATT 1994 and The Agreement on Safeguards. If the actual objective of Indonesia were to protect domestic galvalume producers, it would have been easier for Indonesia to use the remedy under ATIGA. It is not because Indonesian authorities did not recognize the solution under ATIGA. However, there must be an agenda that made Indonesian authorities imposed the measure that is considered a safeguard measure. From the perspective of claimants, which are Vietnam and Chinese Taipei, these countries definitely hoped that WTO panel viewed the measure at issue to be safeguard measure as

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[166] Walter Woon, *The ASEAN Charter: A Commentary*, 2016, 179.

it was difficult for Indonesia to impose the measure in consistent with the requirements of safeguard measure under GATT 1994 and the Agreement on Safeguards. On the other hand, from Indonesia's point of view, there is a high possibility that WTO panel will rule out that the measure at issue is not following the requirements of safeguard measures. Thus, it is interesting to find out the underlying reasons why Indonesia did not seek a remedy through the process stated under the ASEAN Free Trade Area.

The actual objective of applying safeguard measures by Indonesia is to protect domestic producers of galvalume. Before launching a safeguard investigation, the volume of imports of galvalume has increased sharply. The volume of imports increased sharply from approximately 59.7 million dollars in 2009 investigation to $287 million in 2013, which was the highest volume in ten years.[167] In 2014, Indonesia then initiated a safeguard measure which suddenly led to a considerable decline in the volume of galvalume imports in the following years. This application of safeguard measure has a significant effect on the galvalume import market shares held by Vietnam and Chinese Taipei as intended by Indonesia.

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[167] Ibid., Footnote 156.

Besides the actual intention of Indonesia in using such measure, another point that must be taken into consideration is the underlying reason why Indonesia decided to impose a specific duty on the imports of galvalume instead of imposing import quota. By observing at the main objective of initiating safeguard measures by Indonesia, it can be concluded that the objective is to protect domestic galvalume producers and limit imports from the countries that held a large portion of market share, which were Vietnam and Chinese Taipei. Consequently, the measure was aimed to affect these two countries. If Indonesia chose to apply import quota instead of a specific duty, there would be no negative consequences to the volume of imports from Vietnam and Chinese Taipei. This is because using import quota will allow Vietnam, which is the leading exporter, to possess even more portion of galvalume imports market share. Hence, Indonesia chose not to impose quota but instead decided to impose a specific duty on the imports of galvalume which applied to all countries, including Vietnam, except for allegedly 120 countries.

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Taking a look into the reasons why ASEAN members do not seek trade remedies through the mechanism provided in ATIGA and ASEAN Protocol on Enhanced Dispute Settlement Mechanism, there are several reasons behind such decision.

The first reason is that ASEAN members usually use diplomacy in dealing with disputes to avoid the need for a more serious form of dispute settlement mechanism.[168] If they are not pleased with the outcome after using a diplomatic way, the members will bring the disputes before WTO Dispute Settlement Body as they are more confident in WTO panel and Appellate Body than the Dispute Settlement Body provided under ASEAN Protocol on Enhanced Dispute Settlement Mechanism.[169] This is because the resources in ASEAN is relatively limited in comparison to the resources that WTO Dispute Settlement Body has.[170]

The second reason supporting why Vietnam preferred bringing the disputes to WTO is that Vietnam trusted in the ruling of the WTO panel and Appellate Body. Vietnam was the party that could select the forum, either WTO Dispute Settlement Body or ASEAN Dispute Settlement Body. The dispute settlement mechanism under WTO is used globally, unlike the mechanism under ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which is intended to use only for ASEAN countries. For all the years after the establishment of WTO, dispute

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[168] Michael Ewing-Chow and Ranyta Yusran, "The Legitimacy of International Trade Courts and Tribunals," https://www.cambridge.org/core/books/legitimacy-of-international-trade-courts-and-tribunals/asean-trade-dispute-settlement-mechanism/5E12F753C685002585B6F114247307F6/core-reader
[169] Ibid. Footnote 156.
[170] Ibid. Footnote 156.

settlement mechanisms under the WTO have proven to be reliable and predictable as jurisprudence is formed from several disputes.[171] From the theoretical aspect, the disputes concerning trade should be settled through the regional regime, which is ASEAN Protocol on Enhanced Dispute Settlement Mechanism. However, from the practical aspect, trade disputes among ASEAN have never been brought before the ASEAN Senior Economic Officials Meeting (SEOM), which acts similarly to the WTO Dispute Settlement Body (DSB), meaning that there is no precedents or jurisprudence.[172] The ASEAN Senior Economic Officials Meeting (SEOM) has the power to establish panel and adopt panel and Appellate Body reports, monitor the implementation of findings and recommendations of the panel and the Appellate Body, and authorize the suspension of concessions and other obligations under ASEAN economic agreements. From the history of trade disputes among ASEAN members, the members tend to lean towards the dispute resolution under WTO, which is an international organization. Thus, there is neither precedents nor practical experience concerning the ruling of the ASEAN Senior Economic Officials Meeting (SEOM). Although Indonesia and Vietnam

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[171] M. Lewis and P. Van den Bossche, *What to do when disagreement strikes? The complexity of dispute settlement under trade agreements.* Routledge, 2014.
[172] Ibid. Footnote 156.

are both members of ASEAN, Vietnam is not obliged to bring the trade dispute concerning galvalume to the ASEAN dispute settlement body, so Vietnam has the freedom to choose the way in dealing with such trade disputes. Without precedents, the domestic authorities are not able to expect the outcome of the dispute. It is reasonable to expect that Vietnam would undoubtedly be reluctant to bring the dispute concerning safeguard measures to the ASEAN Dispute Settlement Mechanism. The uncertainty is one of the major causes of the unpopularity of the ASEAN Dispute Settlement Mechanism. Furthermore, in terms of enforceability, there is a higher possibility that the parties will follow the panel report and Appellate Body report as the WTO is a large international organization that has a significant contribution to international trade disputes.

The third reason is related to political issues that are embedded in ASEAN dispute settlement mechanisms.[173] ASEAN members who faced disputes related to trade among ASEAN members are not willing to bring their disputes to ASEAN dispute settlement mechanisms. They have the view that it would be more difficult for political influence to intervene in the dispute mechanism under WTO. In comparison to the ASEAN dispute settlement mechanism, there is a possibility that partiality will

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[173] Ibid., Footnote 156.

arise in the process of settling the disputes among ASEAN states. It can be proved through the prior case among ASEAN members. In Sipadan–Ligitan dispute, Indonesia primarily suggested to Malaysia to bring the dispute to the High Council of the Treaty of Amity and Cooperation(TAC). Malaysia expressed the opinion that Malaysia was not willing to bring the disputes to TAC as the territorial disputes with all of its neighbors with the fear of bias.[174] Therefore, the mentioned dispute is brought to the International Court of Justice. This is an example of the unpopularity of the ASEAN dispute settlement mechanism.

All in all, at present, ASEAN Protocol on Enhanced Dispute Settlement Mechanism is not appropriate for disputes concerning safeguard measures for ASEAN countries until it will be further developed to heighten the predictability of ASEAN Dispute Settlement Mechanism in the future.

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[174] Severino, *Southeast Asia in Search of an ASEAN Community*. ISEAS Publishing, 2006, p. 12.

### 4.6.2 Rationale for not applying Quantitative import restrictions

One of the critical features in safeguard measures is that such measures must suspend, withdraw, or modify the concession or obligations. To suspend the concession, safeguard measures can be taken in the form of quantitative import restrictions or of duty increases to higher than bound rates.[175] The application of quantitative restriction is found in Article 5 of the Agreement on Safeguards as follows.

**Article 5 of the Agreement on Safeguards**

"Application of Safeguard Measures

1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

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[175] World Trade Organization, "Technical Information on Safeguard Measures," https://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm.

2. (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek Agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article 12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph1 of Article13 and that clear demonstration is provided to the Committee that (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (*ii*) the reasons for the departure from the provisions in subparagraph (a) are justified, and (*iii*) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be

extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury."[176]

With regards to Article 5 of the Agreement on Safeguards, the measures of quantitative restriction should only be applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.[177] It can be interpreted that quota should be applied in proportion to the adequacy to prevent or remedy serious injury. If WTO member takes the measure in the form of quantitative restriction, the principle is that the level of quota must not be below the most recent three representative years.[178] For principle on the allocation of quota, the allocation of quota is based on past market shares of suppliers.[179] However, in the case that WTO members can provide is a clear justification for setting a different level of quota.[180]

Recognizing the principle of safeguard measure in the form of quota in Article 5 of the Agreement on Safeguards helps us in

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[176] *Agreement on Safeguards*. Article 5.
[177] Cliff Stevenson, "Us Steel Duties and Safeguard Actions under the Wto," Commonwealth Trade Hit Topic, 1995.
[178] Ibid., Footnote 179.
[179] Ibid., Footnote 179.
[180] Ibid., Footnote 179.

understanding the reasons that Indonesia did not apply quotas on the imports of galvalume. As mentioned earlier, safeguard measures can be in the form of duty or quota. If Indonesia imposed a quota on the imports of galvalume, the outcome of such dispute would be different. In the case of applying quota, Article XI of GATT will apply on quantitative restrictions regardless of whether the product was subject to a tariff binding. Under such scenario, the Agreement of Safeguards would apply, so the ruling of the panel will differ as the main focus of the dispute would divert to whether the application of quota on the imports of galvalume by Indonesia was consistent with the requirements of safeguard measure or not. It is noteworthy to examine the application of quota on the imports of galvalume to find out the reasons that Indonesian authority did not choose to follow the quantitative restriction path.

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The quantitative restriction is generally recognized to be creating more trade restrictions than non-quantitative, which is tariffs.[181] The application of quota on the imports of galvalume should have led to a significant decrease in the imports of galvalume than the imposition of tariffs. Considering the way of quota allocation in Article 5 of the

[181] Yong-Shik Lee, *Safeguard Measures in World Trade: The Legal Analysis*, 3 ed. (Cheltenham: Edward Elgar Publishing).

Agreement on Safeguards, a quantitative restriction shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years. There is a loophole in this Article as the Agreement on Safeguards does not assign the starting point of time and endpoint of time for the three consecutive years that is used to determine the quota for the supplying countries.[182] The determination of three consecutive years is subject to the discretion of the domestic authority.[183] The amount of minimal quota will be substantially different concerning the choice of the reference period. The minimal quota of imports is dependent on whether the reference period covers the process at the beginning of the investigation period or not.[184] This is true in the case where the main exporting countries exported a substantial volume of products when they recognized the initiation of a safeguard investigation.[185] The increasing number of imports from exporting countries will result in a change in the quota allocated to such countries. Vietnam and Chinese are the top two leading exporters of galvalume in Indonesia. If these two countries fear that Indonesia will apply quota on the imports of galvalume, they will export more

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182 Ibid.
183 Ibid.
184 Ibid.
185 Ibid.

galvalume products to Indonesia during the start of safeguard investigation, as will increase the minimal quota allocated to them. In this situation, if the domestic authority of Indonesia applies quota as a safeguard measure to deter the increasing imports of galvalume, Vietnam and Chinese Taipei will still be the top two countries. They will have a high allocation of quota in comparison to other galvalume exporters. Accordingly, the main reason Indonesia avoided the use of quota as safeguard measure was that the main exporting countries of galvalume like Vietnam and Chinese Taipei would still benefit from the allocation of quota. This is because the minimum quota is allocated based on the average imports of three consecutive years. From the avoidance of applying quota on the imports of galvalume, it can be implied that Indonesia's actual intention of not using quota on the imports or galvalume was to target dominant galvalume exporters. Indonesia chose to impose a duty to lower the imports from the leading exporters. Although the panel and the Appellate Body rejected Indonesia's standing point that the imposition of duty is a safeguard measure, Indonesia was successful in lowering the imports of galvalume mainly from Vietnam and Chinese Taipei. To conclude, the main reason that Indonesia did not impose quota was based on the allocation of imports as Vietnam, and Chinese Taipei would still benefit from using quota.

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After imposing a duty on the imports of galvalume, there was a significant reduction in the market share of these two exporters. The overall imports of galvalume dropped dramatically to approximately 80%.[186] The vital point that must be noted is that Vietnam and Chinese Taipei, the leading suppliers, are responsible for a massive decrease in the imports after the imposition of specific duty.

Apart from applying a surcharge on the imports of products, another way to retaliate the increased imports is quota. Domestic authorities do not commonly apply quota for the following reasons. From the perspective of the domestic producers, applying quota on the imports of products means that a particular volume of products from suppliers will still be allowed to enter into the market. Even though the volume of imports is restricted under the quota allocated to each country depending on the average of imports in the last three representative years, the imports of products can get access to the market of the country that applies the quota. Thus, the domestic producers will not be satisfied with the application of quota as a safeguard measure. There is a possibility that the domestic producers will oppose the application of quota on the imports of galvalume.

[186] Ibid.

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The country that imposes quota does not only benefit from deterring the imports of foreign products. There must be something in exchange for the use of quota as a safeguard measure which is the trade measure that is used against fair trade practice, unlike countervailing measures and anti-dumping measures. Thus, the domestic industries should not be allowed to gain advantages from the imposition of safeguard measures without exerting any effort in improving the competitiveness of the domestic producers. Such effort comes in the form of an adjustment plan. The definition of adjustment plan is not defined in the Agreement on Safeguards.

Nevertheless, there is a reference to the adjustment plan related to Article 5.1, Article 7.1, and the preamble of the Agreement on safeguards.[187] According to Article 5.1 of the Agreement on Safeguards, safeguard measures should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available. This Article implies that the country that applies

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[187] Fernando Pierola, *The Challenge of Safeguards in the Wto, Cambridge University Press*, 2014.

safeguard measures must facilitate the adjustment. An adjustment plan is not a requirement of applying safeguard measures. However, it is a part of the reasoned explanation of the domestic authorities to explain the use of quantitative restriction as a safeguard measure. The duty of conducting the adjustment plan is on the domestic industries that request the application of safeguard measures. In order to make a viable adjustment plan, many issues must be involved in the plan, including such as cost reduction, an increase of capacity, modernization plans, and improvement in efficiency.[188] Having a viable adjustment plan will represent a strong justification that the safeguard measure applied is proportional to the necessity of preventing or remedying serious injury and facilitating adjustment under Article 5.1 of the Agreement on Safeguard.[189] To elaborate, the application of the safeguard measure will not meet the objective which is to protect the domestic producers unless the adjustment plan is conducted. The period of safeguard investigation is the time that domestic producers should come up with the solutions to increase competitiveness in the market so that they will be capable of competing with foreign countries when it comes to the end of safeguard

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[188] Lakshmikumaran & Sridharan, "International Trade Amicus," no. 99 (2019).
[189] Ibid., Footnote 184.

investigation. The plan is detailed and costly as the analysis of economics is involved.

If Indonesia applied quota on the imports of galvalume, a particular volume of galvalume would still get access to the market. The Indonesian domestic producers of galvalume would not be satisfied with the application of quota. As mentioned earlier that the primary purpose of Indonesia is to lower the imports from main exporting countries; such purpose will not be fulfilled through the use of quota in Article 5 of the Agreement on Safeguards. In the situation that quota is applied to imports of galvalume, a number of imports from Vietnam and Chinese Taipei would drop but not as much as the result of the imposition of surcharge on the imports. Hence, the imposition of surcharge is better for Indonesia.

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### 4.6.3 Significant implications from Indonesia – Safeguard on Certain Steel or Iron Products

The number of applications of safeguard measures imposed by Thailand has been very low comparing to the number of applications of other kinds of countermeasures. The reason for such low number is because requirements of safeguards are challenging to be satisfied comparing to the requirements for the application of anti-dumping and

countervailing measures. Indonesia — Safeguard on Certain Iron or Steel Products is a dispute that provides Thailand many significant implications that can be useful for Thailand in the future. Indonesia is a decent example because both Thailand and Indonesia are in ASEAN, and the level of development of both countries are comparable. The steel sector contributed a large portion of the economy in both countries. Regarding the similar level of development and economy, Thailand can apply the implications from Indonesia — Safeguard on Certain Iron or Steel Products to the application of safeguard measures in the galvalume sector. For the lessons learned from the analysis of this dispute, there are several implications that Thailand should consider in using the safeguard measure.

Valuable lesson arising from this dispute is that the determination of safeguard measures by domestic authorities is not final. Indonesia — Safeguard on Certain Iron or Steel Products has set out new jurisprudence concerning the determination of safeguard by domestic authorities. The panel and Appellate Body in this dispute ruled that the determination of safeguard measure by domestic authorities is not dispositive. The panel is independent in determining whether the measure at issue constitutes a safeguard measure as stipulated in Article XIX of the GATT 1994 and

the Agreement on Safeguards. Although claimants and respondent accepted that the measure at issue constitutes a safeguard measure according to the meaning of Article XIX of the GATT 1994 and the Agreement on Safeguards, the panel is free to conduct an objective and independent assessment on this matter. Therefore, the domestic authorities must be very cautious in considering all the evidence and documents that are needed in order to characterize the measure as safeguard measure before imposing such measure. Otherwise, the incorrect characterization of measures can lead to disputes under WTO.

Another implication from Indonesia - Safeguard on Certain Iron or Steel Products is that the outcome will be different if the safeguard measure imposed by Indonesia is in the form of the import quota, not in the form of specific duty. Although galvalume are unbound products in Indonesia's WTO Schedule of Concessions, Article XI of GATT 1994 concerning the rule on quantitative restrictions will apply. In this case, the measure at issue will be subject to Agreement on Safeguards leading to examination on whether the measure at issue is consistent with the requirements under the Agreement on Safeguards.

However, the outcome will change if a member whose tariff is "unbound" impose a safeguard measure in the form of an appropriate

import quota. In this situation, imposing an import quota will suspend the WTO Member's obligations under Article XI of the GATT 1994, so such measure would be characterized as safeguard measure that is subject to the discipline of safeguards. The panel and Appellate body will then focus on WTO-consistent investigation concerning whether the imposition of quota complies with the requirements of safeguard. Applying different forms of measures can lead to different outcomes, especially in the case where the tariffs for such products is unbound under the Schedule of Concessions. Applying safeguard measure in the form quota will end the future dispute on whether the measure at issue suspend A GATT obligation or withdraw or modify a tariff concession or not. However, imposing safeguard measure in the form of quota on unbound products is not advisable as the country imposing quota will need to fulfill all four requirements of safeguard measure, which are difficult to be met.

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In applying such implications to Thailand, Thailand is also one of the leading producers of galvalume. The implication of this dispute is necessary for Thailand. If Thailand wishes to protect the domestic producers of galvalume from the increasing imports in the future, applying quota on the imports of the product will not have a significant

effect on the decrease in the volume of imports from main exporting countries as the allocation of quota is calculated on the average volume of imports in the past three consecutive years. Therefore, the application of quota is not an effective way to protect domestic producers from increased imports. Considering another way to protect domestic producers which is the imposition of specific duty, the imposition specific duty on the unbound product is not characterized as safeguard measure. Accordingly, such imposition by Thailand will not be subject to the Agreement on Safeguards, so Thai domestic authorities will not have to conduct safeguard investigation and follow the requirements of safeguard measures. Another important implication for Thailand concerns the determination of safeguard measure. As we can see from Indonesia — Safeguard on Certain Iron or Steel Products, the panel can perform an objective assessment on the characterization of safeguard measure. Despite the determination that the specific duty imposed by Thailand is a safeguard measure, there is a possibility that the panel will reject such determination by the domestic authorities. To emphasize, although the parties in dispute are not raising the issue whether the measure at issue is a safeguard measure or not, the panel still has the right to examine this matter. In the situation when Thailand imposes specific duty on galvalume which is also unbound under the Schedule of Concessions of

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Thailand, Thai authorities should not try to regard the measure as safeguard measure as there is the possibility that the panel will reject the safeguard determination by Thai authorities later on. The rejection of the determination of safeguard measure by Thai authorities may lead to negative consequences on the Thai steel sector. Thailand should instead address the imposition of duty on unbound products as a stand-alone measure that is subject to MFN-treatment.

If Thailand wants to retaliate the increased imports of galvalume, the first thing that should be taken into consideration is the Schedule of Concessions. According to the Schedule of Concessions of Thailand, the tariff rate concerning galvalume from ASEAN members is unbound due to ATIGA. Thailand should not follow the path of imposing a specific duty on the imports of galvalume from ASEAN countries, including Vietnam, which mainly exports galvalume. In the situation when Thai domestic authority initiates a safeguard investigation by imposing a specific duty, the outcome will the same as Indonesia — Safeguard on Certain Iron or Steel Products. We have learned from this dispute that the panel will reject all claims related to safeguards by determining that the measure at issue does not constitute becaus the imposition of specific duty does not suspend the obligation under the Schedule of Concession of Thailand.

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Moving to another alternative to protect domestic producers, a quantitative restriction can be applied under the conditions stated in Article 5 of the Agreement on Safeguards. In dealing with increased imports of products, Thai domestic authorities do not generally impose quota to restrict the imports of products because of an administrative issue. In using quantitative restriction, Thai Customs must exert considerable effort in monitoring the imports of restricted goods as a certain amount of quota is allocated to each country differently depending on the volume of imports in the past three consecutive years. Unlike imposing a tariff, the officials will have to monitor the imports of products to make sure that the number of imports stays within the quota allocated to such country. Thus, the application of quota requires more effort and costs by the country imposing quota. All in all, imposing a quota on the imports of products is impractical.

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# Chapter V Conclusion and Recommendation

## 5.1 Conclusion

Indonesia — Safeguard on Certain Iron or Steel Products has provided significant jurisprudence for domestic authorities on the duty of the WTO panel to perform an objective and independent assessment in the characterization of safeguard measure. In the application of safeguard measures in the future, domestic authorities must be aware that the safeguard investigation conducted by them is not dispositive. Although domestic authorities determine that the measure imposed by the country is a safeguard measure, the final say on whether such measure constitutes a safeguard measure or not depends on the WTO panel. The important takeaway is that the panel has the right to perform safeguard characterization even though the parties in dispute are not mentioning the issue on whether the measure at issue is a safeguard measure or not. This jurisprudence leads to a significant change in the way of dealing with disputes concerning safeguard measures. Before this dispute was brought to WTO, most disputes relating to safeguard measures usually concerns the application of safeguard measure. However, this dispute has made a shift towards the qualification of safeguard measure by pointing out the

duty of the panel to perform an objective and independent assessment. Therefore, in applying measures to retaliate increased imports of goods in the future, domestic authorities should not rely on their determination of such measure but rather appropriately regard the measure from the beginning so as to prevent future disputes when the national authority views the measure as a safeguard measure, but the WTO panel views otherwise. From the implication of this dispute, it is evident that the imposition of specific duty on an unbound product does not suspend the obligation under the Schedule of Concession, so it does not constitute a safeguard measure. Therefore, domestic authorities should not regard such imposition as safeguard measure as the panel will later reject the determination by domestic authorities and rule out that the imposition on specific duty on unbound products is not a safeguard measure.

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Besides imposing safeguard measures in the form of tariffs, there is another way of imposing safeguard measure which is a quota. The quota is not commonly used as the imposition of tariff because of the administrative issues and effect of the measure. From the theoretical aspect, the application of quota on the imports of products does not seem to be complicated. Nonetheless, the quota is impractical for the reason that the authorities will have to monitor the quantity of imports which is different from the imposition of surcharge that does not require extra

attention from the officials. In terms of the effect resulting from applying quota on the imports of products, it is not efficient as imposing tariffs in remedying the domestic producers because the particular volume of imports within the quota allocated to different countries can access the market. The leading exporters of the products will not be affected through the imposition of quota on the imports of products. In comparison to a surcharge, the imposition of surcharge leads to a more significant reduction in the volume of imports of products at issue. Therefore, using quota as a safeguard measure may not be the best way to seek remedy for domestic producers who suffered from increased imports.

Furthermore, this dispute has also given a vital implication as Indonesia applied the measure at issue with the recognition that the measure at issue did not constitute a safeguard measure to avoid four requirements of safeguard measures. It is evident that the measure at issue is not a safeguard measure, so the requirements of safeguard do not apply to the case. Nonetheless, it must be aware that the imposition of specific duty is subject to MFN-treatment, which is the general rule of WTO. The fact that the measure at issue is not a safeguard measure does not exempt Indonesia from MFN treatment under GATT 1994.

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## 5.2 Recommendation

When Thailand wants to seek remedy for domestic producers who suffered from increase imports, whether the product at issue is bound under the Schedule of Concessions or not is an important issue and should be considered. For the imposition of tariffs, the Agreement on Safeguard will apply only when the products at issue are bound under the Schedule of Concessions. For the goods that are unbound, Thailand has no specific commitments under Article II of GATT 1994. The panel in Indonesia — Safeguard on Certain Iron or Steel Products clearly ruled out that the imposition of specific duty on unbound products does not constitute a safeguard measure as it does not suspend the obligation in the Schedule of Concessions. Therefore, Thailand does not have to follow the requirements of safeguard measures which is beneficial for Thailand as it is challenging to meet all requirements of safeguard measures under Article XIX of GATT 1994 and the Agreement on Safeguards. However, the imposition of specific duty on the imports of unbound products is still subject to MFN-treatment. Thailand has to impose a specific duty on the products from other countries in accordance with MFN-treatment.

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A proper characterization of the measure is essential so that Thai domestic authorities can follow the correct path in seeking remedy for domestic producers. If Thai domestic authorities incorrectly regard the

imposition of specific duty on unbound products as a safeguard measure, they will have to follow the procedures of safeguard measures which are unnecessary in the case. In conducting safeguard investigation, the domestic authorities must explain all the conditions in applying safeguard measures, and it must also be published before the imposition of safeguard measures. Thus, it will be time-consuming for domestic authorities to conduct safeguard investigation as required by the Agreement on Safeguards as analysis on the economy must be involved. As far as it is the imposition of a specific duty on the products that are unbound in the Schedule of Concessions, the safeguard investigation will be rejected by the WTO panel on the ground that the measure at issue does not constitute a safeguard measure. If Thailand wants to impose a specific duty on unbound products, such measure is not a safeguard measure. Thus, it must be noted that Thailand cannot impose a duty in any manner but must comply with MFN obligation.

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Another recommendation is that seeking remedy for domestic producers through safeguard measure in the form of quota is not recommended. The application of quota poses administrative issues to Thai authorities as they will have the duty to monitor the number of imports so as to make sure that the imports do not exceed the quota. This shows the impracticality of the quota. Moreover, it is not an efficient way

to help Thai domestic producers as a certain quantity of imports is still allowed to enter Thailand, which means that the threat to domestic producers still exists. Therefore, Thailand should instead seek remedy for domestic producers through the imposition of tariffs on the imports of products as the effect of imposing tariffs on the Thai import market are more recognizable than the effect of applying quota. A surcharge is the most efficient and practical way to reduce the volume of imports of products into the domestic market. To optimize the application of safeguard measure, during the imposition of tariffs, domestic producers in Thailand should make an effort to improve the situation of the market by enhancing the competitiveness of the domestic industries to able to compete with other countries when the period of safeguard measure ends as the safeguard measure is imposed only for the purpose of emergency action.

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